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REPORTERS

Supreme Court of India

Shri Surjit Singh Chadha, Advocate,
Supreme Court of India.

Allahabad

Shri A. D. Prabhakar, M.A., LL.B., Advocate.

LUCKNOW BENCH

Shri Kashi Prasad Saksena, M.Sc., LL.B.,
Advocate.

Andhra Pradesh

Shri P. Sitarama Raju, B.A., B.L., Advocate.

Shri M. Banga Raju, B.A., B.L., Advocate.

Assam & Nagaland

Shri Nagendra Mohan Ganguly,
Advocate, Gauhati.

Bombay

Shri K. J. Kale, B.A., LL.B., Advocate.

Calcutta

Shri Subodh Chandra Basak, M.Sc., LL.B.,
Advocate.

Shri H. N. Ghosh, M.A., LL.B., Bar-at-law.

Shri Amla Lal Chatterji, Advocate.

Shri Gauri Prasad Mukherji, Advocate.

Shri Janendra Coomar Datt, Advocate,
Supreme Court of India.

Delhi

Shri Surjit Singh Chadha, Advocate,
Supreme Court of India.

HIMACHAL PRADESH BENCH

Shri A. C. Mehta, B.A., LL.B., D. O. P.,
Advocate, Supreme Court of India.

Goa

Shri Shridhar Tamba, Advocate.

Gujarat

Shri Damodar Khimchand Shah, B.Sc., LL.B.,
Advocate.

Jammu & Kashmir

A.—SRINAGAR

Shri S. N. Dar, B.A., LL.B., Advocate.

B.—JAMMU

Shri Bakshi Ishwar Singh, Advocate,
Supreme Court of India.

Kerala

Shri K. V. R. Shenoi, B.A., B.L., Advocate

Shri K. A. Nayar, M.A. (Madr.), B.A.,
Hons. (Oxon), Bar-at-law.

Madhya Pradesh

A.—JABALPUR

Shri A. N. Mukerjee, Advocate.

B.—GWALIOR

Shri G. S. Garg, Advocate.

C.—INDORE

Shri M. P. Avadhoot, B.Sc., LL.B., Advocate

Madras

Shri O. R. Krishna Rao, B.A., B.L., Advocate

Manipur

Shri Kolfam Rohini Kumar Singh,
Advocate, Imphal.

Mysore

Shri G. S. Ullal, M.A., B.L., Advocate,
Supreme Court.

Shri Anant V. Albal, Advocate,
Supreme Court.

Orissa

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Advocate.

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Rajasthan

Shri Madakmal Singhvi, Advocate.

Tripura

Shri Monoranjan Choudhury, M.A., B.L.,
Advocate.

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—Preamble — Judicial precedents — Principles as to — Decision without reason can hardly be a precedent — Decision of Division Bench of High Court of Allahabad (old) prior to 1948 — Entitled to great respect and value — But to say that a Judge of the New High Court established under U. P. High Courts Amalgamation Order 1948 — Para 14 is bound by it may not be quite correct

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—Preamble — Interpretation of Statutes — Meaning of words — Variation in language and absurdity — See Municipalities — U. P. Municipalities Act (2 of 1916), S. 160

All 177 A (C N 34)

—Pre. — Statement of Objects and Reasons — Use of — (Interpretation of Statutes)

Bom 127 D (C N 25)

—Pre — Interpretation of Statutes — Prospective or retrospective operation—See Transfer of Property Act (1882), Pre.

Goa 42 B (C N 8)

—Preamble — Interpretation of Statutes — Interpretation of Constitution — See Constitution of India, Preamble

Guj 124 C (C N 23)

—Pre. — Interpretation of Statutes — Mandatory and directory provisions — See Land Acquisition Act (1894), S. 18

Pat 131 (C N 36)

—S 9 — Jurisdiction — Dispute of a civil nature can be dealt with in Civil Courts unless its jurisdiction is barred — Presumption is in favour of Civil Court's jurisdiction — Person claiming ousting of jurisdiction must establish it

Mad 108 B (C N 25)

CIVIL P. C. (contd.)

—Ss 11, 47, O. 22, R. 3; O. 1, R 10; O. 21, R 35 — Parties and representatives — Benamidar can represent real owner — Proceedings between benamidar and third party — Death of benamidar — His heirs brought on record — Application by real owner for being brought on record dismissed — Decree against heirs of benamidar — Held on fact that benamidar and his heirs represented real owner and decree was binding on the real owner — Expression of opinion on question not in issue does not operate as res judicata

SC 316 A (C N 62)

—S. 11 — Applicability to writ proceedings — See Constitution of India, Art. 226

Punj 104 C (C N 20)

—S. 24 (4) — Objection to jurisdiction can be taken even in appeal or revision — See Provincial Small Cause Courts Act (1887), S. 16

Madh Ura 56 A (C N 19)

—S. 47 — Parties and representatives — Benamidar can represent real owner — Proceedings between benamidar and third party — Death of Benamidar — His heirs brought on record — Application by real owner for being brought on record dismissed — Decree against heirs of benamidar — Held on facts that benamidar and his heirs represented real owner and decree was binding on him — See Civil P. C. (1908), S. 11

SC 316 A (C N 62)

—S. 47 and O. 21, R 36 — Delivery of symbolical possession to decree-holder in execution—Suit for recovery of possession of property on the basis of execution sale maintainable

Ker 121 A (C N 29)

—S. 60 — Bank holding power of attorney to collect bills due to executant towards Bank advances — See Transfer of Property Act (4 of 1882), S. 130

SC 313 (C N 61)

—S 80 — Suit for declaration of title and possession decreed — State Government impleaded as pro forma defendant, being tenant of property, not putting in appearance — Want of notice under S. 80 — Plea as to — Cannot be raised by private individual to assail the decree — State Government by non-appearance must be deemed to have waived the pleas

All 161 (C N 30)

—Ss 100-101 — Plea of "benami" — It is mixed question of law and fact — Cannot be raised first time in second appeal

Orissa 67 A (C N 28)

—Ss. 100-101 — Substantial error or defect in procedure — What amounts to, stated — Finding of fact by trial Court reversed by lower appellate Court — High Court not entitled to interfere merely because some of reasons given by trial Court are not considered — 1968 BLJR 374 held no longer good law in view of AIR 1963 SC 302

Pat 128 (C N 35)

—S 105 and O 41, R 25 — Order of remand illegal — Bar under S 105(2) does not apply

Orissa 67 B (C N 28)

—S 107 — Regular Court, when can try small cause suit—Objection to jurisdiction—

CIVIL P. C. (contd.)

See Provincial Small Cause Courts Act (1887), S. 16 Madh Pra 56 A (C N 19)
 —S 107 (2), O 41, R 27 (1) (b) — Power of appointment of Commissioner in appeal — When should be exercised
 Mad 144 (C N 34)

—S. 115 — Powers of Court — Question as to age of minor plaintiff — Defendant not raising any objection in Court below to admissibility of certified copy of application filed by minor's mother under Guardians and Wards Act and to certificate of guardianship — He cannot question admissibility of such documents in revision
 All 162 C (C N 31)

—S. 115 — Section is similarly worded as S 8 (2) (b) (i) of Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963) — Suit for possession under S 6 of Specific Relief Act (1963) filed before Subordinate Judge — Judge coming to conclusion that sanction of Administrative Tribunal under S 9 of Code of Comunidades (1961) was necessary before such suit was entertained — Revision remedy held not barred — Expression "Case" includes civil proceedings other than suits, and is not restricted to entirety of proceeding in Civil Court — (Words and Phrases — "Case")
 Goa 37 A (C N 5)

—S 115 — Case — Meaning of — Revision remedy held not barred — See Specific Relief Act (1963), S 6 (2) (a)
 Goa 37 B (C N 5)

—S 115 — Revisional Jurisdiction of High Court in cases under the Rent Act — Nature of — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S 29 (2)
 Guj 110 E (C N 21)

—S. 115 — Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965), Ss 20 (1) and 18 (5) — Revision — High Court has jurisdiction under S. 115, Civil P. C. to revise order passed by District Court under S 20 (1) of Kerala Act — 1960 Ker LT 1248, Overruled
 Ker 103 (C N 24) (FB)

—S. 115 — Objection to jurisdiction of Court can be taken in appeal or revision — See Provincial Small Cause Courts Act (1887) S 16 Madh Pra 56 A (C N 19)

—S. 115, O 40, R. 4 and O 43, R 1 (s) — Application under O 40, R 4 (c) — No prayer for attachment and sale of receiver's property — Application dismissed — Order of refusal not appealable as it is not one under O. 40, R 4 — Revision lies.
 Raj 109 (C N 22)

—Ss. 122 and 129, O 6, R. 5 (2) and O 5, R. 2 (as framed by Bombay under S. 122) — Letters Patent (Bom), Cl. 37 — Rules framed under S 122 — Applicability to proceedings on original civil side — Power of framing rules for regulating procedure on original civil side under Ss 122 and 129

CIVIL P. C. (contd.)

C P. C. and Cl 37 of Letters Patent — Scope and extent of — Bom 117 A (C N 23)
 —S 129 — Power of framing rules for regulating procedure on original civil side — Scope and extent of — See Civil P. C. (1908), S 122 Bom 117 A (C N 23)

—S 141 — Proceedings under S. 48 of Bihar H. R. Trusts Act 1950 — They are of kind contemplated by S 141. See Bihar Hindu Religious Trusts Act (1950) (1 of 1951), S. 48 Pat 118 A (C N 33)

—S 151 — Liability of surety — Nature of — Liability not deferred until remedies against principal debtor are exhausted — Decree obtained by creditor against debtor and surety directing creditor to first exhaust remedies against debtor — Direction held not justified under O. 20, R 11 (1) or S 151, Civil P C — See Contract Act (1872), S 128 SC 297 (C N 57)

—S. 152 and O 45, R 13 — Powers of High Court pending appeal to Supreme Court — Decree can be amended pending application for leave to appeal
 Andh Pra 128 (C N 37)

—O 1, R 1 — Election petition — Proper or necessary party — See Representation of the People Act (1951), S 82
 Mad 116 (C N 27)

—O 1, R 3 — Election petition — Proper or necessary party — See Representation of the People Act (1951), S 82
 Mad 116 (C N 27)

—O 1, R 9 — Plaintiff filing suit against 'A' and 'B' — 'A' is one of the trustees of a temple—B is tenant of property which A claims as temple property and which plaintiff claims it in his own right — 'A' is sued in his personal capacity — No necessity to join other trustees as parties
 Mad 108 D (C N 25)

—O 1, R 10 — Parties and Representatives — Benamidar can represent real owner — See Civil P C (5 of 1908), S. 11
 SC 316 A (C N 62)

—O 1, R 10 — Election petition — Proper or necessary party — See Representation of the People Act (1951), S 82
 Mad 116 (C N 27)

—O 5, R 2 (as framed by Bombay High Court under S 122) — Applicability to proceedings on the Original Side — See Civil P. C. (1908), S 122 Bom 117 A (C N 23)

—O 5, R 2 (Bombay) — Chamber summons taken out by defendant after returnable date of plaintiffs summons is not barred under O 6, R 5 (2) (Bombay) — See Civil P. C (1908), O 6, R. 5 (2)
 Bom 117 A (C N 23)

—O. 6, R 2 — Plea of want of notice under S 80 is not open to private individual — State Government, pro forma defendant, not putting in appearance — Any objection with regard to notice under S 80 must be deemed to have been waived — See Civil P. C (1908), S. 80 All 161 (C N 30)

—O. 6, R 2 — Pleadings — Construction — Law of pleadings should not be so rigidly

CIVIL P. C. (contd.)

construed as to be inappropriate and not calculated to serve the cause of justice

Delhi 120 D (C N 18)

—O. 6, R 5 (2) — Applicability to proceedings on the original side of High Court — See Civil P C (1908), S 122

Bom 117 A (C N 23)

—O. 6, R 5 (2) and O. 5, R 2 (Bombay) — Summons, served on defendant, not accompanied by copy of plaint — Chamber Summons taken out by defendant, after returnable date of plaintiff's summons is not barred under O. 6, R 5 (2)

Bom 117 B (C N 23)

—O. 8, R 5 — Counter affidavits — See Constitution of India, Art 226

Orissa 80 C (C N 33)

—O. 9, R 13 — Sufficient cause — That a woman defendant gave birth to a child 6 days before date of hearing was sufficient cause for her absence in Court — Assuming she gave birth to the child 6 days after the date of hearing would make no difference in existence of sufficient cause — Whichever version was true she would be unable to attend Court on date of hearing

Orissa 77 A (C N 32)

—O. 9, R 13, Proviso — Several defendants — Decree in favour of some — Ex parte against others — Setting aside of ex parte decree — Effect — Proviso will not apply

Orissa 77 B (C N 32)

—O. 20, R 11 (1) — Liability of surety — Nature of — Liability not deferred until remedies against principal debtor are exhausted — Decree obtained by creditor against debtor and surety directing creditor to first exhausted remedies against debtor — Direction held not justified under O. 20, R 11 (1) or S 151, iCivil P. C — See Contract Act (1872), S. 128 SC 297 (C N 57)

—O. 21, R 22 — Applicability to recovery proceedings under Income-tax Act 1961 — See Income-tax Act (1961), S 179

Mad 143 (C N 33)

—O. 21, R 35 — Parties and Representatives — Benamidar can represent real owner — See Civil P C (5 of 1908), S 11

SC 316A (C N 62)

—O. 21, R 35 — Symbolical possession and limitation — See Limitation Act (1908), Art 138

Ker 121 B (C N 29)

—O. 21, R 36 — Delivery of symbolical possession to D H — Suit for recovery of possession of property on the basis of executions sale maintainable — See Civil P C (1908), S 47

Ker 121 A (C N 29)

—O. 21, R 89 — Suit to set aside sale — Bar — See Tenancy Laws — Orissa Tenancy Act (2 of 1913), S 228

Orissa 67 C (C N 28)

—O. 21, R 90 (as amended by All. H. C) — Appeal against assessment to sales tax — Deposit of admitted tax within limitation — Proof — Manner of furnishing is of secondary importance — See Sales Tax — U. P.

CIVIL P. C. (contd.)

Sales Tax Act (15 of 1948), S 9 (1)

All 200 A (C N 41) (FB)

—O. 21, R 90 — Suits to set aside sale — Bar — See Tenancy Laws — Orissa Tenancy Act (2 of 1913), S. 228

Orissa 67 C (C N 28)

—O. 22, R. 3 — Parties and Representatives—Benamidar can represent real owner — See Civil P C. (5 of 1908), S. 11

SC 316 A (C N 62)

—O. 23, R 1 — Bar to relief under — See Constitution of India, Art. 226

Punj 104 C (C N 20)

—O. 23, R. 1 (2) (a) and (b) — Words "other sufficient ground" in Cl. (b) should be read independent of words "formal defect" in Cl. (a) — Court can allow withdrawal from suit in the interest of justice — AIR 1940 Bom 121 (FB) and AIR 1951 All 845 (FB), Diss

Mys 141 (C N 27)

—O. 33, Rr 5 and 6 and O. 44, R 1 — Enquiry into pauperism — Stage for

Guj 122 (C N 22)

—O. 33, R 6 — Enquiry into pauperism — Stage for — See Civil P. C (1908), O. 33, R 5

Guj 122 (C N 122)

—O. 37, R 3 — Provisions do not violate Art. 19 (1) (f) — See Ahmedabad Small Cause Court Rules, R 39

Guj 124 A (C N 23)

—O. 37, R. 3 — Provisions do not violate Art 14 of the Constitution — See Ahmedabad Small Cause Court Rules, R 39

Guj 124 D (C N 23)

—O. 38, R 11 — Reliance on — See Presidency-Towns Insolvency Act (1909), S. 9 (e)

Mad 112 (C N 26)

—O. 39, R 9 — Writ petitions by private operators against order of R.T.A granting permit to State Road Transport Corporation — See Motor Vehicles Act (1939), S. 48

SC 329 D (C N 65)

—O. 40, R 1 — Receiver can be appointed pending appointment of new shebait — See Bihar Hindu Religious Trusts Act (1950) (1 of 1951), S 48

Pat 118 A (C N 33)

—O. 40, R. 4 — Order of refusal under—Appealability—See Civil P. C (1908), Section 115

Raj 109 (C N 22)

—O. 41, R 10 — Appeal to set aside ex parte decree — District Judge making conditional order on payment of costs of opposite party within 30 days in the Court of Civil Judge — Payment made to Court of District Judge — Held such payment was not proper compliance though the error was condonable for reasons of bona fides

Raj 112 B (C N 23)

—O. 41, R 22 — Cross objections — Dismissal of — Decree should bear date of judgment of dismissal — Application for certified copy of decree not made within time for appeal — Decree sheet also not prepared — Period of limitation will not be extended — Section 5, Limitation Act can be used to claim extension

Delhi 126 A (C N 19)

CIVIL P. C. (contd.)

O. 41, R. 22 Cross objections. Scope of. Remand, when should take cross objection. Order 120 D (C N 10)

O. 41, R. 22 Cross objections. Power against some defendants. One defendant's appeal dismissed. Appeal by others. Whether the defendant whose appeal was dismissed can assail the decree and reopen the controversy in the path of cross objection? (Quare) Order 120 C (C N 10)

O. 41, R. 22 Cross objections. Appeal and cross objections should be heard together. Judgment should be one, and decision incorporated in one decree. Appeal finally disposed of. Cross objection cannot be introduced upon later. Order 120 D (C N 10)

O. 41, R. 23 Order of remand illegal. Appeal under O. 105 (2) does not arise. See Civil P. C. (1908), O. 105

O. 41, R. 27 (1) (b) Appointment of commissioner in appeal. Power of which should be exercised. See Civil P. C. (1908), O. 107 (2) Order 67 H (C N 28)

O. 41, R. 1 (c) Order of refusal of application under O. 41, R. 1 (c). Appealability. See Civil P. C. (1908), Section 115. Order 106 (C N 28)

O. 41, R. 1 Enquiry into propriety. May be. See Civil P. C. (1908), O. 33, R. 6. Order 109 (C N 28)

O. 41, R. 13 Appeal to Supreme Court. Power of High Court pending appeal. See Civil P. C. (1908), O. 115. Order 120 (C N 30)

CIVIL SERVICES

GENRAL. SUBORDINATE SERVICE (DISCIPLINE AND APPEAL) RULES

R. 10 Service under contract. Removal. Art. 311 (2) whether attracted. See Constitution of India, Art. 338. Order 101 H (C N 30)

FUNDAMENTAL RULES

Art. 311 (1), 11 and 11A. When Gov. servant confirmed on permanent post of lower division clerk in Forest Department. Afterwards his services transferred to Jail Department but not substantively. At the time of transfer the servant himself gives voluntary declaration that he would not claim any lien on his permanent post of Forest Department. Later on, his services in Jail Department terminated "as no longer required" and he placed at disposal of Forest Department. Forest Department takes view that because the servant had voluntarily undertaken not to claim lien on his post in Forest Department, he had no right of reappointment on his former post. Held that refusal to restore him on his permanent post contravened R. 11 and 11A of the Fundamental Rules which continued to be operative and effective as laws in force by virtue of Art. 311 (1), 11 and 11A of the Constitution and also statutory provisions. (Constitution of India, Arts. 311 and 313)

CIVIL SERVICES FUNDAMENTAL RULES (contd.)

Art. 311 (1) of the Constitution and also statutory provisions. (Constitution of India, Arts. 311 and 313)

R. 14 Lien on permanent post. Refusal to re place him on his former post. Contravenes R. 14 and 11A. See Civil Services. Fundamental Rules, R. 9 (13). Order 120 (C N 30)

R. 11 (A) Lien on his permanent post. Refusal to re place him on his permanent post. Contravenes R. 11 & 11A. See Civil Services. Fundamental Rules, R. 9 (13). Order 120 (C N 30)

R. 20 (1) Member of Indian Civil Service on deputation to Central Government holding post of Secretary for less than five years from date of appointment as Secretary. R. 20 (1) can have no application to his case if he has not reached the end of thirty five years' service counted from his date of arrival in India. Hence no question of his holding the post for a period of five years after. Order 100 C (C N 30)

HYDRABAD STATE AND SUBORDINATE SERVICES RULES

R. 37 Rules regarding removal. Effect of. Constitution of India, Art. 300, 10. Order 120 (C N 31)

COMMISSIONS OF INQUIRY ACT (1952)

S. 2 Commission can be appointed to look into conduct of former ministers. Order 258 H (C N 48)

S. 3 Appointment of commission of inquiry to enquire into conduct of ex minister. Request to Supreme Court, in special appeal against decision of High Court holding appointment of Inquiry Commission illegal, to summon relevant files so that facticity of the charges might be established. Request not acceded to on ground that once it was held by the H. C. that inquiry was illegal, the truth or otherwise of the allegations was for the commission's consideration. See Constitution of India, Art. 138. Order 258 D (C N 48)

S. 3 Charges against ex minister. Specific and records rather than oral testimony to be used to establish them. Affidavit making out sufficient case for inquiry. Each charge referring in detail to events with dates and names of persons concerned. Charges held such that inquiry could be ordered. Order 258 H (C N 48)

S. 3 Commission directed to inquire into conduct of certain named persons who were ministers in the outgoing ministry. Commission also directed by O. 4 (b) of notification to inquire whether any other person, besides the named individuals, whether a member of Council of Ministers or other who was made illegal during the period

COMMISSIONS OF INQUIRY ACT (contd.)

Later on, Clause (d) deleted — Deletion challenged on ground that it was deleted for fear that it might recoil on persons who started the inquiry — Held that it was unlikely that the Commission would overlook evidence which pointed to corruption or mal-practice in others. Even if no direct finding was given there would be ample reference to these matters in the report, in spite of the deletion of the clause

SC 258 E (C N 48)

—S 3 — Appointment of Commission to inquire into conduct of ministers of outgoing ministry challenged before Supreme Court as being mala fide — Held that question of mala fide could only be decided if it could be held that charges were false — Whether they led to the conclusion that the inquiry was justified or it was malicious could not be said when there were only allegations and recriminations but no evidence — If the charges had been made maliciously or falsely, the Commission would say so, where necessary — Supreme Court could not anticipate the inquiry and hold one themselves

SC 258 F (C N 48)

COMPANIES ACT (1 of 1956)

—S 17 — Alteration of Memorandum of Association — Alteration in objects to enable Company to carry on new business — Extent of power — Confirmation by Court — Matters to be considered

Orissa 91 B (C N 35)

—Ss 17 (1) (a) and 293 (1) (e) — Alteration in Memorandum — Amendment enabling Company to make contributions towards national or political objects or political party — Not contrary to law — Court not to refuse confirmation merely because it may conflict with proposed legislation

Orissa 91 A (C N 35)

—S 293 (1) (e) — Alteration of memorandum — Amendment of — Legality — See Companies Act (1956), S 17 (1) (a)

Orissa 91 A (C N 35)

—S 515 — Applicability — See Companies Act (1956), S 524

Delhi 112 (C N 17)

—Ss 524, 515 and 647 (as amended in 1960) — Applicability — Winding up subject to supervision of Court — Removal of liquidator — Power of Court — Liquidator can be removed 'on cause shown'

Delhi 112 (C N 17)

—S. 559 (1) — Application under — Income-tax Officer could maintain application as creditor

Andh Pra 140 A (C N 43)

—S. 559 (1) — Application should be made within two years of date of dissolution — Court can pass order at any time thereafter

Andh Pra 140 B (C N 43)

—S 559 (1) — Setting aside dissolution — Fraud can be a ground — But fraud must be strictly proved

Andh Pra 140 C (C N 43)

—S 647 (as amended in 1960) — Liquidator can be removed "on cause shown" — See Companies Act (1956), S 524

Delhi 112 (C N 17)

CONSTITUTION OF INDIA

—Preamble, Art 19 — Interpretation of Constitution to be based on words in the Constitution itself — (Civil P. C (1908), Preamble — Interpretation of Statutes — Interpretation of Constitution)

Guj 124 C (C N 23)

—Art 14 — Rules framed under R 210 — Rule is constitutionally valid — See Registration Act (1908), S 69 (bb) (Andhra)

Andh Pra 134 A (C N 40)

—Art. 14 — Rules framed under R 199 (4) — Rules take view of these document writers who are already working in the field — See Registration Act (1908), S. 69 (bb) (Andhra)

Andh Pra 134 B (C N 40)

—Art 14 — Provisions of R 39 of Ahmedabad Small Cause Courts Rules do not violate the Article — See Ahmedabad Small Cause Courts Rules, R 39

Guj 124 D (C N 23)

—Arts 14, 15 and 16 — Employment — Equality of Treatment — Person discriminated against has right to challenge discriminatory order — Discrimination when permissible — Two tests laid down — Civil Services in Madras State — Age of superannuation in some services only, raised to fifty eight — Dearth of experienced officers and need of technically qualified officers were criteria, where retirement age was raised — Age not raised for service in Commercial Tax Department for the same reasons — Held there was no discrimination

Mad 118 (C N 28)

—Art 14 — S 132, Income Tax Act 1961 — Not violative of the Article — See Income-tax Act (1961), S 132

Mys 118 A (C N 26)

—Art 14 — Territorial classification — Admission to Medical Colleges in State — Government directive specifying merit-cum-regionwise classification as basis of selection — Violates Art 14

Orissa 80 B (C N 33)

—Art 14 — Admission to educational institution — Govt. directive to Selection Board abruptly changing the basis of selection to the detriment of students — Legality — See Constitution of India, Art 226

Orissa 80 D (C N 33)

—Art. 14 — Two different modes of trial prescribed for same offence — Legality — See Punjab Entertainments Duty Act (16 of 1955) (as amended in 1963), S 14A

Punj 98 (C N 18)

—Art 15 — Equality of treatment — Discrimination, when permissible — See Constitution of India, Art 14

Mad 118 (C N 28)

—Art. 15 — Admission to educational institution — Sudden change in basis of selection to the detriment of candidates — Legality — See Constitution of India, Art. 226

Orissa 80 D (C N 33)

—Art. 15 (1) — Counter-affidavits — Allegation that impugned Government directive involves discrimination solely on ground of place of birth — Not controverted

CONSTITUTION OF INDIA (contd.).

in counter-affidavit — Allegation must be held to have been admitted and as such violative of Art. 15 (1) — See Constitution of India, Art 226 Orissa 80 C (C N 33)

—Art 16 — Rules regarding promotions — Effect of — See Hyderabad State and Subordinate Services Rules R 37

Andh Pra 118 B (C N 34)

—Art 16 — Equality of treatment — Discrimination, when permissible — See Constitution of India, Art. 14

Mad 118 C (C N 28)

—Art. 19 — Rules framed under R. 210 — Rule is Constitutionally valid — See Registration Act (1908), S 69 (bb) (Andhra)

Andh Pra 134 A (C N 40)

—Art. 19 — Rules framed under R 199 (4) — Rule takes liberal view of those document writers who are already working in the field — See Registration Act (1908), S 69 (bb) (Andhra)

Andh Pra 134 B (C N 40)

—Art 19 — Interpretation of the Constitution to be based on words in the Constitution itself — See Constitution of India, Preamble

Guj 124 C (C N 23)

—Art 19 — S 132, Income-tax Act — Does not violate fundamental rights under the Article — See Income-tax Act (1961), S. 132

Mys 118 A (C N 26)

—Art. 19 (1) (f) — Provision in R. 39 of Ahmedabad Small Cause Court Rules read with O. 37, R 3, C P. C. does not violate Art. 19 (1) (f) — See Ahmedabad Small Cause Court Rules, R. 39

Guj 124 A (C N 23)

—Art. 21 — S. 132, Income-tax Act 1961 — Does not violate rights under the Article — See Income-tax Act (1961), S. 132

Mys 118 A (C N 26)

—Arts. 21, 31 (f) — Articles contemplate a valid law i.e. a law which does not infringe any of fundamental rights such as those established in Arts 14 and 19

Mys 118 B (C N 26)

—Art 26 — Appointment of receiver pending appointment of new Shebait of a Hindu Religious Trust — Art. 26 no bar — See Bihar Hindu Religious Trusts Act (1950) (1 of 1951), S 48

Pat 118 A (C N 33)

—Art. 31 — S. 132, Income-tax Act 1961 — Not violative of rights under the Article — See Income-tax Act (1961), S. 132

Mys 118 A (C N 26)

—Art. 31 (f) — Article contemplates a valid law i.e. a law which does not infringe any fundamental rights — See Constitution of India, Art. 21

Mys 118 B (C N 26)

—Arts 53, 77, 226 — Scope — Arts 53 and 77 should be read together — Executive power of Union vested in President — Power exercised through other officers must comply with provisions of Art. 77 (2) & (3) — Government of India (Allocation of Business) Rules (1961) framed under Art 77 (3) — Scheme under, for staffing senior posts for Centre — Implementation of decisions

CONSTITUTION OF INDIA (contd.)

of appointments committee must be expressed in name of President, otherwise they have no statutory force and cannot be enforced

Cal 180 D (C N 34)

—Art. 77 — Arts 53 and 77 should be read together — See Constitution of India, Art. 53

Cal 180 D (C N 34)

—Art 77 — Home Ministry's Resolution D/- 17-10-1957 has no statutory force — See Constitution of India, Art 226

Cal 180 E (C N 34)

—Art. 77 (1) — Citizenship Act (1955), S. 9 (2) — Citizenship Rules (1956), R. 30 — Order under Sec 9 (2) and Rule 30 — Nature and validity of - Executive order within meaning of Art. 77 (1) is valid though passed in name of Central Government and not President

All 165 A (C N 32)

—Art 133 (a), (b) and (c) — Sub-clause (c) is wider in scope than sub-clauses (a) and (b) — Cases not satisfying requirements of sub-clauses (a) and (b), may fall under sub-clause (c) — Sub-clause (c) does not confer an unlimited jurisdiction on High Court

Goa 44 A (C N 9)

—Art 133 (c) — Substantial question of law — Whether particular person is member of the "Hospicio" and other related questions regarding elections to General Body and Governing Council are neither substantial questions of law nor of general public importance — Question of law, in order to be substantial, may be of private importance but it should have importance from point of view of both parties to the litigation

Goa 44 B (C N 9)

—Art 136 — Appointment of commission of inquiry to enquire into conduct of ex-ministers — Request to Supreme Court, in special appeal against decision of High Court holding appointment of Inquiry Commission legal, to summon relevant files so that falsity of the charges might be established — Request not acceded to on ground that once it was held by the S C that inquiry was legal, the truth or otherwise of the allegations was for the commission's consideration — Commissions of Inquiry Act (1952), S. 3

SC 258 C (C N 48)

—Art 136 — New point — Point not taken in High Court — Point not allowed to be raised by Supreme Court as on facts, it would have caused grave miscarriage of justice

SC 316 B (C N 62)

—Art 141 — Observations of Supreme Court in AIR 1968 SC 488 as to manner of furnishing proof of payment of deposit — Not obiter and are binding on the Court — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 9 (1)

All 200 A (C N 41) (FB)

—Art. 153 — Governor can continue to hold office beyond period of five years till successor enters office — See Constitution of India, Art. 156 (3)

SC 258 A (C N 48)

—Arts 156 (3), 153, 160 — Governor can continue to hold office beyond period of five years till successor enters office.

S C 258 A (C N 48)

CONSTITUTION OF INDIA (contd.)

—Art 160 — Governor can continue to hold office beyond period of five years till successor enters office — See Constitution of India, Art. 156 (3) SC 258 A (C N 48)

—Art 163 (1) — Power of Governor to appoint Chief Minister — Exercise of his discretion not questionable in writ — See Constitution of India, Art 164 (1)

Cal 198 A (C N 35)

—Art. 163 (2) — Governor's power to withdraw pleasure during which Ministers hold office — Not questionable in writ proceedings — See Constitution of India Art 164 (1) and (2) Cal 198 B (C N 35)

—Arts 164 (1) and 163 (1) and 226 — Power of Governor to appoint Chief Minister — Governor acts in his sole discretion — Exercise of discretion not questionable in writ Cal 198 A (C N 35)

—Arts 164 (1) and (2) and 163 (2) and 226 — Governor's power to withdraw pleasure during which Ministers hold office — Power is unfettered by any restriction — Exercise of power not questionable in writ Cal 198 B (C N 35)

—Art 166 — Publication amounting to technical contempt of High Court — Offending matter directed to be published by the then law Minister and not by council of Ministers — Entire council of ministers cannot be held liable for releasing offending matter for publication — See Contempt of Courts Act (1952), S 3

Pat 140 D (C N 37)

—Art 166 (3) — Rules of Execution Business (1965) Sch 3, Item No 20 — Proposal for institution of withdrawal of a prosecution against advice tendered by Judicial Department — It must be referred to Council of Ministers for discussion and final orders of Governor Pat 140 C (C N 37)

—Art 191 — Representation of the People Act (1951), Ss 9A and 7 (d) — Disqualification for membership to State Legislature — Contract by acceptance of tender by State Government not complying with S 299 (1) of Constitution — Contract treated as binding subsisting contract by parties — Person entering into contract incurs disqualification — See Representation of the People Act (1951), S 9A SC 302 B (C N 59)

—Art. 191 (1) (a) — Office of profit — Allowances paid under Rr. 3 to 7 of Punjab Panchayat Samities and Zilla Parishads Non-official Members (Payment of Allowances) Rules, 1965, does not convert the office of Chairman Panchayat Samities into an office of profit — Such a person is not disqualified from being elected to the Legislative Assembly SC 262 (C N 49)

—Art 226 — Writ petition against R T. A.'s order — R T. A directed to maintain status quo during pendency of writ — Compromise between parties — Orders of R T A in terms of compromise — Acquiescence in the Order of R T A — Writ will not be granted against orders of R T A. —

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Writ of certiorari will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. Principle is to a great extent, similar to though not indetical with, the exercise of discretion in the Court of Chancery — Evidence Act (1872), S. 115 SC 329 E (C N 65)

—Art 226 — Natural Justice — Enquiry under R. 13 of Notaries Rules 1956 — Opportunity of being heard — See Notaries Act (1952), S. 10 All 195 A (C N 40)

—Art 226 — Apparent error of law — See Notaries Act (1952), S 10 All 195 C (C N 40)

—Art. 226 — Mala fide — Notaries Act (1952), Ss 10, 5 — Earlier notification quashed by judgment of High Court in special appeal — Delay in issue of certificate to practice as a Notary signed much earlier — No inference that Government acted mala fide deliberately with view to deprive a Notary Public of his right to practise as a Notary All 195 D (C N 40)

—Art. 226 — Threat of reversion in service — Interference under — Permissibility — See Constitution of India Art 311 Andh Pra 118 A (C N 34)

—Art 226 — Other remedy — Breach of service agreement with Govt. remediable under general law — No writ will lie

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—Arts 226, 311 — Civil Services — Bengal Subordinate Service (Discipline and Appeal) Rules, R. 10 — Service under contract — One clause providing for removal from service, for negligence, inefficiency or unsatisfactory work, without notice — Removal from service on charges of misappropriation and tampering of record — Contractual clause does not cover the case and Art. 311 (2) comes into operation Cal 164 B (C N 30)

—Arts 226 and 311 (2) — Delay — Dismissal of Civil servant — Charges serious, legal position difficult, legal advice necessary — Delay in filing writ petition was excusable — Civil Services

Cal 164 C (C N 30)

—Arts 226, 311 — Scope — No legal right in existence when writ is applied for — Writ of mandamus cannot be issued — Expiry of period for licence before obtaining rule or before pronouncement of judgment — Writ of mandamus must be refused — Temporary service based on contract — Service terminated against principles of natural justice — Application for writ of certiorari — Contract expiring afterwards — Writ can still be issued — Civil Services Cal 164 D (C N 30)

—Art 226 — Executive power of Union vested in President — Power exercised through other officers must comply with provisions of Arts 77 (2) and (3) — See

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- Constitution of India, Art. 58
Cal 180 D (C N 34)
- Arts. 226, 77 and 309, Proviso — Home Ministry's Resolution dated 17th October, 1957, has no statutory force — It is not a rule either under S. 3 of All India Services Act or under Art 77 or Proviso to Art. 309 — Claim to hold the post of a secretary to Central Government under the above resolution held could not be enforced by Court — (All India Services Act (1951), S. 3)
Cal 180 E (C N 34)
- Art. 226 — Discretion of Governor to appoint Chief Minister — Cannot be questioned in writ proceedings — See Constitution of India, Art 164 (1)
Cal 198 A (C N 35)
- Art. 226 — Governor's power to withdraw pleasure during which Ministers hold office — Exercise of power not questionable in writ — See Constitution of India, Art. 164 (1) and (2) Cal 198 B (C N 35)
- Art. 226 — Rule nisi — Issuance of — Test
Cal 198 C (C N 35)
- Art. 226 — Quo warranto — It is not enough for a person holding a public office, whose appointment is challenged in a quo warranto proceeding, merely to produce the warrant or the notification of the appointment — He must go further and satisfy the Court that the appointment is legal and valid
Cal 198 D (C N 35)
- Art. 226 — Natural justice — See Ahmedabad Small Cause Court Rules, R. 39
Guj 124 A (C N 23)
- Art. 226 — Natural justice — Principles — Principles are not violated under the summary procedure contemplated under R. 39 of Ahmedabad Small Cause Court Rules
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- Art 226 — Judicial review of administrative order — See Land Acquisition Act (1894), S. 17
Mad 104 B (C N 24)
- Art 226 — Writ to quash order under S. 33 (2) (b) Industrial Disputes Act by Labour Court refused — Appeal against refusal — Scope of appeal — Subsequent events not relevant to scope of appeal
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- Art 226 — Extent of Judicial review of action of Commissioner of Income-tax — See Income-tax Act (1961), S. 132
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- Art. 226 — Parties — Non-joinder — Writ petition challenging selection of candidates for admission to Government Medical Colleges in State — List of Candidates published expressly stating that candidates were 'provisionally admitted' and in case of their failure to report for medical examination and admission by a certain date their names would be struck off — Writ petition by non-selected candidates is not unmaintainable for non-joinder of selected candidates as opposite parties especially when Court has made it clear that their selection will not be disturbed Orissa 80 A (C N 33)
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- vits — Allegation in writ petition that impugned Government directive involves discrimination solely on ground of place of birth not controverted in counter-affidavit by Government opposite party — Allegation must be held to have been admitted and as such violative of Art. 15 (1) — (Civil P. C. (1908), O. 8, R. 5) Orissa 80 C (C N 33)
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- Art 226 — Ceriorari — Principles of natural justice — Applicability to University disciplinary action — Candidate asking for materials proposed to be used against him in support of charges — Materials not supplied but used — Penalty imposed — Principles violated — Hence penalty unsustainable Orissa 89 (C N 34)
- Art 226 — Joint petition — Three petitioners similarly situated on the date of petition — Petitioners also apprehending common danger and wishing to raise identical points — Joint petition is maintainable
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datory procedure laid down in Ss. 91 to 151 of Kerala Municipal Act 1950, not followed — Levy in nature of tax not justified — See Municipalities — Kerala Municipalities Act, 1960 (14 of 1961), S 284

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—Art 286 (1) (b) — Exemption under — Sale in course of export — Sale must occasion export — (Sales Tax — U. P. Sales Tax Act (15 of 1948), S 3 — Sales Tax — Central Sales Tax Act (1956), S 5)

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—Art 299 — Representation of the People Act (1951), Ss 9A and 7 (d) — Disqualification for membership to State Legislature — Contract by acceptance of tender by State Government not complying with Section 299 (1) of Constitution — Contract treated as binding subsisting contract by parties — Person entering into contract incurs disqualification — See Representation of People Act (1951), S 9A

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—Art 309 — Rules regarding promotions — Effect of — See Hyderabad State and Subordinate Services Rules, R 37

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—Art 309 — Scope

Andh Pra 118 D (C N 34)

—Art 309, Proviso — Home Ministry's Resolution, D/- 17th October, 1967, has no statutory force — See Constitution of India, Art 226

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—Arts 311, 226 — Threat of reversion in service — Interference under Art 226 when permissible Andh Pra 118 A (C N 34)

—Art. 311 — Service under Contract — Clause in contract providing for removal without notice for inefficiency, negligence etc. — Removal for misappropriation and tampering of record — Art 311 (2) comes into operation as clause does not cover the case — See Constitution of India, Art 226

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—Art 311 — Temporary service based on contract — Service terminated against principles of natural justice — Writ of certiorari applied for — Contract expiring afterwards — Writ can still be issued — See Constitution of India Art 226

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—Art 311 — Reduction in rank — All India Services (Discipline and Appeal) Rules (1955), R 3 (4) — Government servant officiating in higher post — Reversion to lower post for administrative reasons or unsuitability — Not a reduction in rank

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—Art. 311 — Lien on permanent post — See Fundamental Rules, R 9 (13)

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—Art. 311 (2) — Demotion — When amounts to penalty

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—Art 311 (2) — Procedure contemplated by Cl. (2) — Compliance of — Waiver

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—S. 3 — Interference with due course of justice in pending case — Revision petitions before High Court against order of committal court declining permission to withdraw prosecution — Offending publication creating atmosphere of prejudice against petitioner — Publication held did amount to technical contempt of High Court. See Contempt of Courts Act (1952) S 1

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—S. 3 — Publication amounting to technical contempt of High Court — Offending matter directed to be published by the then Law Minister and not by Council of Ministers — Entire Council of Ministers cannot

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—R. 9 — Trial of military personnel by Criminal Court — Central Government according sanction for — Interference by military authority — Illegal — See Criminal P. C. (1898), S. 549 Raj 115 B (C N 24)

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—S 96 — Order of seizure of paddy — Legality — See Criminal P. C. (1898), Section 516-A Goa 48 B (C N 12)

—S 98 (1) — Property which is subject matter of complaint and is stated to be stolen, found lying in house of accused — S 98 (1) is not applicable in terms apart from the fact that there is no allegation either in the complaint or in examination of complainant that the house of accused is used for deposit or sale of stolen property Goa 48 A (C N 12)

—Ss. 145, 439 — Findings of fact arrived at on enquiry under S. 145 — When can be interfered with in revision Punj 101 A (C N 19)

—S 145 — Addition of parties after commencement of enquiry but before its conclusion — Not barred — Issue of fresh order under sub-section (1) is not necessary Punj 101 B (C N 19)

—S 156 (3) — Complaint sent to Police, by Magistrate, for investigation under the section — Objection to the case being conducted by the Public Prosecutor on submission of charge-sheet by police cannot be taken — See Criminal P. C. (1898), S. 190 Ker 97 (C N 22)

—S 165 — Provision mandatory — Non-compliance fatal — See Penal Code (1860), S. 99 Ray 121 (C N 26)

—Ss. 190, 156 (3), 4 (1) (h) — Complaint to Magistrate — Magistrate sending it for investigation under S 156 (3) — No objection can be taken to the case being conducted by Public Prosecutor on submission of charge-sheet by police, AIR 1967 All 468 and 1968 Ker LT 57, held no longer good law in view of AIR 1964 SC 1541 Ker 97 (C N 22)

—S. 190 — R. 3 of Kerala Panchayats (Trial of Offences by Magistrates) Rules 1964 before amendment — Not void on ground of repugnancy to this section — See Constitution of India, Art 254 (2) Ker 111 A (C N 27)

—S. 190 — Taking cognizance of offence — Meaning of — Magistrate having no power to try accused or to commit him for trial is not competent to take cognizance — AIR 1952 All 873 and AIR 1967 Pat 416 and AIR 1959 Bom 137, Diss. from Ker 111 E (C N 27)

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—S. 190 (1) (c) — Power to take cognizance of an offence — Not one of the ordinary powers of a Magistrate — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 119 Ker 111 B (C N 27)

—S 190 (1) (c) — S. D. M. cannot take cognizance of a panchayat offence, under this section — See Panchayats — Kerala Panchayats Act (32 of 1960), S. 199 Ker 111 F (C N 27)

—S 191 — Taking cognizance on invalid complaint — Effect — See Criminal P. C. (1898), S. 4 (1) (h) Ker 111 D (C N 27)

—S. 192 — Transfer of case — To whom can be made — Transfer does not confer power to try when it is wanting Ker 111 C (C N 27)

—S. 195 (1) (c) — Bar under — Operating even if forgery is committed subsequent to initiation of proceedings all that S. 195 (1) (c) lays down is that if a forged document is produced or given in evidence by a party to any proceeding in any Court, the bar laid down in that section is attracted and for that purpose it is immaterial whether the forgery was committed prior or subsequent to the initiation of the said proceeding All 189 A (C N 38)

—S. 195 (1) (c) — Scope — Penal Code (1860), Ss. 471, 406, 467 and 420 — Main offence under S. 471 — Other offences flowing from it — Mere tagging of other offences to S. 471 will not take case out of ambit of Section 195 (1) (c) Criminal P. C. All 189 B (C N 38)

—S. 195 (2) — 'Competent Authority' under Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951, is not 'Court' within meaning of S. 195 (2) Cal 161 A (C N 29)

—S 209 (1) — Order of discharge under set aside and Magistrate directed to make commitment — Magistrate not required to follow procedure laid down in Ss. 211, 212 and 213 — See Criminal P. C. (1898), S. 437 Cal 161 B (C N 29)

—S. 236, Illustration (b) — Contradictory statements — Charge need not say which one is false — (Penal Code (1860), S. 193 — Contradictory statements — Prosecution need not prove which one is false) Mys 114 A (C N 25)

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—S. 367 — Circumstantial evidence — Conviction on — See Evidence Act (1872), S. 3

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—S. 367 — Appreciation of evidence — Duty of Court — Commission of offence after pre-planning — Currents and cross-currents of motives and emotions — Atmosphere of party feud — Test of truth would be mute circumstances — (Evidence Act (1872), S. 3)

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—S. 367 — Appreciation of evidence — Duty of Court of appeal — See Criminal P. C. (1898), S. 423

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—S. 367 — Conviction or sentence — Operative portion of judgment — Duty of Courts

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—Ss. 417, 423 — Presumption of innocence — Benefit of doubt — Acquittal in appeal — High Court will not disturb finding of fact — (Penal Code (1860), Ss. 405, 496) — (Evidence Act (1872), S. 3) — (Motor Vehicles Act (1939), S. 31)

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—S. 423 — Benefit of doubt — Acquittal in appeal — Interference by High Court — See Criminal P. C. (1898), S. 417

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—Ss. 435, 439 — Offences under Ss. 504 and 323, Penal Code tried as summary case — On some altercations between Magistrate and Counsel for accused, latter withdrawing his vakalatnama after cross-examining some of prosecution witnesses — Upon Counsel's withdrawal, accused participating in trial and himself examining defence witnesses without moving Court that he would like to engage another advocate — On conviction, accused making grievance that prejudice was caused to him because his counsel could not cross-examine one of prosecution witnesses — On revision, conclusions of Magistrate in support of conviction found to have been based on evidence and order of conviction found neither illegal nor improper — Nor was there any defect of jurisdiction — Case held not fit for interference in exercise of jurisdiction under Ss. 435 and 439 — (Penal Code (1860), Sections 323, 504)

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—S. 439 — Scope of S. 494 — Refusing consent to withdrawal, manifestly improper — High Court has power to interfere — See Criminal P. C. (1898), S. 494

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—S. 479-A — Prohibition against user of evidence of a witness examined in a proceeding under S. 512 — Has reference only to absconding accused — See Criminal P. C. (1898), S. 512

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—S. 488 — Claim for maintenance under — Decree for judicial separation under S. 10 of Hindu Marriage Act does not operate as bar — Parties living separately by mutual consent — Wife held not entitled to maintenance — Children, not deprived of their right to claim maintenance — (Hindu Marriage Act (1955), S. 10)

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—Ss 489, 488 — Enhancement of maintenance allowance — Can take effect from date of application — AIR 1949 Cal 584, Dissented from — Ker 108 (C N 25)

—Ss 494, 439 — Scope of S. 494 — Refusing consent to withdrawal, manifestly improper — High Court has power to interfere — Pat 140 B (C N 37)

—S 512 — Proceedings under the section is a judicial proceeding under S. 4 (m) — See Criminal P. C (1898), S. 479-A

Mys 114 C (C N 25)
—Ss. 512 and 479-A—Prohibition has reference only to the absconding accused — Statement by witness in S. 512 proceeding — Prosecution of witness for giving false evidence — Statement in S. 512 proceeding can be used against him — (Penal Code (1860), S. 193) — Mys 114 D (C N 25)

—Ss. 516-A, 96 — Complaint case against accused for paddy theft — Paddy found from house of accused not produced before Magistrate — Question of ownership involved — Order of Magistrate directing seizure of paddy from house of accused held to be not legal — S 516-A not attracted — Goa 48 B (C N 12)

—S. 522 (1) — Force or criminal force contemplated — Applicant not in physical possession of house — Dispossession of, by placing lock over lock — No force used to his person — Section not attracted — (Penal Code (1860), Ss 349, 350) — Goa 45 (C N 10)

—S. 533 — Non-compliance with S. 342 — When fatal — See Criminal P. C. (1898), S. 342 — Mys 114 B (C N 25)

—S 549 — Trial of military personnel — Determination of venue for — Final choice rests with Central Government — Discretion of Military authority under R. 6, not final — No legal hindrance for authority to differ from previous order — See Army Act (1950), S 125 — Raj 115 A (C N 24)

—S. 549 — Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules (1952), Rr 8, 9 — Trial of military personnel by Criminal Court — Central Government according sanction for — Interference by Military authority — Illegal — Raj 115 B (C N 24)

—Schs II, III and IV — Powers of Magistrates — See Panchayats — Kerala Panchayats Act (32 of 1960), S 119

Ker 111 B (C N 27)

DEBT LAWS

—**RAJASTHAN RELIEF OF AGRICULTURAL INDEBTEDNESS ACT (25 of 1957)**

—S. 6 (1) — Term 'debt' — It would as much include decretal debts as those debts in respect of which no decree has already been passed — Raj 123 C (C N 27) (FB)

—S 7 — Term 'creditors' — It would include decree-holders also — Raj 123 B (C N 27) (FB)

—S. 10 — Jurisdiction conferred on Debt Relief Court — Nature of — It can to cer-

DEBT LAWS — RAJASTHAN RELIEF OF AGRICULTURAL INDEBTEDNESS ACT (contd.)

tain extent disturb decree or order of Civil Court — Raj 123 A (C N 27) (FB)

DEFENCE OF INDIA RULES (1962)

—R 125 (2) — Essential Articles (Price Control) Order, 1963 — Order silent on time of operation — Mere publication in Gazette does not bring it into immediate effect — General Clauses Act (1897), S 5, not applicable to executive order — All 184 (C N 36)

EASEMENTS ACT (5 of 1882)

—S. 4 — Easement is an interest in property — Dominant owner, however, has no right or title to servient tenement — Andh Pra 131 C (C N 39)

—Ss. 13, 28, 30 — Right to light and air — Partition — Effect — Transferee entitled to easement necessary for enjoyment of transferred property unless partition deed contains specific agreement to curtail such right — Andh Pra 131 A (C N 39)

—S. 28 — Right to light and air — Partition — Effect — See Easements Act (1882), S. 13 — Andh Pra 131 A (C N 39)

—S. 30 — Right to light and air — Partition — Effect — See Easements Act (1882), S. 13 — Andh Pra 131 A (C N 39)

EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

See under Houses and Rents.

EDUCATION**—WEST BENGAL BOARD OF SECONDARY EDUCATION ACT (37 of 1963)**

—S. 45 (1) and (2) (f) — West Bengal Board of Secondary Education (Appointment of Secretary) Rules (1963), R. 8 — Validity of R. 8 — Rule comes within scope of S. 45 (1) and is perfectly valid and intra vires — Cal 175 A (C N 33)

—Ss. 45 (1) and 46 — West Bengal Board of Secondary Education (Appointment of Secretary) Rules (1963), R. 8 — R appointed by Board of Secondary Education established under West Bengal Secondary Education Act, 1950 and his post of Secretary continued under 1963 Act — Order of State Government under R. 8 dispensing with his services on payment of three months' salary — Held, R was employee of the new Board — Powers had been specifically given under 1963 Act to State Government to make rules for Secretary and power under R. 8 was validly exercised. Decision of Basu, J., D/-22-2-1967, Reversed — Cal 175 B (C N 33)

—S. 46 — Dismissal of Secretary of the Board constituted under the old Act giving him three months' salary, though post of Secretary of the Board continued under new Act — Validity and effect — See Education — West Bengal Board of Secondary Education Act (37 of 1963), S. 45 (1)

Cal 175 B (C N 33)

EDUCATION (contd.)**—WEST BENGAL BOARD OF SECONDARY EDUCATION (APPOINTMENT OF SECRETARY) RULES (1963)**

- R. 8 — Validity — See Education — West Bengal Board of Secondary Education Act (37 of 1963), S. 45 (1) and (2) (f) Cal 175 A (C N 33)
- R. 8 — Exercise of power under — Propriety — See Education — West Bengal Board of Secondary Education Act (37 of 1963), S. 45 (1) Cal 175 B (C N 33)

ELECTRICITY ACT (9 of 1910) (as amended in 1959)

- S. 6 (1) (a) — Provisions of S. 6 (1) are mandatory — Notice must specifically call upon licensee to sell the undertaking—Power must be exercised in mode prescribed—(General Clauses Act (1897), S. 14 — Power) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Expropriation — Statutes) SC 267 (C N 50)

ESSENTIAL COMMODITIES ACT (10 of 1955)

- Ss. 6-A and 7 — Forfeiture of goods — Mens rea or bona fides of dealer — Consideration of, is relevant — Ss. 6-A and 7 are in pari materia All 159 (C N 29)
- S. 7 — Ss. 6-A and 7 are in pari materia — See Essential Commodities Act (1955), S. 6-A All 159 (C N 29)

ESTATE DUTY ACT (34 of 1953)

- S. 7 — Debt due to deceased — Cannot be excluded from estate duty solely because it had become barred by time — Though right to recover such debt is extinguished by law of limitation, debt itself is not extinguished — Limitation Act (1908), S. 3 Madh Pra 50 C (C N 17)

- S. 13 — National Savings Certificates purchased by deceased jointly in his and wife's names — Deceased's will purporting to gift away absolutely such certificates but not transferred to her name exclusively — S 13 applies and such amount cannot be excluded from the property passing on death of deceased Madh Pra 50 A (C N 17)

- S. 14 (1) — Insurance policies on life of deceased and assigned to wife — Policies kept up by regular payment of premia wholly for her benefit — Entire amount of policies must be deemed to have passed on deceased's death — Burden of proving that such policies did not pass on the death of the assured is on the person accountable Madh Pra 50 B (C N 17)

EVIDENCE ACT (1 of 1872)

- S. 3 — Appreciation of evidence — See Criminal P. C. (1898), S. 367 Goa 40 A (C N 7)
- S. 3 — Finding of fact based on appreciation of evidence — Interference by High Court — See Criminal P. C. (1898), S. 417 Goa 40 B (C N 7)

EVIDENCE ACT (contd.)

- S. 3 — Circumstantial evidence — Conviction on — (Criminal P. C. (1898), S. 367) Guj 100 A (C N 20)
- S. 3 — Appreciation of evidence — Duty of Court — See Criminal P. C. (1898), S. 367 Orissa 73 (C N 30)
- Ss. 8, 27—Evidence of conduct—Admissibility — Accused giving information to Police head constable in presence of panchas that he would show the stolen goods — He further taking them to cow-dung hill and from there taking out stolen articles—This was done on very next day after commission of offence — This evidence being evidence of conduct of the accused, was admissible under S. 8 — It was also admissible under S. 27 Guj 100 B (C N 20)
- S. 8 — Mere pointing out place where articles are hidden — Not sufficient for raising presumption under S. 114, Illustration (a) — See Evidence Act (1872), S. 114, Illus. (a) Guj 100 D (C N 20)
- S. 14 — Delay in issue of certificate to practise as a Notary Public signed much earlier — No inference that Government acted mala fide deliberately with a view to deprive Notary Public of his right to practise as a Notary — See Constitution of India, Art. 226 All 195 D (C N 40)
- S. 27 — Evidence of conduct — Admissibility — See Evidence Act (1872), S. 8 Guj 100 B (C N 20)
- S. 35 — Certificate of guardianship under S. 7 of Guardians and Wards Act is admissible in evidence — Entries therein as to period of minority are relevant under S. 35, Evidence Act — (Guardians and Wards Act (1890), S. 7) — (1896) ILR 18 All 478, Not foll. All 162 B (C N 31)
- Ss. 101-104 — Non-statement of claim pursuant to notice under S. 9, Land Acquisition Act — Burden is on claimant to prove sufficient cause for omission — See Land Acquisition Act (1894), S. 9 Andh Pra 124 (C N 35)
- Ss. 101 to 104 — Eviction of tenant — Burden of proof as to greater hardship — It is on tenant once landlord satisfies requirements of S. 13 (1) (g) of the Rent Act — See Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13 (1) (g) Guj 110 D (C N 21)
- Ss. 101 to 104 — Innocence of accused — Presumption as to — See Criminal P. C. (1898), S. 423 Orissa 75 A (C N 31)
- S. 114 — Innocence of accused — Presumption as to — See Criminal P. C. (1898), S. 423 Orissa 75 A (C N 31)
- S. 114, Illustration (a) — Proof of possession of stolen goods and not of possession of place where those goods were hidden and found is necessary Guj 100 C (C N 20)
- S. 114, Illus. (a) and S. 8 — Presumption under S. 114 (a) when arises — Mere pointing out place where articles are hidden—Not sufficient — (Penal Code (1860), Ss. 379, 411) Guj 100 D (C N 20)

EVIDENCE ACT (contd.)

—S 114, Illus. (e) — Official acts — Presumption as to regularity — Extent of — Absence of negligence in carrying out public work not presumed

Bom 127 F (C N 25)

—S. 115 — Writ petition against R.T.A.'s order — See Constitution of India, Art 226

SC 329 E (C N 65)

—S 115 — Estoppel — Question as to age of minor — See Civil P. C. (1908), S. 115 All 162 C (C N 31)

—S. 115 — Objection to admission of additional evidence not raised before lower Appellate Court — Estoppel against raising the same in revision — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 29 (2)

Guj 110 F (C N 21)

—S. 115 — Admission to educational institution — Basis of selection changed abruptly to the detriment of candidates — Principle of equitable estoppel — Applicability — See Constitution of India, Art. 226

Orissa 80 D (C N 33)

FACTORIES ACT (63 of 1948)

—S 59 — Factory declared an establishment under Bihar Shops and Establishments Act — See Industrial Disputes Act (14 of 1947), S. 2 (rr)

SC 306 B (C N 60)

FOREIGNERS ACT (31 of 1946)

—S 2(a) — Citizenship Act (1955), S. 9(1) — Acquisition of foreign citizenship by Indian citizen between 26-1-1950 and commencement of Citizenship Act — No loss of Indian citizenship till commencement of Citizenship Act — Person entering India before commencement of Act (1955) cannot be deemed foreigner at time of his entry

All 165 E (C N 32)

—S 14 — Citizenship Act (1955), S. 9(2) — Citizenship Rules (1956), R 30 — Receipt of decision of Central Government under R 30 by the State Government — Framing of charge under S 14 prior to communication of order under R 30 to accused — Effect — Proceedings are not vitiated

All 165 C (C N 32)

—S 14 — Person entering India as Indian citizen — Becoming foreigner thereafter — Cannot be prosecuted for breach of para 7 of Foreigners Order, 1948 — See Foreigners Order (1948), para 7

All 165 D (C N 32)

FOREIGNERS ORDER (1948)

—Para 7 — Person entering India as Indian citizen — Becoming foreigner thereafter — Cannot be prosecuted for breach of para 7

All 165 D (C N 32)

FUNDAMENTAL RULES

See under Civil Services

GENERAL CLAUSES ACT (10 of 1897)

—S 3 (S) — Executive order though passed in name of Central Government and not President — Validity — See Constitution of India Art. 77 (1)

All 165 A (C N 32)

—S 3 (22) — Good faith — Implication and connotation — See Municipalities — Bombay District Municipal Act (3 of 1901), S 167

Bom 127 B (C N 25)

GENERAL CLAUSES ACT (contd.)

—S. 3 (22) — Acts prior to 1897 — Applicability of definition of good faith—(Contract Act (1872), S. 2) — (Transfer of Property Act (1882), S. 3)

Bom 127 C (C N 25)

—S. 5 — Not applicable to executive order — See Defence of India Rules (1962), R. 125 (2)

All 184 (C N 36)

—S. 14 — Power — Provisions of S 6(1) are mandatory — Notice must specifically call upon licensee to sell the undertaking — See Electricity Act (1910) (as amended in 1959), S 6 (1) (a)

SC 267 (C N 50)

GOA, DAMAN AND DIU AGRICULTURAL TENANCY ACT (7 of 1964)

See under Tenancy Laws

GOA, DAMAN AND DIU (JUDICIAL COMMISSIONER'S COURT) REGULATION (1963)

—S. 8 (2) (b) — Suit for eviction of tenant filed by landlord under Portuguese Civil P. C. — Relief prayed for, granted — Revision by tenant — Contention that by combined operation of Ss. 4, S (1) and 58 (2) read with S. 2 (11) (i) of Goa, Daman and Diu Agricultural Tenancy Act, Judge was barred from entertaining suit for eviction — Contention raised in suit but not pressed — Tenant, held, could not re-agitate this point in revision — Relief granted not interfered in revision — (Tenancy Laws — Goa, Daman and Diu Agricultural Tenancy Act (1964), Ss. 4, S (1), 58 (2), 2 (11) (i))

Goa 42 A (C N 8)

—S 8 (2) (b) (i) — Revision — Maintainability — See Specific Relief Act (1963), S. 6 (2) (a)

Goa 37 B (C N 5)

GUARDIANS AND WARDS ACT (8 of 1890)

—S. 7 — Certificate of guardianship under the section is admissible in evidence — Entries therein as to period of minority are relevant under S 35, Evidence Act — See Evidence Act (1872), S. 35

All 162 B (C N 31)

HINDU LAW

—Debts — Manager — Suit against—Creditor wishing to make joint family liable for manager's debts should make it clear in plaint — Judgment or decree not indicating that debt was incurred in capacity of manager — Decree cannot be executed against entire family property, but can be executed only against judgment-debtor's share — AIR 1935 Lah 1 Diss

All 155 (C N 28)

—Guardianship — Contract by guardian on behalf of minor — Enforcement — Principles — (1912) ILR 39 Cal 232 (PC) held no longer good law

Bom 140 A (C N 26)

—Guardianship — De facto and de jure guardian — Mother cannot be de jure guardian when father is living — Father living but reducing the family to extreme poverty by addiction to drink — Mother taking help of her father to avoid sale of property by revenue authorities — Held, that the mother was a de facto guardian of the minor and in that capacity she was competent to act on her son's behalf as if she was the infant's de jure guardian

Bom 140 B (C N 26)

HINDU LAW (contd.)

—Marriage — Marriage of man with impotent woman is invalid — Such marriage is not nullity unless a declaration is secured from Court — Death of husband — No declaration from Court that marriage was nullity — Woman gets status of widow of deceased — Third person cannot question her status
Mad 124 (C N 30)

HINDU MARRIAGE ACT (25 of 1955)

—S. 10 — Claim for maintenance by wife — Decree under the section does operate as bar — See Criminal P. C (1898), S 488
All 191 (C N 39)

HOUSES AND RENTS

—BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (57 of 1947)

—S. 13 (1) (g) — Word 'required' — Meaning of — It could not be equated with mere demand or claim — But absolute or compelling necessity need not be shown
Guj 110 A (C N 21)

—Ss 13 (1) (g) and 13 (2) — Requirement of landlord — Even when part of premises is required honestly and reasonably, test of section is satisfied
Guj 110 B (C N 21)

—Ss 13 (1) (g) and 13 (2) — Burden of proof as to greater hardship — It is on tenant once landlord satisfies requirements of S. 13 (1) (g) — Evidence Act (1872), Ss 101 to 104
Guj 110 D (C N 21)

—S. 13 (1) (hh), (3-A) (a) and (3-B) — Proposal to build one new building on demolition of two adjacent buildings, belonging to same landlord — Provision for residential tenements under S 13 (3-A) (a) need not necessarily be in the place where such tenements are presently occupied — Word "premises" occurring in S. 13 (1) (hh) includes more than one building
Bom 119 A (C N 24)

—S 13 (1) (hh), Explanation (as added by Maharashtra Amendment Act 13 of 1964) — Building having loft on top of first floor is not one having more than two floors
Bom 119 B (C N 24)

—S 13 (1) (hh), (3-A) and (3-B) (b) — Institution of suit for possession under S. 13 (1) (hh) — Enclosure of copy of certificate issued under S 13 (3-B) (b) with plaint instead of original certificate — No non-compliance with S. 13 (3-A)
Bom 119 C (C N 24)

—S. 13 (2) — Question of greater hardship — Considerations that weigh in striking just balance between landlord and tenant — Procedure in passing a partial decree
Guj 110 C (C N 21)

—S 13 (2) — Powers in revision of High Court in cases under the section — Nature of — See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S 29 (2)
Guj 110 E (C N 21)

—Ss 29 (2) and 13 (2) — Nature of powers in revision of High Court with refer-

HOUSES AND RENTS — BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (contd.)

ence to cases under S 13 (2) — Civil P C (1908), S. 115
Guj 110 E (C N 21)

—S 29 (2) — Evidence Act (1872), S. 115 — Objection to admission of additional evidence not raised before lower Appellate Court by defendants — Held, after having taken a chance of decision in their favour, it would not be open to defendants to raise any such point in revision
Guj 110 F (C N 21)

—EAST PUNJAB URBAN RENT RETRICTION ACT (3 of 1949)

—S 13 — Eviction under — Prior notice under S 106 of Transfer of Property Act determining contractual tenancy essential—Such notice, however, not essential where contractual tenancy has already been determined — AIR 1952 Punj 422, Overruled
Punj 110 (C N 21) (FB)

—KERALA BUILDINGS (LEASE AND RENT CONTROL) ACT (PRESIDENT'S ACT) (2 of 1965)

—S. 18 (5) — Order under — Revision to High Court — Maintainability — See Civil P C (1908), S 115
Ker 103 (C N 24) (FB)

—S 20 (1) — Order passed by District Court under the sections — Is revisable by High Court under S 115, Civil P. C — See Civil P C (1908), S 115
Ker 103 (C N 24) (FB)

HYDERABAD STATE AND SUBORDINATE SERVICES RULES.

See under Civil Services

IMPORTS (CONTROL) ORDER (No. 17 of 1955) (D/-7-12-1955)

—Person found in possession of imported watches — Onus to show that they are smuggled lies on the Department — See Sea Customs Act (1878), S. 167 (8)
Andh Pra 139 (C N 42)

INCOME-TAX ACT (11 of 1922)

—S 2 (11) (as it stood before its amendment by Finance Act of 1955)—Expression "previous year" in S. 23-A (1) — Interpretation of—See Income-tax Act (1922) (as it stood before its amendment by Finance Act of 1955), S. 23-A (1)
SC 292 (C N 56)

—Ss 4 (1) (a) and 42 (3) — Part B States (Taxation Concessions) Order (1950), Paras 4 (1) (m), 6, 6-A and 7 — Assessee a firm in Bangalore appointed as sole agent for Ceylon by a tile-manufacturing company of Feroke in taxable territory — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Beypore (in taxable territory) and handed over to a bank in Bangalore — Payments made to assessee by that bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued arose within meaning of S 4 (1) (a) in taxable territories other than Part B

INCOME-TAX ACT (1922) (contd.)

State — Business operations were carried out at three different places, i.e. Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for in pursuance to assessee's trading profit

SC 299 (C N 58)

—S 10 (2) (xv) — For the purpose of the business — Expenses incurred for conducting proceedings before Income-tax Authorities — Expenses are incurred for saving, preserving or protecting, portion of income arising out of assessee's business enabling assessee to make its legitimate profits and they are, therefore, laid out wholly and exclusively for assessee's business — It is admissible deduction under S 10 (2) (xv)

Cal 171 (C N 32)

—S 18-A — Non-resident firm — Liability of agent appointed under S. 43 — Extent of — 'For all purposes' — Meaning of — Not liable to pay advance tax under S. 18-A — See Income-tax Act (1922), S 43

SC 319 (C N 63)

—S 23 (5) (a) — Dissolution of registered partnership firm — Assessment of partners under S 23 (5) (a) — There can be no joint and several liability of all partners for payment of tax under S 44 — See Income-tax Act (1922), S 44

SC 285 (C N 54)

—Ss 23-A (1) and 2 (11) (as it stood before its amendment by Finance Act of 1955) — Expression "previous year" in S 23-A (1) — Interpretation of — Assessee having 5 different sources of income, and two businesses having separate accounting years, may have two previous years — (1963) 49 ITR 369 (Bom), Partly Reversed

SC 292 (C N 56)

—S 37 (1) or (2) — Scope — Field of operation of the two sub-sections is different — AIR 1964 Assam 1 (FB), Dissent from

Mys 118 C (C N 26)

—S 42 (3) — Assessee a firm in Bangalore appointed as sole agent for Ceylon by a tile-manufacturing company of Feroke — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Beypore and handed over to a bank in Bangalore — Payments made to assessee by that bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued or arose within meaning of S 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places, i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit — See Income-tax Act (1922), S 4 (1) (a)

SC 299 (C N 58)

—Ss 43, 18-A — Non-resident firm — Liability of agent appointed under S. 43 — Ex-

INCOME-TAX ACT (1922) (contd.)

tent of — 'For all purposes' — Meaning of — Not liable to pay advance tax under S 18-A — (Words and Phrases — 'For all purposes')

SC 319 (C N 63)

—S 44 (prior to its amendment by Act 11 of 1958) and S 23 (5) (a) (prior to its amendment by Finance Act (18 of 1956)) — Dissolution of registered partnership firm — Assessment of partners under S. 23 (5) (a) — There can be no joint and several liability of partners under S 44 — (1966) 59 ITR 315 (Andh Pra), Reversed

SC 285 (C N 54)

—S 66 (2) — Question whether certain item is capital or income does not involve a question of law — Decision of Appellate Tribunal thereon cannot be interpreted in revision

All 188 (C N 37)

INCOME-TAX ACT (43 of 1961)

—S 69-A — S 132 does not purport to substitute provisions of Ss 147 and 69-A — See Income-tax Act (1961), S 132

Mys 118 E (C N 26)

—S 132 — Scope and validity — Constitution of India, Arts 14, 19, 21, 31 — S 132 is neither incompetent nor invalid as infringing any of fundamental rights guaranteed under Arts 14, 19, 21 and 31

Mys 118 A (C N 26)

—S 132 — Scope

Mys 118 D (C N 26)

—Ss 132, 147, 69-A — S. 132 does not purport to substitute provisions of Ss. 147 and 69-A

Mys 118 E (C N 26)

—S 132 — Orders made under — They are in the nature of interlocutory orders in aid of ultimate order of assessment or reassessment

Mys 118 G (C N 26)

—S. 132 — 'On the information in his possession had reason to believe' — Meaning of — Extent of judicial review of action of Commissioner — Constitution of India, Art 226

Mys 118 H (C N 26)

—S. 132 — Usefulness or relevancy of documents

Mys 118 I (C N 26)

—Ss 132 (5), 156, 220 — Existing liability referred to in S 132 (5) — It is a liability in respect of which person concerned is already in default or can be deemed to be in default — He is not deprived of benefit of S 220

Mys 118 F (C N 26)

—S. 147 — S 132 does not purport to substitute provisions of Ss 147 and 69-A — See Income-tax Act (1961), S. 132

Mys 118 E (C N 26)

—S 156 — Existing liability referred to in S 132 (5) — See Income-tax Act (1961), S 132 (5)

Mys 118 F (C N 26)

—S. 179 and Second Sch., Part I, R. 2 — Failure on part of Recovery Officer to issue notice to defaulter — Defaulter clearly aware of recovery proceedings and in fact participating in them — Held, principle of cases under O 21, R 22, Civil P C (1908), that judgment-debtor appearing in proceedings cannot later raise objection that they are bad for want of notice, should apply to recovery proceedings under Part I and in particular to R. 2

Mad 143 (C N 33)

INCOME-TAX ACT (1961) (contd.)

—S. 220 — Existing liability — Deprivation of benefit of section — See Income-tax Act (1961). S. 132 (5)

Mys 118 F (C N 26)
—Sch. II, Part 1, R. 2 — Recovery proceedings — Applicability of principles under O. 21, R. 22, Civil P. C. — See Income-tax Act (1961). S. 179 Mad 143 (C N 33)

INDIAN ADMINISTRATIVE SERVICE (CADRE) RULES (1954)

—R. 6—Member of I.A.S. serving in Assam State deputed to Central Government — Is cadre officer within R. 6 — See All India Services Act (1951), S. 3 (1)

INDUSTRIAL DISPUTES ACT (14 of 1947)

—S. 2 (j) — Industry — Activity of Cricket Club of India is not an industry — It is members' self-service institution — Various activities of the club considered — Order dated 30-6-1965 of Industrial Tribunal, Maharashtra (I.T.) No. 347 of 1964, Reversed

SC 276 (C N 53)

—S. 2 (j) — "Industry" — Firm of Chartered Accountants — Not within scope of S. 2 (j) — AIR 1963 Cal 310, Not foll.

Mad 134 (C N 32)

—S. 2 (rr), Sch. 3, Item 1 — Factory declared an establishment under Bihar Shops and Establishments Act — Overtime payment to workmen — Bihar Shops and Establishments Act has no relevance in deciding the question of payment of overtime wages—Factories Act (1948), Section 59 — Minimum Wages Act (1948), Section 14 — Bihar Shops and Establishments Act (8 of 1954), Ss. 9, 21

SC 306 B (C N 60)

—S. 10 (2) — Trade Unions Act (1926), Ss. 6 (g), 28 (3), 29 and 30 (3) — Central Trade Union Regulations (1939), Regn. 9 — Dispute regarding workmen of one factory of company represented by their union, and the company referred to Tribunal — Workmen represented by their registered union whose membership was confined to workmen of that particular factory — Constitution of union alleged to have been amended and name changed before reference—Amendment making workmen of all the establishments in Bihar of the company eligible for its membership — Amendment not effected according to provisions of Trade Unions Act — Effect of award does not extend to workmen of other factories — Ref. No. 32 of 1963, D/-20-9-64 — Ind. Tri. Bihar, Reversed

SC 306 A (C N 60)

—S. 15 — Dismissal of worker for misconduct — Powers of Tribunal to decline permission under S. 33 (2) (b) — See Industrial Disputes Act (1947), S. 33 (2) (b)

Mad 121 B (C N 29)

—S. 33 (2) (b) — Writ to quash order under, refused — Appeal against refusal — Scope of appeal — See Constitution of India, Art. 226

Mad 121 A (C N 29)

—Ss. 33 (2) (b), 15, Sch. II, Item 6 — Tribunal, powers of — Alleged misconduct by

INDUSTRIAL DISPUTES ACT (contd.)

employee — Tribunal does not sit in appeal over judgment of management — Yet "baseless findings" and "basic errors" will enable Tribunal to decline permission under S. 33 (2) (b)

Mad 121 B (C N 29)

—S. 33 (2) (b), Sch. III, Item 8 — Misconduct, what constitutes explained — Charge of misconduct is a serious charge and must be supported by material evidence — Powers of High Court to interfere

Mad 121 C (C N 29)

—S. 33 (2) (b) — Misconduct — Request for permission of Tribunal to dismiss an employee — Grounds for dismissal very flimsy as to be open to plausible charge of victimization — Management should take action only on very strong ground — Good relations between employer and employee are desirable. (Dictum)

Mad 121 D (C N 29)

—Sch. II, Item 6 — Dismissal of worker for misconduct — Powers of Tribunal — See Industrial Disputes Act (1947), S. 33 (2) (b)

Mad 121 B (C N 29)

—Sch. 3, Item 1 — Factory declared an establishment under Bihar Shops and Establishments Act — See Industrial Disputes Act (14 of 1947), S. 2 (rr)

SC 306 B (C N 60)

—Sch. 3, Item 4 — Trade Unions Act (1926) (as amended by Act 45 of 1947), Section 28-K — Special leave with pay to workmen who are union's representatives to attend meeting of executive body of Union and Federation of I.N.T.U.C. — Demand, held, not justified — Ref. No. 32 of 1963, D/-20-9-64, Ind. Tri., Bihar, Reversed

SC 306 C (C N 60)

—Sch. III, Item 8 — Misconduct — What constitutes — See Industrial Disputes Act (1947), S. 33 (2) (b)

Mad 121 C (C N 29)

INTERPRETATION OF STATUTES

—Statement of Objects and Reasons — Use of — See Civil P. C. (1908), Preamble

Bom 127 D (C N 25)

KERALA BUILDINGS (LEASE AND RENT CONTROL) ACT (2 of 1965)

See under Houses and Rents.

KERALA LAND REFORMS ACT (1 of 1964)

See under Tenancy Laws.

KERALA MOTOR VEHICLES (STATE TRANSPORT UNDERTAKING) RULES (1960)

—R. 3—Notified routes and existing routes having common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II—See Motor Vehicles Act (1939), S. 68-C

SC 273 A (C N 52)

—R. 3 — Scheme in partial exclusion of existing road transport service cannot be in Form IV

SC 273 C (C N 52)

KERALA MUNICIPAL CORPORATION ACT (30 of 1961)

See under Municipalities.

KERALA MUNICIPALITIES ACT, 1960 (14 of 1961)

See under Municipalities.

KERALA PANCHAYATS ACT (32 of 1960)

See under Panchayats.

KERALA PANCHAYATS (TRIAL OF OFFENCES BY MAGISTRATES) RULES (1964)

See under Panchayats.

LAND ACQUISITION ACT (18 of 1894)

—Ss. 4 (1) and 6 — Notification under Section 4 (1) and declaration under S. 6 can be simultaneous — Directions given in the Madras Land Acquisition Manual recommended for being followed
Mad 104 A (C N 24)

—S. 6 — Notification under S. 4 (1) and declaration under S. 6 can be simultaneous — See Land Acquisition Act (1894), S. 4 (1)
Mad 104 A (C N 24)

—Ss. 9 and 25 (2), (3) — Non-statement of claim pursuant to notice under S. 9 — Burden on claimant to prove sufficient cause for omission — No evidence to explain reason for omission — S. 25 (2) is attracted — Court not entitled to enhance award under S. 25 (3)
Andh Pra 124 (C N 35)

—S. 17 (4) — Opinion of State Government about emergency is challengeable only when the Government acts mala fide or does not apply its mind to the matter — AIR 1965 Mad 328 and W.P. No 1555 of 1964 and W.P. No 795 of 1962 (Mad.) and W.P. No. 505 of 1961 (Mad.) Dissented, and held impliedly Overruled by AIR 1967 SC 1081 — (Constitution of India, Art. 226 — Judicial review of administrative order)
Mad 121 B (C N 24)

—S. 18 — Scope and applicability — Provisos of S. 18 are mandatory — Application for reference, not made within prescribed time — Land Acquisition Judge can refuse to entertain reference and can reject it on this ground — AIR 1963 All 556 (FB) and AIR 1929 All 769 and AIR 1958 Punj 490, Dissented from — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Mandatory and directory provisions)
Pat 131 (C N 36)

—S. 25 (2), (3) — Non-statement of claim pursuant to notice under S. 6 — No evidence to explain reason for omission — Section 25 (2) attracted — Court not entitled to enhance award under S. 25 (3) — See Land Acquisition Act (1894), S. 9
Andh Pra 124 (C N 35)

LETTERS PATENT

—(Bom), Cl. 37 — Power of framing rules for regulating procedure on Original Side — Scope and extent of — See Civil P. C. (1905), S. 122
Bom 117 A (C N 23)

—(Cal), Cl. 36 — Reference under, to third Judge on a difference of opinion between two Judges of High Court — Whether third Judge can differ from referring bench on a point on which both Judges had agreed — 'Quaere'
Cal 150 F (C N 34)

LIMITATION ACT (9 of 1905)

—S. 3 — Law of limitation extinguishes right to recover debt and not the debt itself — See Estate Duty Act (1953), S. 7
Madh Pra 50 C (C N 17)

—S. 4 — Order by District Judge to deposit costs of opposite party within 30 days of order — Last day being public holiday deposit made on next working day — Should be deemed to have been made within time
Raj 112 A (C N 23)

—S. 5 — Application for certified copy not made within time for appeal — S. 5 can be used to claim extension — See Civil P. C. (1905), O. 41, R. 22
Delhi 126 A (C N 19)

—Art. 138 — Limitation Act (1963), Art. 65 — Suit for recovery of possession of property by decree holder auction purchaser on basis of execution sale within 12 years of delivery of symbolical possession — Not barred by limitation — Symbolical possession has the effect of giving a fresh starting point of limitation — (Civil P. C. (1905), O. 21, R. 55 — Symbolical possession and limitation)
Ker 121 B (C N 29)

—Art. 158 — Date of service of notice — It means informal notice and not only intimation
Pat 114 A (C N 32)

—Art. 182 — Dismissal of cross-objections — Application for certified copy of decree not made within time for appeal — Decree sheet also not prepared — Period of limitation will not be extended — See Civil P. C. (1905), O. 41, R. 22
Delhi 126 A (C N 19)

LIMITATION ACT (36 of 1963)

—S. 5 — U. P. Sales Tax Act (15 of 1948), S. 9 (1), First Proviso and S. 9 (6) — Appeal under S. 9 (1) filed within time — Delay in depositing admitted tax — S. 5 which applies to appeals by virtue of Section 9 (6) of Sales Tax Act, held not attracted — Application for condonation of delay in depositing entire amount held not maintainable
All 200 B (C N 41) (FB)

—Art. 65 — Symbolical possession has the effect of giving a fresh start of limitation — See Limitation Act (1905), Art. 135
Ker 121 B (C N 29)

—Art. 131 — Revision — Limitation — Starting point — See Criminal P. C. (1898), S. 435
Ker 126 (C N 31) (FB)

MADHYA PRADESH INDUSTRIAL RELATIONS ACT (27 of 1960)

—Ss. 65 (1) (a), 83, 85 and 86 — Appeal under Section 65 (1) (a) — Finding therein by Industrial Court that dismissal of employee is proper and not in contravention of Section 83 — Setting aside penalty imposed on employer under Section 86 — It must also set aside order of reinstatement passed under Section 85
Madh Pra 62 A (C N 21)

—S. 83 — Finding by Industrial Court that dismissal of employee is proper and not in contravention of Section 83 — Setting aside penalty imposed on employer under Section 86 — It must also set aside order of reinstatement passed under Section 85 — See Madhya Pradesh Industrial Relations Act (27

MADHYA PRADESH INDUSTRIAL RELATIONS ACT (contd.)

of 1960), Section 65 (1) (a)

Madh Pra 62 A (C N 21)

—S 83 (c) — Transfer of employee from one post to another — Labour Court ordering reinstatement to original post — Meanwhile, agreement between employer and Union increasing work-load of that post accompanied by increase in wages — Refusal by employee on first day of his reinstatement to complete increased work-load — His dismissal is not in contravention of Section 83 (c)

Madh Pra 62 B (C N 21)

—S. 85 — Setting aside order of reinstatement — See Madhya Pradesh Industrial Relations Act (27 of 1960), Section 65 (1) (a)

Madh Pra 62 A (C N 21)

—S 86 — Setting aside of penalty imposed on the employer — See Madhya Pradesh Industrial Relations Act (27 of 1960), S. 65 (1) (a)

Madh Pra 62 A (C N 21)

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (19 of 1951)

—Ss 57, 62, 87, 93 — Orders under Section 57 (c) not binding on persons who were not parties to proceedings — Neither S 93 nor 87 bars a civil suit for declaration and injunction by third party who was not a party to proceedings

Mad 108 C (C N 25)

—S. 62 — Bar of civil suit — See Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Section 57

Mad 108 C (C N 25)

—S. 87 — Neither Section 93 nor Sec. 87 bars a civil suit for declaration and injunction by third party not party to proceedings — See Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Section 57

Mad 108 C (C N 25)

—S. 93 — Civil suit for declaration and injunction by third party not party to proceedings under the Act not barred — See Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Section 57

Mad 108 C (C N 25)

—S. 93 — Bar on maintainability of suits in Civil Courts is not absolute — Matters not contemplated by the Act can be dealt with in Civil Courts

Mad 108 A (C N 25)

MEDICINAL AND TOILET PREPARATIONS (EXCISE DUTIES) ACT (16 of 1955)

—S. 3, Sch. Item No 2 (substituted by Finance Act (5 of 1964)) — Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverage and to which alcohol has also been added — Levy of duty will be under Item 2 (iii), only on quantity of alcohol added

Ker 124 (C N 30)

MINIMUM WAGES ACT (11 of 1948)

—S. 14 — Factory declared an establishment under Bihar Shops and Establishments Act — See Industrial Disputes Act (14 of 1947), S 2 (rr)

SC 306 B (C N 60)

MOTOR VEHICLES ACT (4 of 1939)

—S 31 — Ownership of car not transferred to the name of accused in the records of R T O — Cannot go against the accused in this case as the Act came into force long after the sale in his favour — See Criminal P. C. (1898), S 367

Goa 40 B (C N 7)

—Ss 46, 48, 58 (1) (a) — Substantive permit not mentioning period for which it was granted, is not invalid — Bombay Motor Vehicles Rules (1940), Rule 80 Spl Civil Appln. Nos 575 to 596, 634, 540 and 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed

SC 329 A (C N 65)

—S 47 — Notified routes and existing routes having common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II — See Motor Vehicles Act (1939), S 68-C

SC 273 A (C N 52)

—S 48 — Substantive permit not mentioning period for which it was granted, is not invalid — See Motor Vehicles Act (1939), S. 46

SC 329 A (C N 65)

—S 48 — Substantive permit not mentioning date of commencement is not illegal. Spl C A Nos 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed

SC 329 B (C N 65)

—S. 48 — Order granting permit not giving date of commencement — Later order giving such date is not an order of review — Civil P. C. (1908)

SC 329 C (C N 65)

—S 48 — Writ Petitions by private operators against order of R. T. A. granting permit to State Road Transport Corporation — Enforcement of order of R T A stayed pending Writ Petition and R T A directed to maintain status quo pending writ petitions — Subsequent compromise between private operators and Road Transport Corporation — Orders formerly passed by R T A. but kept pending till writ petitions were withdrawn — Order held conditional and not in violation of High Court order — Order of R. T. O. held not invalid — Contempt of Courts Act (1952), Section 1 — Civil P. C. (1908), Order 39, Rule 9 Sp C A Nos 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed

SC 329 D (C N 65)

—S 57 — Bombay Motor Vehicles Rules (1940), Rules 67 and 68 — Orders of R T A in form of resolution at meeting at which parties were present — Resolution communicated to parties — Reasons for order given in the communication — The procedure did not contravene any provision of law or rule — There is no provision either in the Act or the Rules which requires the R. T. A. to give a written decision with regard to the grant of a stage carriage permit — Nor is there anything in the Act or the Rules which by necessary implication throws a duty upon the R. T. A. to give a written judgment in each case and to give reasons thereof along with the written decision — It is true that S 57 (7) requires the R. T. A. to give in writing the

MOTOR VEHICLES ACT (contd.)

reason if it refuses an application for a permit of any kind But in the case of grant of permit, statute does not impose any such duty In the absence of any statutory provision there is nothing wrong in principle if an administrative tribunal gives a decision orally and subsequently reduces to writing the reason thereof and communicates it to the parties — (English practice of interfering by issuing certiorari in respect of orders indicated — Spl C A Nos 575 to 596, 634, 540, 570 to 572 of 1967, D/-20-10-1967 (Bom), Reversed SC 329 F (C N 65)

—S 58 (1) (a) — Substantive permit not mentioning period for which it was granted, is not invalid — See Motor Vehicles Act (1939), S 46 SC 329 A (C N 65)

—Ss 68-C, 68-D, Sec 68-F (2) (iii) and 47 — Kerala Motor Vehicles (State Transport Undertaking) Rules (1960), Rule 3 — Notified routes and existing routes having common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II SC 273 A (C N 52)

—S 68D — Notified routes and existing routes havng common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II — See Motor Vehicles Act (1939), Section 68-C SC 273 A (C N 52)

—S 68E — Section does not require that new scheme should expressly say that it cancels or modifies earlier schemes — New scheme modifying earlier schemes by excluding private operators from notified routes proposed and approved after following procedure laid down in Sections 68C and 68D — Conditions of Section 68E is thereby satisfied and the earlier scheme will stand modified by implication pro tanto on promulgation of new scheme SC 273 B (C N 52)

—S. 68-F (2) (iii) — Notified routes and existing routes having common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II — See Motor Vehicles Act (1939), Section 68C SC 273 A (C N 52)

MUNICIPALITIES**—BOMBAY DISTRICT MUNICIPAL ACT (3 of 1901)**

—Ss 167, 167A — Bombay General Clauses Act (1 of 1904), Section 3 (20) — Negligence of Municipality or its Officers — Suit for damages — Effect of Ss 167 and 167A — (Tort — Negligence)

Bom 127 A (C N 25)
—S 167 — Bombay General Clauses Act (1 of 1904), Section 3 (20) — Good faith — What amounts to — Person whether acted in good faith — Depends on facts of the case

MUNICIPALITIES — BOMBAY DISTRICT MUNICIPAL ACT (contd.)

— (Words and Phrases — Good faith) — (General Clauses Act (1897), S. 3 (22)) — (Penal Code (1860), S. 52)

Bom 127 B (C N 25)
—S 167 — Doing things authorised by Statute — Liability for negligence — When arises — (Tort — Negligence)

Bom 127 E (C N 25)
—S. 167 — Works carried out by Municipality — Neghgence of contractors and engineers — Liability of the Municipality as principal — (Contract Act (1872), Sec 226) — (Tort — Negligence)

Bom 127 H (C N 25)
—S. 167-A — Suit for damages for negligence of Municipality or its officers — Effect of Sections 167A and 167 — See Municipalities — Bombay District Municipal Act (3 of 1901), Section 167

Bom 127 A (C N 25)

—CALICUT CITY MUNICIPAL CORPORATION ACT (30 of 1961)

—See Municipalities — Kerala Municipal Corporation Act (30 of 1961)

—KERALA MUNICIPAL CORPORATION ACT (30 of 1961)

—Ss 98 to 138 — Levy of licence fee — Validity — See Municipalities — Kerala Municipal Corporation Act (30 of 1961), S. 299

Ker 99 (C N 23)
—Ss. 299, 387 — Calicut City Municipal Act (30 of 1961), Sections 299, 387 and 98 to 138 — Levy by Corporation of licence fee for soaking cocoanut husks in soaking pits in payer's property — Levy is not valid — Constitution of India, Article 265

Ker 99 (C N 23)
—S. 387 — Levy of licence fee for soaking cocoanut husks in pits in one's property — Not valid — See Municipalities — Kerala Municipal Corporation Act (30 of 1961), Section 299 Ker 99 (C N 23)

—KERALA MUNICIPALITIES ACT, 1960 (14 of 1961)

—Ss 96 to 151 — Demand by Municipality of licence fee for medical shop — Not valid — Mandatory provisions of Sections 96 to 151, not followed — Effect — See Municipalities — Kerala Municipalities Act, 1960 (14 of 1961), Section 284

Ker 109 (C N 26) (FB)
—S. 135 — Demand by Municipality of licence fee for medical shop — Not valid — See Municipalities — Kerala Municipalities Act (1960) (14 of 1961), Section 284

Ker 109 (C N 26) (FB)
—Ss. 284, 135, 96 to 151, Sch. III, Item 20 — Demand by municipality of licence fee for running medical shop — Levy is not valid — Licence fee cannot be imposed for reimbursing cost of ordinary municipal services — Mandatory provisions of Sections 96 to 151 Not followed — Levy in nature of tax cannot be justified—Constitution of India, Article 265 Ker 109 (C N 26) (FB)

MUNICIPALITIES — KERALA MUNICIPALITIES ACT (contd.)

—Sch. 3, Item 20 — Licence fee for running medical shop — Demand for by Municipality is not valid — See Municipalities — Kerala Municipalities Act (1960) (14 of 1961), S. 284 Ker 109 (C N 26) (FB)

—U. P. MUNICIPALITIES ACT (2 of 1916)

—S. 2 (17) (i) — “As may be prescribed” — Meaning of — See Municipalities — U. P. Municipalities Act (2 of 1916), Section 160

—S. 160 (2) — Appellate authority has power to take additional evidence

—Ss. 160, 296, 2 (17) (i) — Words “as may be prescribed” in Section 160 (2) mean “as may be prescribed by State Government” — Assessment to tax on annual value of certain buildings and lands — State Government may prescribe appellate authority without framing rule under Section 296 — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Meaning of words — Variation in language and absurdity)

—S. 296—Appellate authority—Government may prescribe such authority without framing rule under the Section — See Municipalities — U. P. Municipalities Act (2 of 1916), S. 160

NOTARIES ACT (53 of 1952)

—S. 5 — Delay in issue of certificate signed much earlier — Inference of mala fide whether could be drawn — See Constitution of India, Art. 226

—S. 8 (1) (e) — Certificate or endorsement by Notary Public on affidavit — Necessity of stamp — Stamp Act (1899), Sch. 1, Art. 42

—S. 10 — Notaries Rules (1956), R. 13 — Enquiry under R. 13 — Absence of allegation of professional misconduct — Report of competent Authority — Notification of State Government based on such report, held not valid — (Constitution of India, Art. 226 — Natural justice)

—S. 10 — Notaries Rules (1956), R. 11 (2), 11 (9), 13 — Under R. 11 (2) no entry need be made in notarial register in respect of affidavits—Requirement in regard to maintenance of register under R. 11 (9) showing all fees and charges does not imply the entry of particulars of affidavits themselves in that register — Enquiry under R. 13 — Charge in regard to failure on part of Notary public concerned to enter affidavits in register — Finding of competent Authority that Notary Public failed to maintain register under R. 11 (9) — Finding held not in consonance with the charge and suffered from apparent error of law — (Constitution of India, Article 226)

—S. 10 — Delay in issue of certificate signed much earlier — Inference of mala fide

NOTARIES ACT (contd.)

whether could be drawn — See Constitution of India, Art. 226

—S. 10 (d) — Removal of name of a Notary from register necessarily implies cancellation of certificate — Cancellation of certificate does not per se amount to perpetual debarment from practice

NOTARIES RULES (1956)

—R. 11 (2) — No entry need be made in notarial register in respect of affidavits — See Notaries Act (1952), S. 10

—R. 11 (9) — Register showing all fees and charges — Maintenance of — Does not imply the entry of particulars of affidavits in that register — See Notaries Act (1952), S. 10

—R. 13 — Enquiry under the rule — Absence of allegation of professional misconduct — Effect — See Notaries Act (1952), S. 10

—R. 13 — Enquiry under — Charge in regard to failure on part of the Notary Public concerned to enter affidavits in register — Finding of competent Authority — Propriety — See Notaries Act (1952), S. 10

OPIUM ACT (1 of 1878)

—S. 14 — Searches subject to Criminal P. C. provisions — Violation of — Search illegal — Person searched has right of private defence — See Penal Code (1860), S. 99

—S. 15 — Searches subject to Criminal P. C. provisions — Violation of — Search illegal — Person searched has right of private defence — See Penal Code (1860), S. 99

—S. 16 — Searches subject to Criminal P. C. provisions — Violation of — Search illegal — Person searched has right of private defence — See Penal Code (1860), S. 99

ORISSA TENANCY ACT (2 of 1913)

See under Tenancy Laws.

PANCHAYATS

—KERALA PANCHAYATS ACT (32 of 1960)

—Ss. 119, 129 (2) (xxxix) — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 before amendment of 14-12-67 — Rule is not ultra vires — S. 119 of Act and R. 3 deal with different powers and there can be no conflict between them — (Criminal P. C. (1898), Ss. 28, 36, 37, 190 (1) (c) and Schs. II, III and IV)

—S. 119 — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 prior to amendment of 28-12-1967 — Panchayat offence — Sub-Divisional Magistrate has no power to take cognizance under S. 190 (1) (c) Criminal P. C. — Power not saved by Section 119 — Criminal P. C. (1898), S. 190 (1) (c) Ker 111 B (C N 27)

PANCHAYATS — KERALA PANCHAYATS ACT (contd.)

—S. 129 (2) — Rules under — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R 3 — Validity — See Constitution of India, Art 254 (2)

—S. 129 (2) (xxiv) — Scope — See Panchayats — Kerala Panchayats Act (32 of 1960), S 119
Ker 111 A (C N 27)
Ker 111 B (C N 27)

—KERALA PANCHAYATS (TRIAL OF OFFENCES BY MAGISTRATES) RULES (1964)

—R 3 — Rule not ultra vires on ground of repugnancy to S. 119 of the Kerala Panchayats Act, 1960 — See Panchayats — Kerala Panchayats Act (32 of 1960), S 119

—R. 3 — Panchayat offence — S D.M., has no power to take cognizance of under S. 190 (1) (c), Criminal P. C. — See Constitution of India, Art 254 (2)

—R 3 (as it stood prior to amendment of 14-12-1967) is valid — Panchayat offences committed within panchayat area in respect of which no second class Magistrate is appointed — First Class Magistrate having jurisdiction over that area is not competent to take cognizance and try those offences

Ker 111 F (C N 27)

—PUNJAB PANCHAYAT SAMITIES AND ZILLA PARISHADS ACT (3 of 1961)

—S 95 — Office of profit — Allowances paid under Rr. 3 to 7 of Punjab Panchayat Samities and Zilla Parishads Non-official Members (Payment of Allowances) Rules, 1965, does not convert the office of Chairman Panchayat Samity into an office of profit — Such a person is not disqualified from being elected to the Legislative Assembly — See Constitution of India, Art 191 (1) (a)

SC 262 (C N 4)

—PUNJAB PANCHAYAT SAMITIES AND ZILLA PARISHADS NON-OFFICIAL MEMBERS (PAYMENT OF ALLOWANCES) RULES (1965)

—Rr. 3 to 7 — Office of profit — Allowances paid under Rr. 3 to 7 of Punjab Panchayat Samities and Zilla Parishads Non-official Members (Payment of Allowances) Rules, 1965, does not convert the office of Chairman Panchayat Samity into an office of profit — Such a person is not disqualified from being elected to the Legislative Assembly — See Constitution of India, Art. 191 (1) (a)

SC 262 (C N 49)

PART B STATES (TAXATION CONCESSIONS) ORDER (1950)

—Paragraph 4 (1) (iii) — Assessee, a firm in Bangalore appointed as sole agent for Ceylon by a tile manufacturing Company of Feroke — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills

PART B STATES (TAXATION CONCESSIONS) ORDER (contd.)

obtained at Bypore and handed over to a Bank in Bangalore — Payments made to assessee by that Bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued or arose within meaning of Sec. 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit — See Income-tax Act (1922), S 4 (1) (a)

SC 299 (C N 58)

—Paragraph 6 — Assessee, a firm in Bangalore appointed as sole agent for Ceylon by a tile manufacturing Company of Feroke — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Bypore and handed over to a Bank in Bangalore — Payments made to assessee by that Bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued or arose within meaning of Sec. 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit — See Income-tax Act (1922), S. 4 (1) (a)

SC 299 (C N 58)

—Paragraph 6-A — Assessee, a firm in Bangalore appointed as sole agent for Ceylon by a tile manufacturing Company of Feroke — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Bypore and handed over to a Bank in Bangalore — Payments made to assessee by that Bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued or arose within meaning of Sec. 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit — See Income-tax Act (1922), S 4 (1) (a)

SC 299 (C N 58)

—Paragraph 7 — Assessee, a firm in Bangalore appointed as sole agent for Ceylon by a tile manufacturing Company of Feroke — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Bypore and handed over to a Bank in Bangalore — Payments made to assessee by that Bank — Held, since profits were received in Part B State, it could not be said

PART B STATES (TAXATION CONCESSION)

ORDER (contd.)

the entire profit accrued or arose within meaning of Sec 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit — See Income-tax Act (1922), S 4 (1) (a)

SC 299 (C N 58)

PENAL CODE (45 of 1860)

—S. 52 — Good faith — Implication and connotation — See Municipalities — Bombay District Municipal Act (3 of 1901), S 167

Bom 127 B (C N 25)

—S. 52 — Acts of public servants wholly without jurisdiction — Effect — See Penal Code (1860), S. 99

Raj 121 (C N 26)

—S. 97 — Acts of public servants wholly without jurisdiction — Did not attract exception contained in S 99 — See Penal Code (1860), S. 99

Raj 121 (C N 26)

—Ss. 99, 97, 52 — Acts of public servants wholly without jurisdiction — Attempt at search for and seizure of narcotics from petitioner's house — Officers not complying with S. 165 Criminal P. C — Held, search illegal and petitioner had right of private defence — (Criminal P. C (1898), S 165 — Provision mandatory — Non-compliance fatal — (Opium Act (1878), Ss. 14, 15 and 16 — Searches subject to Criminal P. C provisions — Violation of — Search illegal — Person searched has right of private defence)

Raj 121 (C N 26)

—S. 193—Contradictory statements — Prosecution need not prove which one is false — See Criminal P. C. (1898), S 236, Illus (h)

Mys 114 A (C N 25)

—S. 193 — Proceeding under S 512 Criminal P. C. — Offence can relate to statement made therein — See Criminal P. C (1898), S 479-A

Mys 114 C (C N 25)

—S. 193 — Statement in S 512 proceedings can be used against accused — See Criminal P. C. (1898), S. 512

Mys 114 D (C N 25)

—Ss. 300, 302 — Provocation — Proof — Nature of — Evidence of any witness is not essential

Ker 120 B (C N 28)

—S. 302 — Sentence — Capital punishment awarded by Sessions Court — Reduction of, by Appellate Court

Ker 120 A (C N 28)

—S 302 — Provocation — Proof — Nature of — See Penal Code (1860), S. 300

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—S 304-A — Ingredients of

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—S 304-A — Rash and negligent act — Mixed question of fact and law — Statement of accused that accident was due to failure of brakes — Not a plea of guilty — Conviction

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and sentence on such plea not proper—Criminal P. C (1898), S 271

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—S 323 — Offence under tried as summary case—Conviction for—Interference under Sections 435 and 439 held not possible — See Criminal P. C. (1898), S 435

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—S. 349 — Force or criminal force contemplated — See Criminal P. C (1898), S 522 (1)

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—S. 350 — Force or Criminal force contemplated — See Criminal P. C (1898), Section 522 (1)

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—S 379—Pointing out place where articles are hidden—Person cannot be presumed to be a thief or receiver of stolen property — See Evidence Act (1872), S 114, Illustration (a)

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—S 379 — Conviction under, for cutting and carrying away crops raised by complainant — Defence of bona fide claim of right to land — Mere putting up such a claim not sufficient — Several attempts made either by accused or their predecessor in title to deny that complainant is a bhag tenant of disputed land to dislodge him therefrom, had failed — Crops found to be raised by complainant — No circumstance shown that accused might have entertained honest belief of still having a right to be in khas possession of disputed land — Held that the act in question was another attempt by accused to forcibly dislodge complainant from his possession of disputed land and cutting of crops was not in bona fide exercise of right to land — Case law discussed

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—S 379 — Cutting and carrying away of crops forcibly — Bona fide exercise of right to land — See Criminal P. C (1898), S 439

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—S. 405 — Acquittal in appeal — Interference by High Court — See Criminal P. C (1898), S. 417

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—S. 406 — Main offence under S 471 — Mere fact that Ss 406, 467 and 420 are tacked to it does not take away the case out of ambit of S. 195 (1) (c) Criminal P. C — See Criminal P. C (1898), S 195 (1) (c)

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—S 411 — Mere pointing out place where articles are hidden — Person cannot be presumed to be a thief or a receiver of stolen property — See Evidence Act (1872), Sec. 114, Illustration (a)

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—S. 420 — Tacking of offence under the section to offence under S. 471 — Effect — See Criminal P. C (1898), S. 195 (1) (c)

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—S 467 — Tacking of offence under to offence under S. 471 — Effect — See Criminal P. C. (1898), S. 195 (1) (c)

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—S. 471 — Mere tacking of other offence to S. 471 will not take the case out of S. 195 (1) (c) Criminal P. C. — See Criminal P. C. (1898), S. 195 (1) (c) All 189 B (C N 38)

—Ss. 499, Exception 9 and 500 — Disclosure to Panchayat that son-in-law was impotent — Disclosure in the interests of daughter — Panchayat a recognised forum by custom — Disclosure, held, not punishable

Raj 119 (C N 25)

—S. 500 — Disclosure to Panchayat that son-in-law was impotent — Disclosure held not punishable as Panchayat was a recognised forum by custom — See Penal Code (1860), S. 499 Exception

Raj 119 (C N 25)

—S. 504 — Offence under, tried as summary case — Conviction — Case held not fit for interference under Ss. 435 and 439 Criminal P. C. — See Criminal P. C. (1898), S. 435

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PRESIDENCY TOWNS INSOLVENCY ACT (3 of 1909)

—Ss 9 (c) and 12 (b), (c) — Civil P. C. (1908), O. 38, R. 11 — Attachment before judgment of movable property — Suit decreed and attachment made absolute on 20-11-1964 — Petition on 19-3-1965 to execute decree by sale of attached property — Petition ordered on 31-3-1965 — Insolvency petition on 7-7-1965 — Held, petition was within time — Period of three months had to be counted from date of completion of 21 days after filing execution petition (i.e., 19-3-1965) — O. 38, R. 11 could be relied upon for purpose of realising amount by sale of property without fresh attachment — That order could not be viewed as a deeming provision having the effect of dating execution petition retrospectively to date of decree itself when attachment is made absolute — Case law discussed

Mad 112 (C N 26)

—S 12 (b), (c) — Act of insolvency — Attachment before judgment of movable property — Suit decreed and attachment made permanent — Attachment remained subsisting for a period of 21 days — Period of three months has to be counted from date of completion of 21 days after filing execution petition — See Presidency — Towns Insolvency Act (1909), S. 9 (e)

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PREVENTIVE DETENTION ACT (4 of 1950)

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—Ss 15 and 16 — S. 15 has no bearing on question of jurisdiction of regular Courts to try suit cognizable by Court of small causes as ordinary suit when there is already a Court of small causes having jurisdiction to try suit

Madh Pra 56 B (C N 19)

—Ss 16 and 23 — Civil P. C. (1908), Sections 24 (4), 107 and 115 — Regular Court, when can try small cause suit — Decision of Court in suit, which it is not competent to try, is nullity — Objection to jurisdiction can be

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PUBLIC SAFETY**—PREVENTIVE DETENTION ACT (4 of 1950)**

—S. 3 (3) — 'Forthwith', meaning of — Statute requiring particular thing to be done 'forthwith' — It should be understood as allowing reasonable time for doing it — Report to State Government made four days after passing of detention order and two days after arrest and commencement of detention — Held that even if the strict meaning given to expression 'forthwith' in AIR 1957 SC 28 is applied delay of four days was explained sufficiently by the District Magistrate and there was sufficient compliance with S. 3 (3)

SC 323 A (C N 64)

—S. 3 (3) — Approval of State Government to detention not communicated to detenu — Detention not rendered illegal on that ground

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—S. 3 (4) — Report to Central Government 'As soon as may be' — Time under Sec. 3 (4) can only be calculated from moment matter reached State Government — State Government after receipt of report of detention taking a week for giving its approval and communicating matter to Central Government three days thereafter — State Government cannot be held guilty of unreasonable delay in reporting to Central Government so as to render detention illegal

SC 323 C (C N 64)

—S. 7 — Order of detention and grounds of detention supplied to detenu in English though he knew only Bengali and Tripuri — No request by detenu at earlier stage and no objection as to language of grounds raised by detenu in his original petition under Art. 32 in English — Objection raised at stage of rejoinder held could not be entertained especially when detenu was not handicapped thereby

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—S. 11 — Last day for paying deposit ordered by Court being holiday, deposit made on next working day — Should be deemed to have been made within time prescribed — See Limitation Act (1908), S. 12

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—S. 69 (as inserted by Andhra Pradesh Amendment) Act (5 of 1960) — State legislature is competent to amend the section in view of entry No. 6 of concurrent list — (Constitution of India, Sch. 7, List III, Entry No. 6)

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—S. 9-A, Explanation — Applicability — Contract not fully performed by Contractor — No evidence to show termination of contract by mutual consent — Explanation does not apply

SC 302 A (C N 59)

—Ss. 9-A and 7 (d) — Disqualification for membership to State Legislature — Contract by acceptance of tender by State Government not complying with Art. 299 (1) of Constitution — Contract treated as binding subsisting contract by parties — Person entering into contract incurs disqualification — (Constitution of India (1950), Arts. 191 and 299)

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—S. 77 — Expression, 'expenditure', 'in connection with election' and 'incurred or authorised' in S. 77 (1), meaning of — Payment to secure a seat is an expenditure in connection with election — Deposit made by returned candidate for securing congress ticket forfeiting between the two dates prescribed under S. 77 (1) — Amount of deposit if included in return of election expenses declared by him exceeding the prescribed limit — Held, there was contravention of S. 77 (3) and the candidate was guilty of corrupt practice under S. 123 (6) read with S. 77 (3) — See Representation of the People Act (1951), S. 123 (6)

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—Ss. 82, 90 — Returning Officer — Whether proper or necessary party to election petition — Civil P. C. (1908), O. 1, Rr 1, 3 and 10

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—S. 90 — Returning Officer — Whether proper or necessary party to election petition — See Representation of the People Act (1951), S. 82

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—Ss. 123 (6) and 77 — Expression, 'expenditure in connection with election incurred or authorised' in Section 77 (1), meaning of — Payment to party to secure a ticket for standing as party candidate is an expenditure in connection with election — Deposit made by returned candidate for securing congress ticket forfeited in accordance with party rules between the two dates prescribed under S. 77 (1) — Amount of deposit if included in return of election expenses declared by him exceeding the prescribed limit — Held, there was contravention of Section 77 (3) and the candidate was guilty of corrupt practice under Section 123 (6) read with S. 77 (3)

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—S. 5 — Assessment of dissolved firm invalid

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—S 5 — Sale in course of export — Sale must occasion export — See Constitution of India Art 286 (1)(b) All 205 (C N 42) (FB)

—Ss 7(3), (4) (b), 8(1) and (3) — Number of goods that a dealer can purchase for purposes of S 8(1) — Cannot be restricted by authority issuing registration certificate — No provision either under Act or Rules authorising him to do so — Restriction on ground of possible misuse of certificate, cannot be justified Madh Pra 53 A (C N 18)

—Ss. 7 (4) (a), 8 (4) Central Sales Tax (Registration and Turnover) Rules (1957), Rule 5 (1) — Application for amendment of registration certificate — Date of effectiveness of amendment — Date of application and not when amendment is allowed, should be taken — Responsibility for delay in allowing amendment is on Sales Tax authority Madh Pra 53 B (C N 18)

—S 8 (1)(3) — Restriction as to number of goods that a dealer can purchase — Validity—See Sales Tax—Central Sales Tax Act (1956) S 7 (3) Madh Pra 53 A (C N 18)

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—CENTRAL SALES TAX (REGISTRATION AND TURNOVER) RULES (1957)

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—U. P. SALES TAX ACT (15 of 1948) *

—S. 3 — Sale in course of export — Meaning — See Constitution of India Art 286 (1) (b) All 205 (C N 42) (FB)

—S 9(1), First Proviso — U. P. Sales Tax Rules (1948), R 66(2) — Word "entertained" in First Proviso to S 9(1), meaning of — Appeal against assessment order — Entire admitted tax must be deposited within period of limitation — Manner of furnishing proof of payment is of secondary importance — Observations of the Supreme Court to this effect in AIR 1968 SC 488 are not obiter and are binding — (1963) 14 STC 513 (All), Overruled — Civil P C (1908), O 21, R 90 (as amended by Allahabad High Court) — Constitution of India Art 141 All 200 A (C N 41) (FB)

—S 9(1), First Proviso — Appeal against assessment filed within time — Delay in depositing admitted tax — Condonation of delay — Maintainability of application for — See Limitation Act (1963), S 5

All 200 B (C N 41) (FB)

—S 9(6) — Deposit of admitted tax in appeal against assessment — S 5, Limitation Act 1963, which applies to appeals under S 9(1) by virtue of S 9(6) held not attracted — See Limitation Act (1963), S. 5

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—S. 178-A — Person found in possession of imported watches — Onus to show that they are smuggled lies on the Department—See Sea Customs Act (1878), S 167(8)

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—S. 55 — Suit for removal of obstruction to public street and for restraining defendant from interfering with plaintiff's right to use street for passage of cattle, carts etc. — Permanent injunction restraining defendant from interfering with plaintiff's right to use street granted but mandatory injunction refused on ground that notwithstanding obstruction placed by plaintiff street was wide enough to afford passage to cattle and carts and that plaintiff had not proved special damage — Held, right of public to pass and repass extended over every inch of street and plaintiff was entitled to mandatory injunction for removal of obstructions without proof of special damage— S. A. No 239 of 1960 D/- 21-8-1963 (AP), Reversed

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SPECIFIC RELIEF ACT (47 of 1963)

—S. 6(2)(a) — Suit for possession under — Code of Comunidades (1961), Ss 9, 4, 400, 371, 349 — Sanction of Administrative Tribunal under S 9 not obtained —Permission only of Administrator obtained — Suit neither conservative nor executive — Ss 4 and 400 not attracted — S. 371 prescribing procedural formalities, not applicable—Formalities mentioned in S. 349 should be followed — Whether case is covered by second exception of S 9 — Question is necessary for deciding maintainability of suit — Case remanded in revision with direction to decide this question — (Goa, Daman and Diu

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—**STAMP ACT (2 of 1899)**

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42 so as to require notarial stamp

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—S. 4 — Suit for eviction against tenant
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—Pre Ss 1 and 114A — Act operates prospectively — Contract of lease executed under relevant provisions of Portuguese law in 1961 — Act coming into force in Goa in November 1965 — Parties acquiring certain vested rights and incurring certain liabilities under contracts of lease executed before T. P. Act came into force — In absence of any provision giving retrospective effect, such contracts held would not be affected — Suit filed by landlord for eviction of tenant under above lease without complying with Section 114A — Suit held not liable to be dismissed — S. 114A applies only to leases ex-

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executed under the Act — (Civil P. C. (1908), Pre — Interpretation of Statutes — Prospective and retrospective operation)
Goa 42 B (C N 3)
—S. 1 — Act operates prospectively — See Transfer of Property Act (1882), Pre
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—S. 3 — Definition of good faith in General Clauses Act 1897 — Applicability to — See General Clauses Act (1897), S. 3(22)
Bom 127 C (C N 25)
—S. 6(e) — Bank holding power of attorney to collect bills due to executant towards Bank advances — See Transfer of Property Act (4 of 1882), S. 130
SC 313 (C N 61)
—S. 8 — Deed — Construction of document purporting to extinguish right, title or interest in property — Should be read as a whole — Intention of parties to be taken into account
Andh Pra 131 B (C N 39)
—S. 52 — Rule of lis pendens — Provisions contained in any statute will not have the effect of abrogating the rule — See Tenancy Laws — Kerala Land Reforms Act (1 of 1964), S. 7
Ker 121 C (C N 29)
—S. 53-A — Scope — Transferee obtaining possession of property in pursuance of agreement executed by two vendors — Sale deed executed by one vendor alone in respect of his share only — Transferee conveying his absolute interest to assignee — Assignee obtaining possession of entire property — Plea of part performance not open to assignee against another vendor
Andh Pra 129 (C N 38)
—S. 58(f) — Memo accompanying deposit of title deeds — Registration of — See Registration Act (1908), S. 17(1)(b)
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—S. 58(f) — Mortgage by deposit of title deeds
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—S. 59 — Memo accompanying deposit of title-deeds—Registration of — See Registration Act (1908), S. 17(1)(b)
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—S. 106 — Eviction of tenant under Rent Act — Prior notice determining contractual tenancy essential — See Houses and Rents — East Punjab Urban Rent Restrictions Act (3 of 1949), S. 13
Punj 110 (C N 21) (FB)
—S. 109 — Eviction of tenant under provisions of Rent Act — Prior notice under S. 106 terminating contractual tenancy — Necessity — See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13
Punj 110 (C N 21) (FB)
—S. 111 — Defence of want of service of notice under — Has not been impliedly repealed or abrogated by the Rent Restriction Act — See Houses and Rents — East

T. P. ACT (contd.)

Punjab Urban Rent Restriction Act (3 of 1949), S. 13
Punj 110 (C N 21) (FB)
—S. 114A — Act operates prospectively — Section applies only to leases under the Act — See Transfer of Property Act (1882), Pre
Goa 42 B (C N 3)
—Ss 130, 6 (e) — Bank holding power of attorney to collect bills due to executant towards Bank advances — Order for payment to bank endorsed on bill sent for collection — Held, it was an equitable assignment of specific fund and not a pay order and could not be attached under S. 60 C P C — Civil P. C. (1908), S. 60. AIR 1963 Madh Pra 132, Reversed
SC 313 (C N 61)
U. P. MUNICIPALITIES ACT (2 of 1916)
See under Municipalities
U. P. SALES TAX ACT (15 of 1948)
See under Sales Tax.
U. P. SALES TAX RULES (1948)
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WEST BENGAL BOARD OF SECONDARY EDUCATION (APPOINTMENT OF SECRETARY) RULES (1963)
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WEST BENGAL REHABILITATION OF DISPLACED PERSONS AND EVICTION OF PERSONS IN UNAUTHORISED OCCUPATION OF LAND ACT (16 of 1951)
—S. 2 (2) — Competent authority under the Act — Not a Court within S. 195 (2), Criminal P. C. — See Criminal P. C. (1898), S. 195 (2)
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—“Case” — See Civil P. C. (1908), S. 115
Goa 37 A (C N 5)
—“Entertained” — See Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 9 (1)
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—“Eviction” — See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20 (b), Explanation I thereto
All 170 A (C N 33) (FB)
—“Expenditure”, “in connection with election” and “incurred or authorised” — See Representation of the People Act (1951), S. 123 (6)
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—“For all purposes” — Non-resident firm—Liability of agent appointed under S. 43 — Extent of — “For all purposes” — Meaning of — Not liable to pay advance tax under S. 18-A — See Income-tax Act (1922), S. 43
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—“Good faith” — See Municipalities — Bombay District Municipal Act (3 of 1901), S. 167
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SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 APRIL

DISS.=Dissented from in ; Not F.=Not Followed in ; OVER.=Overruled in ; REVERS.=Reversed in.

CIVIL PROCEDURE CODE (5 of 1908)

- S 11 — AIR 1914 All 173 — DISAP-
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- S 47 — AIR 1914 All 173 — DISAP-
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- Ss 100-101 — 1968 BLJR 374 — HELD
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- S 115 — 1960 Ker LT 1248 — OVER.
AIR 1969 Ker 103 (C N 24)
- O 1, R 10 — AIR 1914 All 173 — DIS-
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62).
- O 21, R 35 — AIR 1964 All 173 —
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- O 22, R 3 — AIR 1914 All 173 — DIS-
APPROVED. AIR 1969 SC 316 A (C N
62).
- O 23, R 1 (2) (a), (b) — AIR 1951 All
845 (FB) — DISS. AIR 1969 Mys 141
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- O 23, R 1 (2) (a), (b) — AIR 1940 Bom
121 (FB) — DISS. AIR 1969 Mys 141
(C N 27)

CONTRACT ACT (9 of 1872)

- S 128 — ('62) A F O D. No 300 of 1959,
D/-3-12-1962 (Pat) — REVERS. AIR
1969 SC 297 (C N 57).
- S 140 — ('62) A F O D. No 300 of 1959,
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SC 297 (C N 57).

CRIMINAL PROCEDURE CODE (5 of 1898)

- S. 4 (1), (4) — AIR 1967 All 468 —
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- S 4 (1) (h) — 1968 Ker LT 57 —
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preted AIR 1969 Ker 97 (C N 22).
- S 156 (3) — AIR 1967 All 468 —
HELD NO LONGER GOOD LAW
in view of AIR 1964 SC 1541 as inter-
preted AIR 1969 Ker 97 (C N 22)
- S. 156 (3) — 1968 Ker LT 57 —
HELD NO LONGER GOOD LAW
in view of AIR 1964 SC 1541 as inter-
preted AIR 1969 Ker 97 (C N 22).
- S 190 — AIR 1952 All 873 — DISS.
AIR 1969 Ker 111 E (C N 27).
- S 190 — AIR 1967 All 468 —
HELD NO LONGER GOOD LAW
in view of AIR 1964 SC 1541 as inter-
preted AIR 1969 Ker 97 (C N 22)
- S 190 — AIR 1959 Bom 437 — DISS.
AIR 1969 Ker 111 E (C N 27).
- S. 190 — 1968 Ker LT 57 —
HELD NO LONGER GOOD LAW
in view of AIR 1964 SC 1541 as inter-
preted AIR 1969 Ker 97 (C N 22).
- S 190 — AIR 1967 Pat 416 — DISS.
AIR 1969 Ker 111 E (C N 27)
- S 435—AIR 1956 Andh Pra 97—DISS.
AIR 1969 Ker 126 (C N 31) (FB).

CRIMINAL P. C. (contd.)

- S 435 — AIR 1967 Ker 280 — OVER-
AIR 1969 Ker 126 (C N 31).
- S 436 — AIR 1941 Oudh 409 — DISS.
AIR 1969 Cal 161 C (C N 29).
- S 437 — AIR 1941 Oudh 409 — DISS.
AIR 1969 Cal 161 C (C N 29)
- S 438 — AIR 1956 Andh Pra 97—DISS.
AIR 1969 Ker 126 (C N 31) (FB).
- S. 438 — AIR 1967 Ker 280 — OVER.
AIR 1969 Ker 126 (C N 31) (FB).
- S 439 — AIR 1956 Andh Pra 97—DISS.
AIR 1969 Ker 126 (C N 31) (FB).
- S 439 — AIR 1967 Ker 280 — OVER.
AIR 1969 Ker 126 (C N 31) (FB).
- S 488 — AIR 1949 Cal 584 — DISS.
AIR 1969 Ker 108 (C N 25).
- S 489 — AIR 1949 Cal 584 — DISS.
AIR 1969 Ker 108 (C N 25).

EDUCATION

—WEST BENGAL BOARD OF SECONDARY EDUCATION ACT (37 of 1963)

- S 45 (1) — (1967) 71 Cal WN 415—
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33).
- S. 46 — 71 Cal WN 415 — REVERS.
AIR 1969 Cal 176 B (C N 33).

EVIDENCE ACT (1 of 1872)

- S. 35 — (1896) ILR 18 All 478 — NC.
FOLL. AIR 1969 All 162 B (C N 31).

HINDU LAW

- Debts — AIR 1935 Lah 1 — DISS. AIR
1969 All 155 (C N 28).
- Guardianship — ILR 39 Cal 232 —
HELD NO LONGER GOOD LAW.
AIR 1969 Bom 140 A (C N 26).

HOUSES AND RENTS

—EAST PUNJAB URBAN RENT RESTRIC- TION ACT (3 of 1949)

- S. 13 — AIR 1952 Punj 422 — OVER.
AIR 1960 Punj 110 (C N 21) (FB).

INCOME-TAX ACT (11 of 1922)

- S. 2 (11) (as it stood before its amendment
by Finance Act of 1955) — (1963) 49
ITR 369 (Bom) — PARTLY REVERS.
AIR 1969 SC 292 (C N 56).
- S. 23 (5) (a) (prior to its amendment by
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1969 SC 285 (C N 54).
- S 23-A (1) (as it stood before its amend-
ment by Finance Act of 1955) — (1963)
49 ITR 369 (Bom)—PARTLY REVERS.
AIR 1969 SC 292 (C N 56).
- S 37 (1), (2) — AIR 1964 Assam 1 (FB),
— DISS. AIR 1969 Mys 118 C (C N
26).
- S. 44 (prior to its amendment by Act 11
of 1955)—(1966) 59 ITR 315 (Andh Pra)
— REVERS. AIR 1969 SC 285 (C N
54).

INDUSTRIAL DISPUTES ACT (14 of 1947)

- S. 2 (i) — ('65) I.T. No. 347 of 1964, dated 30-6-1965 (Mah) — REVERS. AIR 1969 SC 276 (C N 53).
- S. 2 (j) — AIR 1963 Cal 310 — NOT F. AIR 1969 Mad 134 (C N 32).
- S. 10 (2) — ('64) Ref. No. 32 of 1963, dated 28-9-1964 (I.T., Bihar) — REVERS. AIR 1969 SC 306 C (C N 60).
- Sch. 3, Item 4 — ('64) Ref. No. 32 of 1963, dated 28-9-1964 (I.T., Bihar) — REVERS. AIR 1969 SC 306 C (C N 60).

LAND ACQUISITION ACT (1 of 1894)

- S. 17 (4) — ('61) W.P. Nos. 505, etc., of 1961 (Mad.) — DISS — HELD IMPLI-EDLY OVERRULED by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- S. 17 (4) — ('62) W.P. No. 795 of 1961 (Mad) — DISS — HELD IMPLI-EDLY OVERRULED by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- S. 17 (4) — ('64) W.P. No. 1555 of 1964 (Mad.) — DISS — HELD IMPLI-EDLY OVERRULED by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- S. 17 (4) — AIR 1965 Mad 324 — DISS. — HELD IMPLI-EDLY OVERRULED by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- S. 18 — AIR 1929 All 769 — DISS. AIR 1969 Pat 131 (C N 36)
- S. 18 — AIR 1963 All 556 (FB) — DISS. AIR 1969 Pat 131 (C N 36).
- S. 18 — AIR 1958 Punj 490 — DISS. AIR 1969 Pat 131 (C N 36).

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- S. 46 — ('67) Spl. Civil Appln. Nos. 575 to 596, 634, 540 and 570 to 572 of 1967, D/-20-10-1967 (Bom.) — REVERS. AIR 1969 SC 329 A (C N 65).
- S. 48 — ('67) Spl. Civil Appln. Nos. 575 to 596, 634, 540 and 570 to 572 of 1967, D/-20-10-1967 (Bom.) — REVERS. AIR 1969 SC 329 A D (C N 65).
- S. 57 — ('67) Spl. Appln. Nos. 575 to 596, 634, 540 and 570 to 572 of 1967, D/-20-10-1967 (Bom.) — REVERS. AIR 1969 SC 329 F (C N 65).
- S. 58 (1) (a) — ('67) Spl. Appln. No. 575 to 596, 634, 540 and 570 to 572 of 1967, D/-20-10-1967 (Bom.) — REVERS. AIR 1969 SC 329 A (C N 65).

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- Ss. 16, 23 — ('67) C. R. No. 208 of 1966, D/-10-4-1967 (MP) — OVER. AIR 1969 Madh Pra 56 A (C N 19)
- Ss. 16, 23 — ('67) C. R. No. 377 of 1966, D/-29-3-1967 (M.P.) — OVER. AIR 1967 Madh Pra 56 A (C N 19).

SALES TAX

- U. P. SALES TAX ACT (15 of 1948)
- S. 9 (1), First Proviso — (1963) 14 STC 518 (All) — OVER. AIR 1969 All 200 A (C N 41) (FB).

SPECIFIC RELIEF ACT (1 of 1877)

- S. 55 — ('63) S.A. No. 239 of 1960, D/-21-8-1963 (Andh Pra) — REVERS. AIR 1969 Andh Pra 136 (C N 41).

TRANSFER OF PROPERTY ACT (4 of 1882)

- S. 6 (e) — AIR 1963 Madh Pra 132 — REVERS. AIR 1969 SC 313 (C N 61).
- S. 130 — AIR 1963 Madh Pra 132 — REVERS. AIR 1969 SC 313 (C N 61).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 APRIL

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in.

ALLAHABAD

- (1896) ILR 18 All 478 = 1898 All WN 158, Gunjra Kuer v. Ablakh Pande — NOT F. AIR 1969 All 162 B (C N 31).
- ('14) AIR 1914 All 173 = ILR 36 All 446, Mata Prasad v. Ramcharan Sahu — DIS-APPROVED. AIR 1969 SC 316 A (C N 62).
- ('29) AIR 1929 All 769 = ILR 52 All 96, Secy. of State v. Bhagwan Prasad — DISS. AIR 1969 Pat 131 (C N 36).
- ('41) AIR 1941 Oudh 409 = 42 Cri LJ 536, Nasimullah v. Emperor — DISS. AIR 1969 Cal 161 C (C N 29).
- ('51) AIR 1951 All 845 = 1951 All LJ 607 (FB), Abdul Ghapoor v. Abdul Rahman — DISS. AIR 1969 Mys 141 (C N 27).
- ('52) AIR 1952 All 873 = 1952 Cri LJ 1556, Jaddu v. State — DISS. AIR 1969 Ker 111E (C N 27).

ALLAHABAD (contd.)

- ('63) AIR 1963 All 556 = ILR (1963) 1 All 983 (FB), State of U. P. through the Col-lector of Nainital v. Abdul Karim — DISS. AIR 1969 Pat 131 (C N 36).
- ('63) 14 STC 518 (All), Swastika Tannery of Jajmau v. Commr. of Sales Tax, U. P. — OVER. AIR 1969 All 200 A (C N 41) (FB).
- ('67) AIR 1967 All 468 = 1967 Cri LJ 1255, Badri Prasad v. Kripa Shanker — HELD NO LONGER GOOD LAW in view of AIR 1964 SC 1541 as inter-preted. AIR 1969 Ker 97 (C N 22).

ANDHRA PRADESH

- ('56) AIR 1956 Andh Pra 97 = 1956 Cri LJ 571 (2), Veera Ramayya v. Udayagiri Ven-rita Seshavatharam — DISS. AIR 1969 Ker 126 (C N 31) (FB).

ANDHRA PRADESH (contd)

- (63) S A No 239 of 1960, D/-21-8-1963 (Andh Pra) — REVERS. AIR 1969 Andh Pra 136 (C N 41)
- (66) 59 ITR 315 (Andh Pra), Kalva Suryanarayana v Income-tax Officer—REVERS. AIR 1969 SC 285 (C N 54).

ASSAM

- (64) AIR 1964 Assam 1 = (1964) 52 ITR 637 (FB), S Dongarmal Agency (P.) Ltd. v K. E Johnson — DISS. AIR 1969 Mys 118 C (C N 26).

BOMBAY

- (40) AIR 1940 Bom 121 = 42 Bom LR 143 (FB), Ramrao Bhagwantrao v. Babu Appanna — DISS. AIR 1969 Mys 141 (C N 27)
- (59) AIR 1959 Bom 437 = 1959 Cri LJ 1153, State v Shanker — DISS. AIR 1969 Ker 111 E (C N 27).
- (63) 49 ITR 369 (Bom), Shree Goverdhan Ltd v Commr of Income-tax—PARTLY REVERS. AIR 1969 SC 292 (C N 56).
- (65) IT No 347 of 1964, D/-30-6-1965 (Mah) — REVERS. AIR 1969 SC 276 (C N 53).
- (67) Spl Civil Appln Nos 575 to 596, 634, 540 and 570 to 572 of 1967, D/-20-10-1967 (Bom)—REVERS. AIR 1969 SC 329 A, B, D, F (C N 65).

CALCUTTA

- (12) ILR 39 Cal 232 = 39 Ind App 16 (PC), Mir Sarwarjan v. Fakhruddin Mohamed — HELD NO LONGER GOOD LAW. AIR 1969 Bom 140 A (C N 26)
- (49) AIR 1949 Cal 584 = 50 Cri LJ 1006, J. H. Amroon v. Miss R Sassoon—DISS. AIR 1969 Ker 108 (C N 25).
- (63) AIR 1963 Cal 310 = (1963) 1 Lab LJ 567, Rabindranath Sen v First Industrial Tribunal, West Bengal — NOT F. AIR 1969 Mad 134 (C N 32).
- (1967) 71 Cal WN 415, B. N. Banerjee v. State of West Bengal — REVERS. AIR 1969 Cal 175 B (C N 33).

KERALA

- (60) 1960 Ker LT 1248 = 1960 Ker LJ 1254, Kurien v Chacko — OVER. AIR 1969 Ker 103 (C N 24) (FB).
- (67) AIR 1967 Ker 280 = 1967 Ker LT 31 = 1967 Cri LJ 1640, Devaki v. Kittu — OVER. AIR 1969 Ker 126 (C N 31) (FB).
- (65) 1968 Ker LT 57 = 1968 Mad LJ (Cri) 70, State of Kerala v. Wilfred — HELD NO LONGER GOOD LAW in view of AIR 1964 SC 1541 as interpreted. AIR 1969 Ker 97 (C N 22).

MADHYA PRADESH

- (63) AIR 1963 Madh Pra 132 = 1962 MPC 287 = 1962 MPLJ 685 = 1962 Jab LJ 957, Takhatmal v. Bharat Nidhi Ltd. — REVERS. AIR 1969 SC 313 (C N 61).
- (67) C.R. No 208 of 1966, D/-10-4-1967 (M.P.), Govardhan v. Nathu — OVER. AIR 1969 Madh Pra 56 A (C N 19)
- (67) Cr. No 377 of 1966, D/-29-3-1967 (M.P.), Manakchand v. Rajmal — OVER. AIR 1969 Madh Pra 56 A (C N 19).

MADRAS

- (61) W.P. Nos. 505, etc., of 1961 (Mad) — DISS — HELD IMPLIEDLY OVERRULED by AIR 1967 SC 1081 as interpreted AIR 1969 Mad 104 B (C N 24).
- (62) WP No. 795 of 1962 (Mad) — DISS. — HELD IMPLIEDLY OVERRULED BY by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- (64) W.P. No. 1555 of 1964 (Mad) — DISS. — HELD IMPLIEDLY OVERRULED BY AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).
- (65) AIR 1965 Mad 328 = ILR (1965) 2 Mad 416, Periaithambi Mudaliar v Spl Tahsildar, (L A) Planning Scheme, Coimbatore — DISS. — HELD IMPLIEDLY OVERRULED by AIR 1967 SC 1081 as interpreted. AIR 1969 Mad 104 B (C N 24).

PATNA

- (62) A F.O.D No. 300 of 1959, D/-2-12-1962 (Pat) — REVERS. AIR 1969 SC 297 (C N 57).
- (64) Ref No 32 of 1963, D/-25-9-1964 (I.T., Bihar) — REVERS. AIR 1969 SC 306 A, C (C N 60).
- (67) AIR 1967 Pat 416 = 1967 Cri LJ 1677, Pancham Singh v. State — DISS. AIR 1969 Ker 111 E (C N 27)
- (65) 1968 BLJR 374 = 1968 BLJR 359, Sheikh Bashiruddin v. Dhani Mohammad — HELD NO LONGER GOOD LAW in view of AIR 1963 SC 302 as interpreted in AIR 1969 Pat 128 (C N 35).

PUNJAB

- (35) AIR 1935 Lah 1 = 157 Ind Cas 739, Jai Kisen v. Ram Chand — DISS. AIR 1969 All 155 (C N 28).
- (52) AIR 1952 Punj 422 = 51 Punj LR 358, Bawa Singh v. Kundan Lal — OVER. AIR 1969 Punj 110 (C N 21) (FB).
- (58) AIR 1958 Punj 490 = ILR (1958) Punj 854, Hari Krishna Khosla v. State of Pepsu — DISS. AIR 1969 Pat 131 (C N 36).

COMPARATIVE TABLE

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A. I. R. 1969 April = Other Journals

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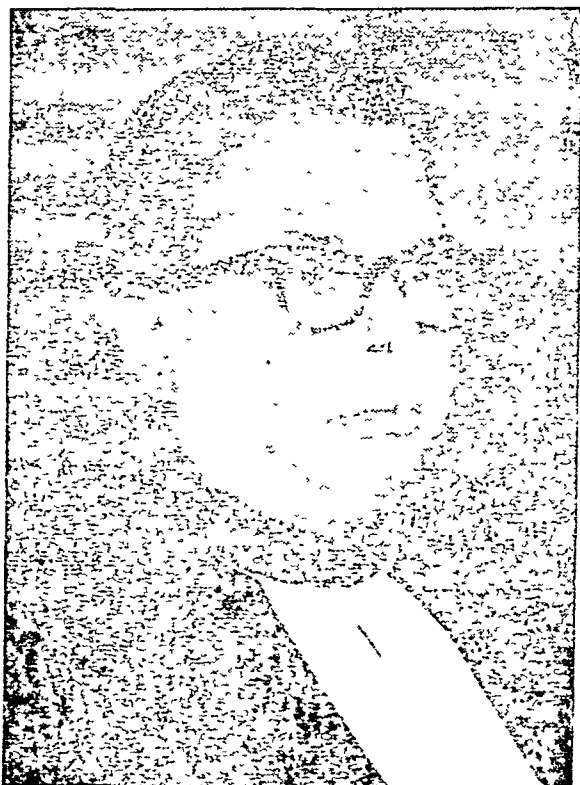
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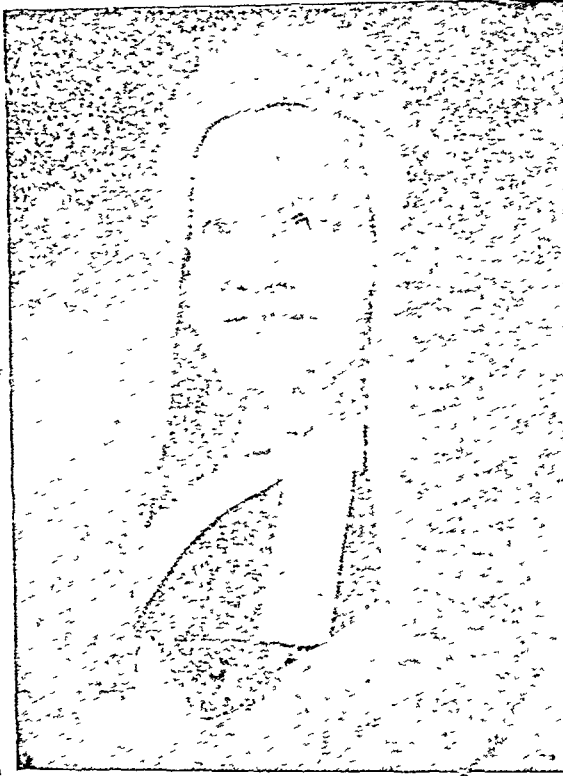
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JOURNAL SECTION

1969 APRIL

INCOME-TAX APPELLATE TRIBUNAL

Address of the Hon'ble the Chief Justice at the inaugural function of Gujarat Bench of Income-tax Appellate Tribunal on 9-11-1968 at 9-80 a. m.

I thank you for the opportunity you have given me this morning to inaugurate Gujarat Bench of the Income-tax Appellate Tribunal. The establishment of a Bench of the Income-tax Appellate Tribunal in Gujarat was a long felt necessity and I am glad that the force of this necessity has been recognised by the Government of India and a Bench is now being established in this State. I understand that when the erstwhile State of Bombay was bifurcated and the State of Gujarat came into being, an attempt was made by the Government of India to explore the possibility of establishing a Bench in Gujarat, but unfortunately the response of the then State Government was not encouraging and the Bench could not be established. Eight years have passed since then and now at last largely due to the sympathetic approach of the Government of India and the co-operation of the State Government, the legitimate expectation of the people of Gujarat is being fulfilled and they are having a Bench in this State. It used to cause a lot of inconvenience to the people of this State to go to Bombay for the purpose of their appeals and though a Bench of the Tribunal used to come to Ahmedabad on circuit, it was hardly a satisfactory arrangement for all appeals could not possibly be heard here and moreover an occasional circuit Bench could not promote the growth of a local income-tax bar and in the absence of a strong local income-tax bar, people were often constrained to have their appeals heard in Bombay, even though it was highly inconvenient and expensive. On behalf of the people of the State, I therefore welcome the establishment of the Gujarat Bench of the Tribunal.

2. The Tribunal has now been in existence for over 27 years. It was born on the 21st January, 1941 and since then it has been functioning with a measure of success unknown to any other administrative tribunal. It is the one Tribunal in the country which has earned the approbation of all, who are concerned with fiscal laws and their administration. The consensus of opinion among tax payers, lawyers, accountants and the litigating public alike has been that the Tribunal, in its existence of 27 years, has done an excellent job. The reasons for the great popularity of the Tribunal are not far to seek. Prior to my elevation as a Judge, I had occasions to appear before the Tribunal in Bombay and I found that an informal atmosphere prevails before the Tribunal and cases are allowed to be argued not only by lawyers but also by

accountants, income-tax Practitioners, officers of companies and other representatives. Secondly, the Tribunal, unlike a Civil Court, is not bound by the rules of evidence. It is permitted, and in fact, expected to do substantial justice. Relevant and material facts which would have been excluded from consideration in a Civil Court are readily taken into account by the Tribunal in an attempt to secure substantial justice to the assesseees. The Tribunal has tempered judicial power with justice and if I may say so, humanised an inhuman law. It has evolved a cheap, quick and informal procedure for doing justice as between the State and the citizen, to the great satisfaction of the litigating public. Moreover, though an administrative Tribunal, it has earned the reputation of being completely independent. I have found in the course of my judicial career that questions involving large amounts are being decided by the Tribunal adverse to the Revenue without the slightest hesitation. The Tribunal has earned unstinted praise for the independence of its decisions and its fervent desire to do justice and it has even the well merited confidence of the public. So great is the popularity and confidence enjoyed by the Tribunal that some time back when suggestions were made in certain quarters as also from persons occupying high places in public life and Judiciary in this country, for the abolition of the Tribunal, there was a unanimous protest from the litigating public. Tax lawyers, accountants, chambers of commerce and other associations expressed alarm at the idea of abolition of the Tribunal and I think the alarm was justified. Speaking for myself, I do not think that if the High Courts were called upon to hear appeals from the Appellate Assistant Commissioners, it would be possible to secure quick and expeditious justice and the assesseees too would not in many cases obtain the relief which they are getting at the hands of the Tribunal. The Tribunal, not being hampered by the technical rules of law, is able to give much greater relief to the assesseees than what the High Courts would ever be able to do.

3. The composition of the Tribunal has also much to commend itself. Having regard to the fact that the Tribunal is called upon to deal with cases which require not only an adequate knowledge of the fiscal laws but also expertise in technicalities of accounts and other commercial practices, every Bench of the Tribunal is composed of one Judicial Member & one Accountant Member. The objec-

tive of making this unique combination is to ensure that legal talent is properly blended with accountancy expertise so that the combination of the two can do full justice to the complex tax questions. The record of the Tribunal for the last 27 years shows that this task has been performed by the Tribunal exceedingly well. Bearing in mind the fact that it is not easy to find one's way amidst the twists and turns of the income-tax maze and that different minds find exits from the labyrinth by different paths and that the decision of quite a few cases requires knowledge not only of fiscal laws but also of other branches of law, it must be admitted that the Tribunal has done a wonderful job with great competence. Judicial Members may of course be expected to deal with legal problems adequately and satisfactorily and to write good judgments but I wish particularly to mention that even some of the Accountant Members have shown wonderfully good grasp of legal principles and their judgments compare very favourably with those of the Judicial Members. This, I believe, is largely due to the proper & judicious selection of Members of the Bench. The method of recruitment which involves selection by a committee presided over by a Supreme Court Judge ensures the selection of the best men and that is an important contributing factor to the popularity and success of the Tribunal.

4. But, I see one possible danger to this popularity and success of the Tribunal and that proceeds from the insistence by the Government on an unduly large number of disposals by every Bench of the Tribunal. I understand that the norm which the Government has laid down for the disposals of the Tribunal is 150 appeals per month. Now, ordinarily, the Tribunal works for about 22 to 23 days in a month and if 150 appeals are to be disposed of in a month, the Tribunal will have to turn out about 7 appeals per day. Speaking personally for myself, I do not think any judicial body can, consistently with quality and efficiency, dispose of 7 appeals in a day by judgment, particularly in a difficult branch of the law like income-tax. There is no branch of the law which evokes greater ingenuity of argument than tax law and very often the Tribunal is called upon to decide complicated and difficult questions of law and insistence on such a large number of disposals per day is bound in the long run to impair the quality and efficiency of the Tribunal. Today, as I said just now, orders of the Tribunal are, by and large, marked by clarity and lucidity and the standard is fairly high but if the Members of the Tribunal are expected to turn out judgments as a factory engaged in manufacture of finished goods, that is bound to have an adverse effect

on the quality of the orders of the Tribunal and that in its turn would considerably affect the confidence which the Tribunal today enjoys in the public mind. Pressed with the idea of turning out at least 7 appeals on an average, the Members of the Tribunal would be induced — almost compelled — to make the hearing perfunctory and in the race for reaching the requisite disposals they would not be able to devote sufficient time and thought to the solution of the problems before them and they would be likely to sacrifice quality and efficiency at the altar of disposals. I would, therefore, strongly urge the Government not to test the efficiency of the members of the Tribunal by the disposals they produce but rather by the quality of their work. After all, the justification for fixing a norm of disposals can only be to secure that the members of the Tribunal work to their full capacity and do not neglect their duties and that can be done by fixing the norm on a realistic basis. I would suggest the average of the last 3 or 5 years. Otherwise, I am afraid the Tribunal will not be able to maintain the high degree of efficiency which today characterises its judgments and its image in the public mind might suffer.

5. Taxation is today one of the most important weapons in the hands of the State for mitigating two objectionable aspects of unrestricted private property; first, the inequalities of wealth, and secondly, the power to use property for private profit, without regard to community purposes. In popular consciousness the first aim still predominates. By graded taxation and super tax on high incomes, gross inequalities of wealth are evened out more easily than by the equalisation of incomes or the abolition of private property. But the second aspect of taxation policy is becoming increasingly more important. Taxation policy is one of the most important means by which the State finances the public sector projects and social service schemes and it also forms an essential part of national economic planning. Taxation, in the present day, is a very powerful instrument in the hands of the society for achieving its political, social and economic objectives. Tax laws in a modern society are directly related to economic factors and are conditioned by social and political forces and guided by industrial and commercial considerations. We often hear a complaint that in our country taxation laws are continuously and incessantly being mangled, marred and amended by the legislators. This complaint is largely true and I agree with those who believe that experimentation in taxation laws should not be so frequent, so short-sighted and so shortlived as to rob the law of that modicum of stability which is essen-

tial to its healthy growth, but by their very nature the taxation laws cannot stand still. They cannot remain static. Experience, changing needs and changing philosophies are bound inevitably to produce constant change in the tax laws. Prof. Goodheart in the Hamlyn Lectures given in 1953 proclaimed his belief in the recognition of an obligation to obey law as an essential element of the law. So far as the law depends upon a recognition of an obligation to obey, it must not be out of line with what one may intelligibly call the social philosophy of the day. Law should not become an impediment in the way of the social philosophy of the country. It is an instrument of social will and it must continuously yield to the dictates of the current political, social and economic considerations. 'Law' as observed by Morris Cohen

"is a science of social instrument, its main object being to establish socio-economic justice and remove the existing imbalance in the socio-economic structure." Law cannot, therefore, afford to stand still and watch the onward march of society as a disinterested spectator. It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary and/or revolutionary changes in society and I do not think we should complain about changes in the law. The only thing that we can expect of the legislators is that the changes must be informed with a sense of a practical realism and must not be guided purely by dogmatic or doctrinaire considerations. The legislators would do well to realise that taxation law can have a great impact on the social and economic structure of the country and, therefore, enactment of taxation laws should be inspired not only by a desire to collect maximum revenue but also by a broad vision taking within its sweep relevant economic and sociological considerations. The desire to save tax is so strong that tax laws ill-conceived and guided merely by a desire to collect more revenue would be likely to affect the social structure and in course of time, result in mal-adjustment of personal, social and family relations affecting all that is fine and noble in human nature. Law "can have neither stable strength, nor utility nor beauty, unless it is built squarely upon the ground of actual social relations in the time and place, of materials apt for the heat and stress of the actual social climates; and of a design which has regard to the accommodation which men actually need, and to their tests and capacities"

6. There is also one other defect from which our fiscal laws suffer. Often it is found that tax laws are badly framed and drafting of amendments does not take into account the impact and interaction of

the amendments on the existing provisions. The draftsmen in many cases also blindly copy from tax laws of other countries without caring to consider whether those provisions fit into our social or economic structure. Some of the provisions of the Gift Tax Act and Estate Duty Act are instances in point. The result is that the tax laws often present a picture of utter obscurity and verbal darkness. It is of course idle to expect having regard to the complexity of our economic life and the large scale tax evasion which is resorted to by some of our taxpayers that revenue laws can be drawn with such simplicity and particularly as to avoid much litigation, but they can certainly be drafted carefully and in clear and simple language. Once the tax policy is formulated by the legislators, that policy has to be expressed in words of legal command and the legal command should be precise, its boundaries definite, its exceptions clear and the possibilities of its abuse anticipated and blocked in language which no one can possibly misunderstand. This is a matter which our legislators might well bear in mind in drafting fiscal statutes.

7. May I close with a tribute which the Tribunal so rightly deserves? Today the Tribunal stands as a glorious example of what administrative justice at its best can achieve. The only comparable example which comes to my mind is conseil —d'etat of France which has earned the reputation of being a more independent and effective Tribunal than even the Courts of law in that country. What Prof Wade said at the end of his Book "Towards Administrative Justice", is fully reflected and epitomised in the work of the Tribunal. He said

"No class of people stands to benefit more in the long run from just administration than the administrators themselves, because the State is permeated from top to bottom with the truth that Government depends upon the approval of the governed. Fairplay in administration will enlist the citizen's sympathies and will enormously reduce the friction with which the machinery of government works. All good administrators should take care that the machinery is properly tended and that the lubricant of justice is supplied in the right quantity at the right points."

This the Tribunal has done in ample measure. I have no doubt that with the great traditions which the Tribunal has established and with the glorious past which it has behind it, the Tribunal will continue to discharge its functions with the same high degree of responsibility and efficiency which have always characterised its work in the past. With these words, I inaugurate the Gujarat Bench of the Tribunal.

BAR COUNCIL NEWS

The Bar Council of Maharashtra

Subject. Removal of name from the Roll of Advocates of the Bar Council of Maharashtra.

It is hereby notified for general information that the names of Shri Balaram Pandurang Gunde and Shri Shankarlal Narsulal Agarwal have been removed from the Roll of Advocates by the order

Bombay, 10th January, 1969.

of the Bar Council of Maharashtra on the ground stated hereunder.

Ground: Removed under Section 26-A of the Advocates Act, 1961 at the request of the Advocates concerned.

By Order
(Sd.) (G. G. KULKARNI.)

Secretary,
Bar Council of Maharashtra.

REVIEWS

THE CRITICAL PROBLEMS OF INDIAN CONSTITUTION. By Hon'ble Mr. Justice P. B. Mukharji of the Calcutta High Court, Published by University of Bombay, Price Rs. 15.

These are the Chimanlal Setalvad Law Lectures delivered by the Hon'ble Mr. Justice P B Mukharji of the Calcutta High Court, in November 1966

The Indian genius has a flare for the absolute and the ideal but a contemptuous disregard for the practical. Naturally, therefore, the Indian Constitution is eclectic. It has all the idealisms and the aspirations of an eclectic Constitution and the practical deficiency of eclecticism. The forms are there Fundamental Rights, division of the legislative, executive and the judicial powers, the Parliament, the Legislatures, the Courts and the administrations. The Directive Principles lay down the political aspirations in no uncertain terms. What has not been learnt so far, and which is the most difficult aspect, is how to work it. The fitness of Democracy is tested when it comes to "applying, upholding and actually administering these constitutional arrangements". The Indian Constitution is passing through a crisis. Some of the grave symptoms that have appeared in the recent times cause great anxiety in the mind of every citizen. Golaknath's case is remarkably fresh.

The lectures are not a running commentary on the Indian Constitution, nor are they a dissertation on the principles of Constitutional Law. Learned author has picked out, in his lectures, "areas and problems under the Indian Constitution which are showing the stress and strain of both constitutional and unconstitutional challenge".

The topics dealt with are the Executive power and the Executive Institutions of the Indian Constitution. The Legislative Power and the Legislative Institutions of the Indian Constitution; the Judicial Power and the Judicial Institutions of the

Indian Constitution; Federalism under the Indian Constitution: the Scope of Conventions in the Indian Constitution and the Rule of Law under the Indian Constitution.

The outstanding feature of these lectures is the original and a bold approach which is typical of the learned author and which marks his decisions, the latest being the case of Adelaide Mande Tobias v. William Albert Tobias, reported in AIR 1968 Cal 133. G.G.M.

NEGLIGENCE AND OTHER TORTS IN ENGINEERING — By B. D. Virmani, Published by Engineering Law Publications of India, 308 Rajendra Nagar, Lucknow-4, Price Rs. 18.

With the ambitious all-round development this country has undertaken, there is bound to be a sporadic building activity. Engineers and Contractors, who undertake to design and supervise such works, are bound to come into troubles knowingly or unknowingly.

The book under review is just meant to acquaint them with the necessary elements of the Law of Tort which they ought to know to avoid liability. Engineers including architects and contractors and men of that profession are not expected, naturally though, to have a first hand knowledge of the law so as to avoid any action that may render them liable. The book will be a handy guide.

There is a useful index at the end.

G.G.M.

AN INTRODUCTORY GUIDE TO CENTRAL LABOUR LEGISLATION — By W. A. Dawson, S. J. of Xavier Labour Relations Institute, Jamshedpur, Asia Publishing House, Price Rs. 25.

Singularly non-technical and free from legal cliches, this book by a professor at one of the leading industrial relations in-

stitutes in India is intended primarily for the instruction of potential labour leaders and for students of labour welfare. It deals with the origin and functioning of Central Labour Legislation through an intensive, thorough and analytical method. Presentation is lucid and exhibits an outstanding knowledge on the part of the learned author. G.G.M.

the Supreme Court as regards its validity equally becomes a law under Art 141 which prevails. G.G.M.

JOURNAL OF THE PATENT OFFICE, TECHNICAL SOCIETY, 1967, Vol. I, Number 1, pages 1 to 110, Published by the Members of the Patent Office, Technical Society, 24, Lower Circular Road, Calcutta-17.

This journal is the first publication of its type in India. The patent system, though more than hundred years old in India, has yet to play full part. This journal will serve as a useful medium for giving information relating to patents and design applications, reports on patent cases and also serve as a forum for presentation, discussion and dissemination of technical advances in matters relating to patents. G.G.M.

HOUSES OF PARLIAMENT CAN MODIFY FUNDAMENTAL RIGHTS.

By Justice V. B. Raju, High Court, Gujarat, published by Surya Prakash 4 Duff Nala, Ahmedabad-3.

This small booklet, while adopting a 'novel' approach to some problems of Constitution, in no way provides or even attempts to provide a solution to the impasse created by Golaknath's case, (AIR 1967 SC 1643). One of the arguments propounded by the learned author is that an Act to amend the Constitution cannot be regarded as law and if it is held to be a law there is nothing to prevent the President from temporarily amending the Constitution by promulgating an ordinance under Art. 123 during the recess of the Parliament. The argument loses all its charm and novelty when pitted against the majority decision in Golaknath's case holding that amendment of the Constitution can be nothing but law. Let us hope, as the learned author does, that an occasion may arise when the Supreme Court (whole of it) may be persuaded to reconsider its view.

Another equally 'novel' argument is that striking down an Act to amend the Constitution achieves nothing and cannot prevent the amendment from taking effect because under Art. 368 the moment a Bill to amend the Constitution is assented to, the Constitution itself automatically stands amended in terms of the Bill. Once an Act to amend the Constitution is held to be a law, an adjudication by

AN INTRODUCTION TO THE LAW RELATING TO SHIPPING IN INDIA.

By B. C. Mitra, Published by Indian Law Institute, West Bengal State Unit 1 & 2 Hastings Street, Calcutta-1 Price Rs. 15.

With the advancement of our foreign trade, law relating to shipping is bound to assume importance.

The book under review presents a general survey of the entire subject of the law of shipping. The subject has been divided into various sections. Merchant Shipping Act, 1958 with latest amendments has been discussed. Other topics that are discussed are "Carriage by Sea", "Marine Insurance" with particular reference to Indian Statute; "General Average", "Admiralty Practice" "Collisions", "Wreck and Salvage", "International Conventions of Merchant Shipping".

There is a complete and up to date case-law including English case-law. Besides English and Indian enactments, relevant Rules and Regulations are given in the Appendix. G.G.M.

PERSONNEL MANAGEMENT AND INDUSTRIAL RELATIONS IN INDIA.

Edited by Dr. T. N. Kapoor, Professor and Head, Department of Commerce and Business Management, Punjab University, Chandigarh, Published by N. M. Tripathi (P) Ltd., Bombay, Price Rs. 25.

An industry is a social world in miniature. Associations of various persons, workmen, supervisory staff, management and employer in industry create industrial relationships. Apart from the economic functions of production and employment, this association affects the economic, social and political life of the whole community also. Thus industrial life creates a series of social relationships which regulate the relations and working together of not only workmen, workmen and management but also of community and industry. Industrial relations are therefore inherent in industrial life.

An important facet of rapid industrial development which we have undertaken, therefore, is scientific management of the people working in industries and the maintenance of fair and satisfactory relations between the employer, management and the employees. Unless this is done, industrial peace cannot be established and production is bound to be adversely affected.

The book under review presents the proceedings and papers of the first All India Seminar on Personnel Management and Industrial Relations held at Chandigarh during February 1965 under the Department of Commerce and Business Management, Punjab University. The seminar was sponsored by the University Grants Commission

The book brings to the forefront the problems that one has to face in effective maintenance of Industrial Relations and Personnel Management. There is a useful index at the end. G.G.M.

CINEMATOGRAPH CODE — By P. Ramareddi, Advocate, Cinematograph Laws Research Institute, Hyderabad-2. Price Rs. 31.

Perhaps this is the only book which has covered the entire field relating to Cinematograph. The phenomenal growth of Cinema Industry during last twenty years was bound to compel the Government to regulate its functioning by legislation. The result is the Central Cinematograph Act and the Cinemas (Regulation) Acts and Rules enacted by different States, not to mention various statutory rules.

The book under review besides giving the Central Cinematograph Act with commentary and case-law and various State Acts and Rules, also gives Cinematograph Censorship Rules, Film Rules, general information and instructions on censorship of films issued by the Govt. of India, principles for guidance in certifying films, complete set of standard agreement forms of film industry, minimum rates of wages, food, conveyance and shooting allowances, working hours and holidays and list of standard occupations in film industry. Thus the book is indispensable to all those who have their occupations in the Cinema Industry.

An index at the end should have proved an asset to facilitate easy reference to topic. Nonetheless the work of the author is commendable. G.G.M.

LEASEHOLD ENFRANCHISEMENT. By N. T. Hague, Published by Sweet & Maxwell, Indian Agents N. M. Tripathi (P.) Ltd.

The Leasehold Reform Act, 1967, confers on the long leasehold owners substantial benefits in that such leaseholders will be enabled to become free-holders, by the compulsory purchase of fee simple of their holdings, together with any intervening leasehold interests.

The book under review explains the operation and effect of the Leasehold Reform Act, 1967 showing particularly how the requirements of the Act follow or depart from the normal conveyancing practice and procedure. G.G.M.

NIGERIAN PRACTICE NOTES NO. 1.

A GUIDE TO BUYING AND SELLING LAND. By Brian Harvy. Published by Sweet & Maxwell, Agents in India N. M. Tripathi (P.) Ltd. Bombay.

This is the first of the Series of Nigerian Practice Notes. The book pertains to practice and procedure and is intended to help the Nigerian legal practitioner in the practice of conveyancing. Nigerian conveyancing practice is based on English practice. The booklet is founded on the author's own experience as a Solicitor handling a considerable volume of conveyancing in England and will be of great help to practitioners in Nigeria. G.G.M.

NIGERIAN PRACTICE NOTES NO. 3.

A GUIDE TO STAMP DUTIES. By P. G. Willoughby, Published by Sweet & Maxwell, Agents in India N. M. Tripathi (P.) Ltd.

This is the third number of the Series of 'Nigerian Practice Notes'. The book under review presents the subject of Stamp duties in Nigeria in a brief but comprehensive manner. There is a bibliography with a reference to English works giving a fuller explanation of the law. G.G.M.

documents. We accordingly exclude from consideration those documents.

6. But that is of no assistance to the appellants. As mentioned earlier, the High Court has refused to rely on the oral testimony adduced in support of the appellants' claim as regards the value of the orchard. It is true that the witnesses examined on behalf of the appellants have not been effectively cross-examined. It is also true that the Collector had not adduced any evidence in rebuttal; but that does not mean that the court is bound to accept their evidence. The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life. As Judge of fact it was open to the appellate Judges to test the evidence placed before them on the basis of probabilities.

7. We have been taken through the evidence of the witnesses. We are in agreement with the learned Judges of the High Court that the evidence in question is unacceptable. It may be that the garden in question was in a very good condition but it must be remembered that the garden was just 2 acres and 49 cents in extent. It is not possible for us to persuade ourselves to believe that the value of about Rs. 59,000 allowed by the High Court for that garden is by any measure inadequate. It is true that the conclusion of the High Court as regards the valuation of the garden rests on inadmissible evidence but the appellants cannot complain about that. If the evidence adduced by the appellants is rejected as has been done by the High Court then the valuation made by the Special Land Acquisition Officer should have remained but that valuation has been substantially enhanced by the High Court by relying on inadmissible evidence. The Government had not appealed against that decision. Therefore the decision of the High Court in that regard stands.

8. The High Court in our opinion was wrong in disallowing the statutory allowance permitted by Section 23 (2) over the value of the trees. The High Court erred in thinking that the value of the trees falls under the second clause of Section 23 (1). The first clause of Section 23 provides for determining the market value of the land acquired. Section 3 (a) prescribes that "the expression 'land' includes benefits to arise out of land, and things attached to the earth

or permanently fastened to anything attached to the earth." Therefore the trees that were standing on the land were a component part of the land acquired. The High Court failed to notice that what was acquired are not the trees but the land as such. The value of the trees was ascertained only for the purpose of fixing the market value of the land. On the value of the land as determined, the court was bound to allow the 15 per cent allowance provided by Sec. 23 (2) of the Act.

9. In *Sub Collector of Godavari v. Seragam Subbaroyadu*, (1907) ILR 30 Mad 151, the High Court of Madras held that the trees standing on the land acquired are 'things attached to the earth' and hence they are included in the definition of land in Section 3 (a) and that definition must apply in construing Section 23 of the Act. It further held that the value of the trees as are on the land when the declaration is made under Section 6 must be included in the market value of the land on which the allowance of 15 per cent should be given under Section 23 (2) of the Act. The same view was taken by the Allahabad High Court in *Krishna Bai v. Secretary of State* ILR 42 All 555 = (AIR 1920 All 101). We are satisfied that these decisions lay down the law correctly. No decision taking a contrary view was brought to our notice.

10. The only other contention taken on behalf of the appellants is as regards the costs. Both the trial court as well as the High Court directed the parties to bear their own costs. Mr. Desai contended that the compensation awarded by the Land Acquisition Officer having been substantially enhanced by those courts, they were bound to award his clients costs to the extent of their success. Costs are essentially in the discretion of the courts. Both the trial court as well as the High Court have given good reasons in support of their order as to costs. The claim made by the appellants was a highly exaggerated one. The bulk of the evidence adduced by them was found to be unacceptable. Under those circumstances, the courts thought that the appellants should not be granted any costs. We see no reason to interfere with that order.

11. In the result this appeal is partly allowed. In addition to the compensation awarded by the High Court, the appellants will get the statutory allowance

of 15 per cent on the value of the trees standing on the acquired land i. e., they will get 15 per cent allowance on a sum of Rs. 58,752. In other respects this appeal fails. There will be no order as to costs.

GGM/D.V.C.

Appeal partly
allowed.

AIR 1969 SUPREME COURT 258
(V 56 C 48)

(From Patna: 1968 BLJR 207)

**M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, V. BHARGAVA AND
C A. VAIDIALINGAM, JJ.**

Krishna Ballabh Sahay and others, Appellants v. Commission of Inquiry and others, Respondents.

Civil Appeal No. 150 of 1968, D/-18-7-1968.

(A) Constitution of India, Arts. 156 (3), 153, 160 — Governor can continue to hold office beyond period of five years till successor enters office.

There is no provision such as Art. 62 (1) or 68 (1) in the scheme of the Governor's appointment. On the other hand, the proviso to Art. 156 (3) contemplates that the Governor is to continue to hold office 'notwithstanding the expiration of his term'. The effect of these words is to exclude all questions of the legality of the holding of office by a Governor after the expiry of his term. There must always be a Governor under Art. 153 and the interregnum is avoided by the proviso to Art. 156 (3). It is, of course, to be expected that a new Governor will be nominated betimes but circumstances may come into being which may take the holder beyond his five years' term without a successor being named. It may not always be possible to appoint a Governor within the term of the incumbent. No doubt the provisions of Art. 160 may be resorted to but even that may not be sufficient to prevent an interregnum. Therefore, it is legitimate to hold that a person once appointed a Governor continues to hold that office till his successor enters upon his office. This successor may be appointed under Art. 155 or an order may be made under Art. 160. Whatever the position the former Governor continues to hold office till the new Governor enters his office.

(Para 7)

There may, however, be cases in which neglect to appoint a Governor soon may lead to an inference of failure to act under the Constitution and it may require further examination as to the remedy in such cases. 1968 BLJR 207, Affirmed. (Para 7)

(B) Commissions of Inquiry Act (1952), S. 3 — Commission can be appointed to look into conduct of former ministers.

When a Ministry goes out of office, its successor may consider any glaring charges against the outgoing ministers and may, if justified, order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny. AIR 1969 SC 215, Foll.; 1968 BLJR 207, Affirmed. (Para 8)

(C) Constitution of India, Art. 136 — Appointment of commission of inquiry to enquire into conduct of ex-ministers — Request to Supreme Court, in special appeal against decision of High Court holding appointment of Inquiry Commission legal, to summon relevant files so that falsity of the charges might be established — Request not acceded to on ground that once it was held by the S. C. that inquiry was legal, the truth or otherwise of the allegations was for the commission's consideration — Commissions of Inquiry Act (1952), S. 3. (Para 10)

(D) Commissions of Inquiry Act (1952), S. 3 — Charges against ex-ministers specific and records rather than oral testimony to be used to establish them — Affidavit making out sufficient case for inquiry — Each charge referring in detail to events with dates and names of persons concerned — Charges held such that inquiry could be ordered.

(Para 12)

(E) Commissions of Inquiry Act (1952), S. 3 — Commission directed to inquire into conduct of certain named persons who were ministers in the outgoing ministry — Commission also directed by Cl. (d) of notification to inquire whether any other person, besides the named individuals, whether as member of Council of ministers or otherwise, made illegal gains during the period — Later on, Clause (d) deleted — Deletion challenged on ground that it was deleted for fear that it might recoil on persons who started the inquiry — Held that it was unlikely that the Commission would overlook evidence which pointed to corruption or malpractice in others. Even if no direct finding was given there would be

ample reference to these matters in the report, in spite of the deletion of the clause. (Para 13)

(F) Commissions of Inquiry Act (1952), S. 3 — Appointment of Commission to inquire into conduct of ministers of outgoing ministry challenged before Supreme Court as being mala fide — Held that question of mala fide could only be decided if it could be held that charges were false — Whether they led to the conclusion that the inquiry was justified or it was malicious could not be said when there were only allegations and re-creminations but no evidence. If the charges had been made maliciously or falsely, the Commission would say so, where necessary. Supreme Court could not anticipate the inquiry and hold one themselves. (Para 14)

Cases Referred: Chronological Paras (1969) AIR 1969 SC 215 (V 56) =

Civil Appeals Nos. 1148-1150 of 1968, D/- 30-4-1968, P. V. Jagannath Rao v. State of Orissa 8

Mr. A. K. Sen, Senior Advocate (M/s. K. K. Jain, Bishambar Lal, H. K. Puri, C. B. Belwariar, Basudev Prasad and Bat Bhadra Prasad Singh, Advocates, with him), for Appellants; Mr. M. K. Nambiyar, Senior Advocate, (M/s. R. K. Garg S. C. Agarwal, Bandnath Prasad and Anil Kumar, Advocates, with him), for Respondent No. 2; M/s. J. P. Goyal and Sobhag Mal Jain, Advocates, for Respondents Nos. 3 to 6; Mr. D. N. Mukherjee, Advocate, for Respondents Nos. 7 and 8; M/s. R. K. Garg, S. C. Agarwal, Anil Kumar Gupta and B. S. Khoji, Advocates, for Respondent No. 9.

ORDER: The Appeal shall stand dismissed, but there shall be no order as to costs. Reasons for our judgment will follow. Stay order is vacated.

2. The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This appeal is brought against an order of the High Court at Patna, November 4, 1967, dismissing a petition under Arts. 226 and 227 of the Constitution. By that petition the appellants sought a declaration that a notification of the Governor of Bihar appointing a Commission of Inquiry under the Commissions of Inquiry Act, 1952, was 'ultra vires' illegal and inoperative and for restraining the Commission from proceeding with the Inquiry. The High Court dismissed the petition without issuing a rule but gave detailed reasons in its orders. The ap-

pellants now appeal by special leave granted by this Court. After the hearing of the appeal concluded we ordered the dismissal of the appeal but reserved the reasons which we now proceed to give.

3. As is common knowledge there was for a time no stable Government in Bihar. The Congress Ministry continued in office for some time first under Mr. Binodanand Jha and then under the first appellant, Mr. K. B. Sahay. When the Congress Ministry was voted out of office, a Ministry was formed by the United Front Party headed by Mr. Mahamaya Prasad Sinha. The United Front Ministry also resigned on 25th January, 1968 and another Ministry was formed by the Shoshit Dal headed by Mr. B. P. Mandal. This Ministry also went out of office on March 22, 1968 to be succeeded by another headed by Mr. Bhola Paswan Shastri. During the continuance of the Congress Ministry Mr. Mahamaya Prasad Sinha helped by Mr. Kamakhya Narain Singh and his brother Mr. Basant Narain Singh and others were in opposition. When the United Front Ministry emerged these opponents became Ministers. The Ministry began to function from March 5, 1967. On March 17, 1967, the Governor announced in his speech that an inquiry would be made against the conduct of some of the Ministers who had gone out of office including the present appellants. It appears that the Council of Ministers then constituted a Cabinet Sub-Committee on July 22, 1967 to make a preliminary examination of the allegations and the materials relating to them. The upshot was a notification issued by the Governor of Bihar under S. 3 of the Commissions of Inquiry Act on October 1, 1967 by which inquiry was ordered against the appellants and two others (Mr. Raghavendra Narain Singh and Mr. Ambika Sharan Singh). The Commission was directed to inquire into and report on the following matters, namely:

"(a) What was the extent of the assets and pecuniary resources owned and possessed by each of the persons above-named, his family, relatives and other persons in whom he was interested, (i) at the beginning and (ii) at the end of the tenure of office or each of the offices held by him as aforesaid;

(b) Whether each of the persons above-named, during the tenure of office or offices held by him, obtained any assets, pecuniary resources or advantages or

other benefits by abusing and exploiting his official position or positions and whether during the said period or periods his family, relatives and other persons in whom he was interested obtained, with his knowledge, consent or connivance, any assets, pecuniary resources, advantages or other benefits;

(c) Whether, and if so to what extent each of the persons above-named otherwise indulged in corruption, favouritism, abuse of power and other malpractices; and

(d) Whether, besides the persons above-named, any other person or persons holding official position either as a member of the Council of Ministers or otherwise, during the aforesaid period, made illegal gains or indulged in corruption, favouritism, abuse of power or other malpractices in like manner as aforesaid."

Later the Government of Bihar decided on October 31, 1967 that clause (d) should be deleted and it was so deleted. The notification went on to state further:

"Without prejudice to the scope of the inquiry, the Commission shall, in particular, inquire into and report on the mala fide and corrupt conduct of the persons above-named in relation to the following matters, viz.—

(a) Contracts for works;

(b) Grant of mineral concessions and issue and renewal of leases, licenses, and permits, particularly with respect to mines, minerals, forests, forest-products, non-ferrous metals, mills, generation and distribution of electricity, ferries, transport, etc.

(c) Purchase and supplies of stores and materials.

(d) Appointments, transfers, promotions etc. of officers.

(e) Institutions and withdrawals of cases.

(f) Protection to criminals and corrupt officers.

(g) Remissions of Government dues, loans and taxes.

(h) Misuse of Government money and property.

(i) Acquisition, deacquisition, settlement and lease of lands.

(j) Collection of money through check-posts.

(k) Any other matter which may be brought to the notice of the Commission in course of the inquiry."

The inquiry was entrusted to Mr. T. L. Venkatarama Aiyar, a retired Judge of this Court. The Commission was to enter

upon its duties from November 6, 1967. On October 31, 1967 a petition was filed in the High Court at Patna. The High Court summarily dismissed the petition on November 4, 1967. This appeal arises from the order.

4. Since no rule was issued by the High Court the allegations in the petition were not controverted or admitted by the opposite parties. When the present appeal was filed reliance was placed upon the affidavits filed with the petition and fresh affidavits were also filed. Opportunity was afforded to the respondents to file affidavits in reply. An affidavit in reply was filed by Abraham, Vigilance Commissioner, on behalf of Government and respondent No. 5 on behalf of respondents 3—6. Separate affidavits were also filed by appellant 1 on April 4, and May 2, 1968. We have considered all the affidavits which find place on the record of the appeal.

5. The arguments of the appellants in this Court were substantially the same as were urged in the High Court. They are really two in number. Shortly stated, they are: firstly, that the appointment of the Commission is a campaign of vilification for political gain by a party in opposition and is based on personal animus against those who kept the members of that party out of office. The argument thus attributes malice and mala fides to the Governor's notification and abuse of the powers under the Commissions of Inquiry Act for an illegitimate purpose. Side by side there is the argument that a succeeding Ministry cannot inquire into the conduct of public and governmental affairs of the Ministry that goes out. The second argument is that the Governor's term having come to an end under the Constitution, he was *functus officio* and could not order the enquiry contemplated by the Government then in power.

6. The second argument goes to the root of the matter and may, therefore, be considered first. It was rejected by the High Court. Mr. M. A. Ayyangar, the Governor in whose regime the notification was issued, was sworn in as Governor of Bihar on May 6, 1962. Under Art. 156 (3) he could hold office for a term of five years from the date on which he entered upon the office, that is to say till May 5, 1967. Therefore, the contention is that his continuance in office was illegal. The respondents rely upon the proviso to Art. 156 (3), which says:

"Provided that Governor shall, notwithstanding the expiration of his term, con-

tinue to hold office until his successor enters upon office," and point out that there cannot be an interregnum in view of the provision of Art. 153 that there shall be a Governor for each State. In reply Mr. A. K. Sen refers to the provisions of Art. 160 which makes provision for contingencies by laying down:

"160. Discharge of the functions of the Governor in certain contingencies.

The President may make such provision as he thinks fit for the discharge of the functions of the Governor of a State in any contingency not provided for in this Chapter."

His contention is that under the third clause of Art. 156 the Governor's term is a closed term and if the term comes to an end without the successor, being named, the provisions of Art. 160 must be used. The proviso, according to him, covers only the time lag before the successor enters office and not a case where no successor is appointed before the term of the holder is over. To hold otherwise, he submits, might enable the appointing authority to set at naught the provisions of the main clause through the proviso. By way of analogy he refers to Arts. 56 and 62 (1) in respect of the President and Arts. 67 and 68 (1) about the Vice-President which enjoin that the election to fill the vacancies has to be completed in each case before the term ceases. He contends that the same result is implicit in the scheme of things in relation to the Governor because of the distinction between 'appointment' and 'entering an office.'

7. We are unable to accept the contention. There is no provision such as Art. 62 (1) or 68 (1) in the scheme of the Governor's appointment. On the other hand, the proviso to Art. 156 (3) contemplates that the Governor is to continue to hold office 'notwithstanding the expiration of his term.' The effect of these words is to exclude all questions of the legality of the holding of office by a Governor after the expiry of his term. There must always be a Governor under Art. 153 and the interregnum is avoided by the proviso. It is, of course, to be expected that a new Governor will be nominated betimes but circumstances may come into being which may take the holder beyond his five years' term without a successor being named. It may not always be possible to appoint a Governor within the term of the incumbent. Suppose, for instance, a person is designated within the

five years and he intends joining after a few days. Mr. Sen concedes that the former Governor may continue to hold office till the new Governor assumes charge and this may take the former Governor beyond his term of five years. Suppose after that term is over the Governor designate declines the office. There will immediately be an interregnum. No doubt the provisions of Art. 160 may be resorted to but even that may not be sufficient to prevent an interregnum. Therefore, it is legitimate to hold that a person once appointed a Governor continues to hold that office till his successor enters upon his office. This successor may be appointed under Art. 155 or an order may be made under Art. 160. Whatever the position the former Governor continues to hold office till the new Governor enters his office. For these reasons we hold that Mr. M. A. Ayyangar acted validly as Governor on October 1, 1967. We may however, say that there may be cases in which neglect to appoint a Governor soon may lead to an inference of failure to act under the Constitution and it may require further examination as to the remedy in such cases. As we do not view this case as satisfying the need for such examination we say nothing about it. No facts bearing upon the failure to designate a successor have been pleaded here.

8. This brings us to the main question. As we pointed out above the first argument consists of two limbs. We shall examine them separately. The contention that the power cannot be exercised by the succeeding ministry has been answered already by this Court in two cases. The earlier of the two has been referred to by the High Court already. The more recent case is *P. V. Jagannath Rao v. State of Orissa*, (Civil Appeals Nos. 1148-1150 of 1968, D/- 30-4-1968) = (AIR 1969 SC 215). It hardly needs any authority to state that the inquiry will be ordered not by the Minister against himself but by some one else. When a Ministry goes out of office, its successor may consider any glaring charges and may, if justified, order an inquiry. Otherwise, each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny. The High Court has adequately dealt with this point and we see no error.

9. The next limb of the argument is that the inquiry is the result of malice and political vendetta and the grounds are false and scurrilous. In the affidavit of Abraham reference is made to the

charges which have been drawn up against the appellants and 2 others (who were also heard by us). These charges number 74 against the ex-Chief Minister (Mr. K. B. Sahay) and 36, 19, 42, 10 and 11 against the others. Some of the charges are interconnected. Mr. Sahay in his affidavit of May 2, 1968 has attempted to establish that Abraham himself had given a different version in his reports and had found nothing wrong where he now finds fault. A few of the charges are attempted to be controverted also. Request is made that the relevant files be summoned so that the falsity of the charges may be established.

10. We find ourselves unable to accede to the request for summoning the relevant files. The reason is fairly obvious. Once we have held that the inquiry is legal, it is manifest that the truth or otherwise of the allegations is for the Commission's consideration. If the disproof of the allegations is so simple, there should be no difficulty in bringing the facts to the notice of the Commission. We have no doubt that our former colleague, who heads the Commission, will be able to decide the issue as we are invited to do.

11. We have read the charges which are to be investigated. We do not wish to say anything about the merits of these charges since what we say is likely to have a bearing one way or another upon their truth. This matter is not in our hands, nor are we in possession of all the materials on which these charges will hereafter be attempted to be proved or disproved. We can only say that (as we see them) each charge refers in detail to events with dates, names of persons concerned, particulars of the action taken and the conduct which is to be considered. The charges are such that we think an inquiry can be ordered. Whether they are true or false is another matter.

12. It cannot be stated sufficiently strongly that the public life of persons in authority must never admit of such charges being even framed against them. If they can be made then an inquiry whether to establish them or to clear the name of the person charged is called for. If the charges were vague or speculative suggesting a fishing expedition we would have paused to consider whether such an inquiry should be allowed to proceed. A perusal of the grounds assures us that the charges are specific, and that records rather than oral testimony will be used to

establish them. We agree with the High Court that the affidavit in opposition make out a sufficient case for inquiry.

13. It is contended that clause (d) was excluded from the notification so that the inquiry might not recoil upon those who had started it. Reference is made to the notification of March 12, 1968 to show that in the notification ordering inquiry against Mr. Mahamaya Prasad Sinha and his colleagues that clause is included. That should be a matter of satisfaction to the present appellants. It is unlikely that the Commission will overlook evidence which points to corruption or malpractice in others. Even if no direct finding is given there will be ample reference to these matters in the report.

14. Finally it is argued that the action is mala fide. This can only be decided if it can be held that the allegations were false. The Commission will first find the facts. Whether they lead to the conclusion that the inquiry was justified or it was malicious, cannot be said just now, when there are only allegations and recriminations but no evidence. If the charges have been made maliciously or falsely, we are sure the Commission will say so, where necessary. We cannot anticipate the inquiry and hold one ourselves.

15. These reasons impelled us to order the dismissal of the appeal which order we formally pronounced earlier.

RGD.

Appeal dismissed.

AIR 1969 SUPREME COURT 262 (V 56 C 49)

(From Punjab: AIR 1968 Punjab 450 (FB))
J. C. SHAH AND V. BHARGAVA, JJ.

S. Umrao Singh, Appellant v. Darbara Singh and others, Respondents.

Civil Appeal No. 1707 of 1967, D/- 25-7-1968.

Constitution of India, Art. 191 (1) (a) — Office of profit — Allowances paid under Rr. 3 to 7 of Punjab Panchayat Samities and Zilla Parishads Non-official Members (Payment of Allowances) Rules, 1965, does not convert the office of Chairman Panchayat Samities into an office of profit — Such a person is not disqualified from being elected to the Legislative Assembly.

The allowances paid under Rules 3 to 7 of the Punjab Panchayat Samities and Zilla Parishad Non-official Members (Pay-

BM/BM/D585/68

ment of Allowances) Rules do not convert the office of Chairman of a Panchayat Samiti into an office of profit. Consequently a person holding an office of Chairman Panchayat Samiti is not disqualified from being elected to the Legislative Assembly. AIR 1968 Punj 450 (FB), Affirmed; AIR 1954 SC 653, Dist.

(Para 4)

The allowance paid under R. 3 is clearly an allowance paid for the purpose of ensuring that the Chairman of a Panchayat Samiti does not have to spend money out of his own pocket for the discharge of his duties. It envisages that in performing the duties, the Chairman must undertake journeys within the district and must be incurring expenditure when attending meetings, supervising plans, projects, schemes and other works and also in connection with the discharge of other lawful obligations and implementation of Government directives. It is a consolidated amount in lieu of the travelling allowance, daily allowance or any other allowances to which he might have been entitled in order to compensate him for expenses incurred in connection with the discharge of his official duties. So far as rules 4 to 7 are concerned, they only provide for payment of travelling allowance and daily allowance when a Chairman performs a journey in connection with his official duties outside the district. Clearly, these allowances are also meant to ensure that he does not have to incur expenditure from his own pocket for the purpose of discharging his official duties.

(Paras 5 to 7)

Cases Referred: Chronological Paras

(1954) AIR 1954 SC 653 (V 41) =

ILR (1955) Mys 109, Ravanna

Subanna v. G. S. Kaggeerappa 10

M/s. Hardev Singh, P. Parmeswara Rao and S. S. Khanduja, Advocates, for Appellant; M/s. R. K. Garg and S. C. Agarwala, Advocates of M/s. Ramamurthi and Co.; and M/s. Baldev Singh Khoji and Anil Kumar Gupta, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

BHARGAVA, J.: The appellant, who was defeated by respondent No. 1 (hereinafter referred to as "the respondent"), the successful candidate, in the General Election of 1967 to the Punjab Vidhan Sabha from Nakodar Constituency, District Jullundur, challenged the election of the respondent in an election petition inter alia on the ground that he was disqualified

from being chosen as a member of the Assembly, because he was holding an office of profit under the State Government at the relevant time. This was the only ground which was pressed at the trial of the election petition before the High Court of Punjab and Haryana at Chandigarh. The High Court dismissed the election petition rejecting this contention of the appellant and, consequently, the appellant has come up to this Court in this appeal under Section 116-A of the Representation of the People Act, 1951.

2. Admittedly, the respondent was the Chairman of a Panchayat Samiti, and the ground that he was disqualified from being a candidate was based on Rules 3 to 7 of the Punjab Panchayat Samities and Zila Parishads, Non-official Members (Payment of Allowances) Rules, 1965 (hereinafter referred to as "the Rules") which are as follows:—

"3 There shall be paid a monthly consolidated allowance, in lieu of all other allowances, at the following rates, to the Chairman of a Panchayat Samiti and that of a Zila Parishad, for performing all official duties and journeys concerning the Panchayat Samities or Zilla Parishads as the case may be, within the district, including attending of meeting, supervision of plans, projects, schemes and other works and also for the discharge of all lawful obligations and implementation of Government directives:—

(a) Chairman, Panchayat Samiti Rs. 100

(b) Chairman, Zila Parishad 150

4. The Chairman, Vice-Chairman and Members shall, for the purpose of rates of mileage and daily allowance admissible to them under these rules, be divided into the following two categories:—

(i) Category I—This shall include Chairman and Vice-Chairman of the Panchayat Samitis and Zila Parishads.

(ii) Category II—This shall include all other Members of the Panchayat Samitis and Zila Parishads.

5. There shall be paid to the Chairman, Vice-Chairman and Member, mileage allowance for journeys performed for any official work outside the district. Such journeys shall not be undertaken unless authorised by the Panchayat Samiti or the Zila Parishad, as the case may be.

Note.—The power under this sub-rule shall not be delegated to any other authority.

(2) The Vice-Chairman and the Member shall also be paid mileage allowance,

in respect of a journey performed within the district, for—

(a) attending the meetings; and

(b) for any official work or for supervision of a cattle fair held by the Panchayat Samiti:

Provided that the Vice-Chairman and the Members shall not be entitled to mileage allowance under Clause (b) unless the journey for such work or supervision has been approved by the Panchayat Samiti or Zila Parishad, as the case may be, and the number of Members deputed for supervision does not exceed five on any one day.

6. The payment of mileage allowance to a Chairman, Vice-Chairman and Members for the purposes and journeys mentioned in Rule 5 shall be regulated as follows:—

(i) Mileage allowance by rail.— For a journey between the stations connected by rail, the Chairman and Vice-Chairman shall be entitled to travel by 1st Class and the Members by 2nd Class. The Chairman, Vice-Chairman and the Members shall be entitled to draw single fare of the Class of accommodation to which he is entitled:

Motor Cycle or Scooter	Ordinary cycle	Other means of conveyance
12 Paise per mile	9 Paise per mile	25 Paise per mile

(b) If a Chairman, Vice-Chairman or Member performs a journey by Motor Cycle, Scooter, Ordinary Cycle or by other means of conveyance between the stations connected by rail or regular bus, the mileage allowance calculated at the rates prescribed above for each kind of conveyance shall be limited to rail or bus fare, had the journey been performed by rail or bus, as the case may be.

Notes.— (1) A Chairman, Vice-Chairman or Member, using means of locomotion provided at the expense of the Government, Panchayat Samiti, Zila Parishad or any other local authority shall not be entitled to any mileage allowance.

(2) A Chairman, Vice-Chairman, or Member travelling in a vehicle belonging to any other Member, Vice-Chairman or Chairman shall not be entitled to any mileage allowance. The mileage allowance of the owner of the vehicle shall, however, be regulated under Clause (iv).

7. Subject to the provisions of Rule 3.—(1) the daily allowance to a Chairman,

Provided that if the journey is performed in lower class, the Chairman, Vice-Chairman and Members shall be entitled to the fare actually paid for that class.

(ii) Mileage allowance by bus.— For a journey between the places connected by road, where regular bus service plies, and also for a journey between the stations connected by rail but performed by bus by taking a single seat, the Chairman, Vice-Chairman and Members shall be paid the fare actually paid.

(iii) Mileage allowance for journeys between the stations partly connected by rail and partly by bus.— For a journey between stations partly connected by rail and partly by bus, the Chairman, Vice-Chairman and Members shall be paid actual railway fare limited to the class of accommodation to which he is entitled and the bus fare actually paid.

(iv) Mileage allowance by road.— (a) The mileage allowance by road shall be admissible, at the rates specified below, for the journeys performed by the Chairman, Vice-Chairman or Members between stations which are neither connected by rail nor by regular bus:—

Vice-Chairman and Members shall be admissible at the following rates.—

Category I .. Rs. 6.00 per day
Category II .. Rs. 4.00 per day.

(2) A Chairman, Vice-Chairman, or Member shall be allowed:—

(a) full daily allowance for the day he attends the meeting;

(b) full daily allowance for the days of halt in case the halt is for any of the purposes specified in rule 5 above;

(c) half daily allowance for the day of departure and half daily allowance for the day of arrival in connection with a journey performed for any of the purposes specified in Rule 5:

Provided that—

(i) in the case of a Chairman, Vice-Chairman or Member who is treated as a State guest while attending the meeting or while on duty within or outside the district, his daily allowance for such days shall be limited to one-fourth if he is provided with free board and lodging and to one-half, if he is charged either for board or for lodging;

(ii) not more than one daily allowance shall be admissible for a day in any case;

(iii) a Chairman, Vice-Chairman or Member may, at his option draw one daily allowance in lieu of mileage allowance plus half daily allowance for the day of journey proceeding and following the day(s) of half."

It was alleged that the office of Chairman of a Panchayat Samiti was an office under the State Government of Punjab and that the allowances paid under these Rules made that office an office of profit. Two questions, therefore, arose for decision. The first was whether the payment of the allowances under Rules 3 to 7 made the office of Chairman of Panchayat Samiti an office of profit, and the second was whether the office of Chairman of Panchayat Samiti was an office under the State Government.

3. The learned Judge trying the election petition recorded evidence in the trial of the petition up to 31st July, 1967, and adjourned the case for arguments to 21st August, 1967. On 19th August, 1967, however, the Governor of Punjab issued Ordinance No. 10 of 1967 to amend the State Legislature (Prevention of Disqualification) Act, 1952, so as to add Section 2 (b) in that Act as follows:—

"It is hereby further declared that the office of Chairman of a Panchayat Samiti or Zila Parishad shall be deemed never to have disqualified and shall not disqualify the holder thereof for being chosen as, or for being, a Member of the Punjab State Legislature."

In view of the issue of this Ordinance, the appellant was allowed to challenge the validity of the Ordinance without amendment of the election petition, and the learned Judge trying the petition, being of the view that the various questions involved were of considerable importance and should be settled by a larger Bench, referred the petition to a Full Bench. The Full Bench held on the first two questions against the appellant, so that the petition had to be dismissed on that ground. Consequently, the Full Bench refrained from expressing any opinion on the third question relating to the validity of the Ordinance and passed an order dismissing the petition with costs.

4. In this appeal also, the same three questions have been again raised by the appellant. We consider that this appeal can be disposed of on the basis of the

answer to the first question alone, because, in our opinion, the High Court came to a correct conclusion in holding that the allowances paid under Rules 3 to 7 of the Rules did not convert the office of Chairman of a Panchayat Samiti into an office of profit.

5. The payment to a Chairman, Panchayat Samiti, under Rule 3 is described in the rule as a monthly consolidated allowance in lieu of all other allowances for performing all official duties and journeys concerning the Panchayat Samiti within the district, including attending of meetings, supervision of plans, projects, schemes and other works and also for the discharge of all lawful obligations and implementation of Government directives. This provision in very clear language shows that the allowance paid is not salary, remuneration or honorarium. It is clearly an allowance paid for the purpose of ensuring that the Chairman of a Panchayat Samiti does not have to spend money out of his own pocket for the discharge of his duties. It envisages that, in performing the duties, the Chairman must undertake journeys within the district and must be incurring expenditure when attending meetings, supervising plans, projects, schemes and other works and also in connection with the discharge of other lawful obligations and implementation of Government directives. No evidence has been led on behalf of the appellant to show that a Chairman of a Panchayat Samiti does not have to perform such journeys in the course of his official duties and to incur expenditure in that connection. The State Government, which was the competent authority, fixed the allowance for a Chairman of a Panchayat Samiti at Rs. 100 per month, obviously because it was of the opinion that this sum will be required on an average every month to meet the expenses which the Chairman will have to incur in this connection. In these circumstances, the burden lay on the appellant to give evidence on the basis of which a definite finding could have been arrived at that the amount of Rs. 100 per month was excessive and was not required to compensate the Chairman for the expenses to be incurred by him in the discharge of his official duties as envisaged in the rule. That burden clearly has not been even attempted to be discharged by the appellant.

6. In this connection, the High Court rightly compared Rule 3 of the Rules

the earlier provision on the same subject contained in the Punjab Panchayat Samitis and Zila Parishads Non-Official Members (Payment of Allowances) Rules, 1961. Under those earlier Rules of 1961 the Chairman was entitled to draw travelling allowance and daily allowance even when travelling within the district. There were, however, certain limitations such as that no travelling allowance was to be drawn by a Member, if the journey was performed for attending a meeting held within a radius of five miles from his place of residence or he performed the journey in a transport provided at the expense of the Zila Parishads/Panchayat Samitis or any other local authority or Government. There were also limitations on the right to draw daily allowance, e. g., the amount of daily allowance was to be limited to $\frac{1}{4}$ th of the rate provided, if the Chairman was provided free board and lodging officially and at $\frac{1}{2}$ rate if he was charged either for board or for lodging. It appears that, in the year 1965, it was considered desirable that the Chairman of a Panchayat Samiti should not draw travelling allowance and daily allowance while performing duties within the district and should only be entitled to these allowances when required to travel outside the district. Consequently, under Rule 3 of the Rules, provision was made for this monthly allowance of Rs. 100 as a consolidated amount in lieu of the travelling allowance, daily allowance, or any other allowances to which he might have been entitled in order to compensate him for expenses incurred in connection with the discharge of his official duties. In these circumstances, the High Court was perfectly correct in arriving at the conclusion that this allowance of Rs. 100 per month did not amount to receipt of any profit or gain by the Chairman and only represented the amount which he was expected to spend on an average every month for the purpose of properly discharging his official duties.

7. So far as rules 4 to 7 are concerned they only provide for payment of travelling allowance and daily allowance when a Chairman performs a journey in connection with his official duties outside the district. Clearly, these allowances are also meant to ensure that he does not have to incur expenditure from his own pocket for the purpose of discharging his official duties. There is again no evidence from which an inference may be drawn that the amount re-

ceived by a Chairman for travelling allowance or daily allowance is in excess of the amount of expenditure which he would have to incur for the purpose of performing the journeys in order to discharge his official duties.

8. Our attention was drawn by learned counsel to the fact that in Rule 7 the persons entitled to daily allowance are divided into two categories and a Chairman of a Panchayat Samiti belonging to Category I is entitled to Rs. 6 per diem when a Member of the Samiti belonging to Category II is only entitled to Rs. 4 per diem. The argument was that there was no explanation for payment at a higher rate to the Chairman and, consequently, it must be held that the Chairman must be making a gain out of the payment to him of daily allowance. We are unable to accept this submission. The daily allowance is invariably fixed after estimating what extra expenditure in a day the person concerned would have to incur. A Chairman, it appears, was expected to incur more expenditure per day than a Member, and that seems to be the reason why a higher rate of daily allowance was prescribed for him. In any case, such a payment is clearly meant only to cover additional expenditure and out-of-pocket expenses of the Chairman and, while no evidence has been advanced to show that out of the amount received as daily allowance the Chairman will in fact invariably make a saving, it cannot be held that this payment would result in gain so as to make the office an office of profit.

9. In the course of his submissions, learned counsel tried to urge that the payment of travelling allowance and daily allowance under Rules 3 to 7 was in addition to the payment of the consolidated monthly allowance under R. 8 and payment of two sets of allowances must necessarily result in profit to the payee. The argument proceeds on a complete misunderstanding of the Rules. Rule 3 only covers payment to compensate a Chairman for journeys performed by him for his official duties within the district in which the Panchayat is situated, while rules 4 to 7 govern cases where the journey is performed outside the district. Rule 3 and Rules 4 to 7 are, therefore, complementary and exclusive of each other. In fact, Rule 5 makes it clear that the mileage allowance is admissible only for journeys undertaken outside the district, while, in respect of daily allowance, the fact that the right

to receive it accrues only when the journey is outside the district is made manifest by laying down that the receipt of this daily allowance is to be subject to the provisions of Rule 3. The submission that the payment under Rules 4 to 7 is in addition to the payment under R. 3 is, thus, clearly misconceived.

10. In this connection, learned counsel drew our attention to a decision of this Court in *Ravana Subanna v. G. S. Kaggeerappa*, AIR 1954 SC 653 at p. 656 where, dealing with the provision relating to this disqualification, the Court held:—

“The plain meaning of the expression seems to be that an office must be held under Government to which any pay, salary, emoluments or allowance is attached. The word “profit” connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit.”

This principle, on the finding arrived at by the High Court and affirmed by us above, is of no assistance to the appellant. It is clear that the appellant has failed to establish that the allowances payable under Rules 3 to 7 of the Rules result in any pecuniary gain to a Chairman of a Panchayat Samiti and, consequently, there is no question of any disqualification arising.

11. The appeal fails and is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 267

(V 56 C 50)

(From Gujarat)*

R. S. BACHAWAT AND K. S.

HEGDE, JJ.

Gujarat Electricity Board, Appellant v. Girdharlal Motilal and another, Respondents.

Civil Appeal No. 2526 of 1966, D/- 6-8-1968.

Electricity Act (1910), (as amended in 1959), Section 6 (1) (a) — Provisions of Section 6 (1) are mandatory — Notice must specifically call upon licensee to sell the undertaking — Power must be

exercised in mode prescribed — (General Clauses Act (1897), Section 14 — Power) — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Expropriation Statutes).

Provisions of Section 6 (1) are mandatory and they must be strictly complied with. Section 6 (1) confers power on the State Electricity Board to take away the property of the licensee. Such a power must be exercised strictly in accordance with law. The legislature has prescribed the manner of its exercise. It must exercise it in that manner and in no other way. Section 6 (1) (a) empowers the Electricity Board to interfere with property rights of the licensee. Therefore such a power has to be strictly construed. It must also be seen that the Parliament deliberately changed the form of the notice to be given from what it was before the Act was amended by Act 32 of 1959 was enacted. It prescribed that the notice must specifically call upon the licensee to sell the undertaking. The mandate of the law is clear and it must be obeyed. AIR 1936 PC 253 (2) and AIR 1960 SC 576, Rel. on. (Para 6)

Therefore, where the notice issued by the Board merely notifies the licensee that the Board has decided to exercise and shall exercise the option of purchasing the undertaking, the notice is invalid.

(Paras 5, 8)

Cases Referred: Chronological Paras

(1960) AIR 1960 SC 576 (V 47) =

1960-2 SCR 739 = 1960 Cri LJ

752, Ballabhdas Agarwala v.

J. C. Chakravarty

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(1936) AIR 1936 PC 253 (2) (V 23) =

63 Ind App 372 = 37 Cri LJ

897, Nazir Ahmad v. King Em-

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Mr. C. K. Daphtary, Attorney-General for India, (Mr. I. N. Shroff, Advocate, with him), for Appellant; Mr. M. C. Chagla, Senior Advocate, (M/s. R. M. Vin and R. Gopalakrishnan, Advocates, with him), for Respondent No. 1, M/s. R. H. Dhebar and S. K. Dholakia, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

HEGDE, J.: The only question for decision in this appeal is whether the notice issued by the appellant on June 23, 1961 under Section 6 of the Indian Electricity Act 1910 as amended by Act 32 of 1959 (to be hereinafter referred to as the Act) is valid. The High Court has come to the conclusion that it is not a valid notice.

* (Spl. Civil Appln. No. 1098 of 1962, D/- 31-10-1963—Guj)

2. On 4th January, 1923, the father of respondent No. 1 was granted a licence to supply electric energy within the area consisting of municipal limits of Dabhoi and the territories comprised within half mile radius from the municipal boundary lines by the Government of Baroda under the Baroda Electricity Act Samvat 1964 (Act 1 of 1964). The said Co. was known as Dabhoi Electricity Co. Respondent No. 1 was at all material times the holder of this licence.

3. The said licence conferred an option on the Government to purchase the undertaking in accordance with the terms of the licence. Clause 26 (a) of that licence is material for our present purpose. That clause reads:

"The option of purchase given by Section 8 of the Act shall be exercisable on the expiration of 40 years computed from the commencement of this licence and thereafter on the expiration of every subsequent period of 8 years during the subsistence of this licence....."

4. On the merger of Baroda State with the then Province of Bombay, the Indian Electricity Act, 1910 and the Indian Electricity (Supply) Act, 1948 were made applicable to the territories of the former State of Baroda and the corresponding Baroda Act was repealed with the saving clause that the licences issued under the repealed Act shall continue to remain in force until the expiration of the period of licence as if they were issued under the Act of 1910.

5. In exercise of the powers conferred by Section 5 of the Indian Electricity (Supply) Act, 1948, the State Government constituted the appellant Corporation. The appellant served upon respondent No. 1 a notice on June 23, 1961. That notice is important for our present purpose. Hence we shall quote the same in full. It is as follows:

"THE GUJARAT ELECTRICITY BOARD

BOARD

Kothi Bldg., Raopura
Road, Baroda.

Reg. A. D.

Ref. No. PLE. BRD.

7 (A) 19648.

Dated 23 June, 1961.

To

The Dabhoi Electric
Power Supply Co.
c/o Shri Girdharlal Motilal
Contractor (Sheth).
Ajit Bungalow, Pratapnagar
Society, Baroda.

Sub- (1) Notice under Section 6 of the
Indian Electricity Act 1910

and exercise of option vested in the Gujarat Electricity Board to purchase your undertaking.

(ii) The Dabhoi Electric License 1923 granted by the Government of Baroda under the State Electricity Act, Samvat 1964.

Dear Sir,

In exercise of the powers conferred on the Gujarat Electricity Board by virtue of Section 71 of the Electricity (Supply) Act, 1948, read together with Section 6 of the Indian Electricity Act, 1910, as amended by the Indian Electricity (Amendment) Act, 1959 (32 of 1959) this is to give you notice that the Gujarat Electricity Board has decided to exercise and shall exercise the option of purchasing your undertaking on 3rd January, 1963, the date on which the license granted to you by the Government of Baroda expires. The receipt of this notice may please be acknowledged.

Yours faithfully,

Sd/- Secretary, The
Gujarat Electricity Board."

As this notice was issued after the Indian Electricity Act, 1910 was amended by Act 32 of 1959, we have to see whether that notice complies with the requirements of Section 6 (1) (a) of the Act which says:

"Where a license has been granted to any person not being a local authority, State Electricity Board shall.—

(a) in the case of a license granted before the commencement of the Indian Electricity (Amendment) Act, 1959 on the expiration of each such period as is specified in the license..... have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section."

These provisions confer a power on the State Electricity Board to purchase the property of the licensee but that right can be exercised only in the manner provided in the Act and not in any other way. It must be remembered that the provisions in question empower the State Electricity Board to interfere with the property rights of the licensee. Therefore such a power will have to be strictly construed. The legislature has prescribed a mode for the exercising of that

power and hence that power can be exercised only in that manner and in no other manner. See *Nazir Ahmad v. King Emperor*, 63 Ind App 372 = (AIR 1936 PC 253 (2)) and *Ballabhdas Agarwala v. J. C. Chakravarty*, 1960-2 SCR 739=(AIR 1960 SC 576). Before the option to purchase the undertaking can be exercised, the State Electricity Board must call upon the licensee by means of a notice in writing within the period mentioned in Section 6 (1) to sell the undertaking to it on the expiration of the period for which licence was given. The impugned notice does not require the licensee to sell the undertaking. It merely notifies the respondent that the appellant Board has decided to exercise and shall exercise the option of purchasing the respondent's undertaking on 3rd January, 1963, the date on which the licence granted to him by the Government of Baroda expired.

6. It was contended by the learned Attorney-General on behalf of the appellant that in matters like these rigid compliance with the provisions of law should not be insisted upon. According to him if the legal requirements are substantially satisfied the validity of the notice given, should be upheld. Proceeding further he urged that so long as the notice given by Electricity Board is sufficient to intimate the licensee the intention of the Board, the mandate of the law is complied with; in a notice under Sec. 6 (1) what is of the essence is the substance of the matter mentioned therein and not the manner in which the notice is worded. He urged that the licensee must have imported some commonsense into the notice received by him and he could not be allowed to riggle out of his obligation by having recourse to technicalities. In advancing these arguments, the learned Attorney-General overlooked the fact that notice required by Section 6 (1) is not a notice of an action to be taken or merely a procedural step. It is a mode of exercising the power conferred on the State Electricity Board by the exercise of which the property rights of the licensee can be affected. Section 6 (1) confers power on the State Electricity Board to take away the property of the licensee. Such a power must be exercised strictly in accordance with law. The legislature has prescribed the manner of its exercise. It must exercise in that manner and in no other way. It must also be seen that the Parliament deliberately changed the

form of the notice to be given from what it was before Act 32 of 1959 was enacted. It prescribed that the notice must specifically call upon the licensee to sell the undertaking. The mandate of the law is clear and it must be obeyed. We agree with Mr. M. C. Chagla learned counsel for the licensee that the issuing of a notice strictly in accordance with the provisions of Section 6 (1) is a condition precedent to the exercise of the power conferred on the State Electricity Board to purchase the undertaking. That being so, we must hold that Section 6 (1) is mandatory and it must be strictly complied with.

7. In this case we are not satisfied that the requirements of law have at least been substantially complied with. Obviously the person who issued the notice was not familiar with the legal position. He appears to be under the misapprehension that Section 71 of the Electricity (Supply) Act 1948 was still in operation when he gave the notice. He appears to have been in two minds. He was not sure whether he should issue the notice under the provisions of the Act as they stood on the date of the notice or in accordance with the provisions as they were prior to the coming into force of Act 32 of 1959. At the top of the notice it is mentioned that it is given under Section 6 of the Act but in the body of the notice it is purported to be given in exercise of the power available under Section 71 of the Indian Electricity (Supply) Act. Again the contents of notice indicate that it is a notice under Section 7 (1) read with Section 7 (4) of the Indian Electricity Act, 1910 as they stood prior to 1959. Quite clearly the notice speaks in two voices. It is the product of a confused mind. We fail to see how any commonsense can be read into it. On reading the notice the licensee could not have been definite whether the State Electricity Board purported to exercise the power under the law as it was on the date of the notice or as it was under the unamended Act. Rights and liabilities of the Electricity Board and the licensee before Act 32 of 1959 came into force are substantially different from their rights and liabilities under the Act. On reading the impugned notice it could not have been clear to the licensee that he had been called upon to sell the undertaking in accordance with the law as it then stood. We are unable to accede to the request of the Attorney-

General to read into notice words which are not there.

8. For the reasons mentioned here-inbefore we agree with the High Court that the impugned notice is invalid and by virtue of that notice the appellant cannot compel the respondents to sell the undertaking in question.

9. Accordingly this appeal fails and the same is dismissed with costs.

MVJ/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 270
(V 56 C 51)

(From: Gujarat)*

S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

State of Gujarat, Appellant v. Jetawat Lalsingh Amarsingh and others, Respondents.

Civil Appeal No. 1057 of 1965, D/- 7-8-1968.

(A) Bombay Merged Territories and Areas (Jagir Abolition) Act (39 of 1954), S. 14 (1) — Compensation under — When can be claimed.

Before a person can claim compensation under S. 14 (1), he has to establish (1) that he is not the Jagirdar of the concerned Jagir, (2) he is aggrieved by the provisions of the Act as abolishing, extinguishing or modifying any of the rights to, or interest in property as a result of the abolition of the Jagir and (3) compensation for such abolishing, extinguishment, modification has not been provided in the provisions of this Act.

(Para 6)

(B) Bombay Merged Territories and Areas (Jagir Abolition) Act (39 of 1954), S. 14 (1) — Right of Bhayyat to enjoy Gharhkhed lands free from payment of assessment — Amounts to interest in property — Land subject to assessment — Interest is modified.

It cannot be denied that right to enjoy a property without the liability to pay assessment is a more valuable right than the right to enjoy the same property with the liability to pay assessment. Where, therefore, a Bhayyat of the Jagir was enjoying, before the Bombay Act 39 of 1954 came into force, certain Gharhkhed land without the liability to pay assessment but after the Act came into force he is enjoying those very lands

with the liability to pay assessment, there is hardly any doubt that his interest in that property stands modified. (Para 7)

(C) Bombay Merged Territories and Areas (Jagir Abolition) Act (39 of 1954), S. 14 (1) — Right of Bhayyat of Jagir to receive annual cash allowance from Jagir — Amounts to interest in property.

The right of the Bhayyat of the Jagir to receive certain cash allowance annually from the Jagir is one of those rights that have got to be compensated under S. 14 (1). That liability is not the personal liability of the Jagirdar. The Bhayyat was entitled to get that amount from the Jagir. In other words it was a charge on the Jagir. Therefore it is an interest in property. (Para 8)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1481 (V 55) =

Civil Appeals No. 517-534 of 1965, **State of Gujarat v. Vakhat-singhji Vajesinghji**

(1885) ILR 9 Bom 483, **Shapurji Jivanji v. Collector of Bombay**

Mr. N. S. Bindra, Senior Advocate, (M/s. S. K. Dholakia and S. P. Nayar, Advocates, with him), for Appellant; Mr. Somnath R. Upadyya and Miss Bhuvanesh Kumari, Advocates and M/s. J. B. Dadachanji and Co., Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

HEGDE, J.: This is an appeal by special leave. Herein we have to determine the true scope of Section 14 (1) of the Bombay Merged Territories and Areas (Jagir Abolition) (Bombay Act No. 39 of 1954). That question arises thus:

2. Respondent No. 1 was the Bhayyat of the Jagir of Ghantol. That Jagir was situated in the Idar State, a former Indian State. The area comprised in that State is a part of the State of Gujarat at present. The said Jagir was a proprietary Jagir and for the purpose of succession and inheritance, it was governed by the rule of primogenitor. The eldest son succeeded to the Gaddi; the other junior members of the family were granted maintenance known as Jiwarak out of the Jagir estate. The former Thakore of Ghantol, Shri Dalpatsinhji Kumarsingh granted as Jitwarak to the father of the present respondent, a half share in a village by means of a deed dated February 18, 1916. In 1928 dispute arose between the Thakore and the Bhayyats in the matter of aforesaid Jiwarak. Hence

* (Spl. Civil Appln. No. 560 of 1961, D/- 21-11-1963 — Guj.).

the first respondent and his brother filed a suit in the Sadar Court of the then Idar State claiming Jiwarak. The Court of first instance decreed the suit in favour of the first respondent and his brothers. The Thakore went in appeal against the said judgment. When the appeal was pending, the dispute was compromised and a consent decree was passed on September 23, 1940. Under the consent decree the following rights were given to the first respondent and his brothers as Jiwarak.

(1) Rights to recover assessment (Vighoti) of Survey Nos. 382-387, 396, 398, 399, 542, 543, 544, 545 and 546 assessed at Rs. 175/-.

(2) Right to own and possess Gharkhed Lands consisting of Survey Nos. 219, 220, 225, 227, 228 and 229 assessed at Rupees 74/8/- free from payment of assessment; and

(3) Right to receive a cash allowance of Rs. 234/12/- annually from the Jagir.

3. The Act came into force on August 1, 1954 as a result of which all Jagirs in the merged territories of Bombay including the Jagir of Chantoil were abolished. Thereafter respondent No. 1 claimed compensation under S. 14 (1) of the Act. He applied to the Jagir Abolition Officer for fixing the compensation due to him in respect of his aforementioned rights. That officer rejected his claim but when the matter was taken up in appeal to the Gujarat Revenue Tribunal, the Tribunal granted him compensation in respect of his rights to recover assessment of Rs. 175/- annually, but it rejected his claim for compensation under the remaining two heads. The first respondent then took up the matter to the Gujarat High Court under Art. 227 of the Constitution in Special Civil Application No. 560 of 1961. The High Court allowed that application. It held that the first respondent is entitled to compensation in accordance with the provisions of the Act both in respect of Gharkhed lands as well as in respect of his right to receive cash allowance of Rs. 234/12/- annually. The Jagir Abolition Officer was directed to hold further enquiry for determining a compensation payable to the first respondent in respect of those rights. This appeal is directed against the said order of the High Court.

4. The long title of the Act shows that it is an Act to abolish Jagirs in the merged territories and merged areas in the State of Bombay. Its preamble reads:

"Whereas it is expedient in the public interest to abolish Jagirs of various kinds in the merged territories and merged areas in the State of Bombay and to provide for matters consequential and incidental thereto: it is hereby enacted as follows....."

Section 2 defines the various expressions including Gharkhed land, Jagir, Jiwai Jagir, used in the Act. Jagirs are abolished under S. 3. That Section reads:

"Notwithstanding anything contained in any usage, grant, sanad, order, agreement or any law for the time being in force, on and from the appointed date, ...

(i) all jagirs shall be deemed to have been abolished;

(ii) save as expressly provided by or under the provisions of this Act, the right of a jagirdar to recover rent or assessment of land or to levy or recover any kind of tax, cess, fee, charge or any hak and the right of reversion or lapse, if any, vested in a jagirdar, and all other rights of a jagirdar or of any person legally subsisting on the said date, in respect of a jagir village as incidents of jagir shall be deemed to have been extinguished."

Section 4 provides that all Jagir villages shall be liable to pay land revenue in accordance with the provisions of the Code and the rules relating to unalienated lands shall apply to these villages.

5. In this case we are not concerned with the compensation payable to the Jagirdar. We are dealing with the case of a person coming under S. 14 (1) of the Act. That Section prescribes the method of awarding compensation to persons other than Jagirdars who are aggrieved by the provisions of the Act as abolishing, extinguishing or modifying any of their rights to, or interest in property. The Section reads thus:

"Section 14 (1).

If any person other than a jagirdar is aggrieved by the provisions of this Act as abolishing, extinguishing or modifying any of his rights to, or interest in property and if compensation for such abolition, extinguishment or modification has not been provided for in the provisions of this Act, such person may apply to the Collector for compensation."

6. The real question for decision is whether the right to own and possess Gharkhed land and the right to receive cash allowance annually from the Jagir are rights to property or at any rate interest in property. Before a person can claim compensation under S. 14 (1), he

has to establish (1) that he is not the Jagirdar of the concerned Jagir, (2) he is aggrieved by the provisions of the Act as abolishing, extinguishing or modifying any of the rights to, or interest in property as a result of the abolition of the Jagir and (3) compensation for such abolishing, extinguishment, modification has not been provided in the provisions of this Act. It is admitted that the petitioner was not a Jagirdar. It is also admitted that he is aggrieved by the provisions of this Act. It was not said that for abolition of any of the privileges enjoyed by him any compensation had been provided under the provisions of the Act. The only point in controversy is whether the claim put forward by him can be considered as right to, or interest in property.

7. We shall first take up the Gharkhed lands. Admittedly the first respondent was enjoying those lands without any liability to pay assessment. That was a right conferred on him under the compromise decree. No material was placed before us to show that the Jagirdar was competent in spite of the compromise decree to collect assessment from him in respect of those lands. This was not a case of suspension of land revenue. The first respondent's right was to enjoy the land free of the liability to pay the land revenue. That was the position on the date the Act came into force. So far as the Thakore was concerned the right to collect the assessment of those lands had been given as Jagir to the Jagirdar. We see no merit in the contention of Mr. N. S. Bindra, the learned Counsel for the appellant that the Sovereign had an inherent right to levy assessment and any agreement not to collect assessment has necessarily to be considered as a concession and not a right. That question is wholly irrelevant for our present purpose. In this case we are not called upon to consider the nature of the power of the Sovereign to levy assessment. The only question for our decision is that whether by abolishing the Jagir and by levying assessment on the Gharkhed lands any of the respondent's rights to or interest in property were abolished, extinguished or modified. We are considering the plaintiff-respondent's right to or interest in property as it stood before the Act and not after S. 5 of the Act came into force. There is no denying the fact that right to enjoy a property without the liability to pay assessment is a more valuable right than the right to enjoy the same property with the liability to pay assessment. Be-

fore the Act, the first respondent was enjoying Gharkhed lands without the liability to pay assessment but after the Act came into force he is enjoying those very lands with the liability to pay assessment. Therefore there is hardly any doubt that his interest in that property stands modified. In this case it is not necessary to consider whether that interest can be considered as a right in the property.

8. We are also in agreement with the High Court that the right to receive cash allowance of Rs. 234/12/- annually from the Jagir is one of those rights that have got to be compensated under S. 14 (1). That liability was not the personal liability of the Jagirdar. The first respondent was entitled to get that amount from the Jagir. In other words it was a charge on the Jagir. Therefore it is an interest in property.

9. We are unable to agree with Mr. Bindra that the decision of this Court in Civil Appeals Nos. 517-534 of 1965 = (AIR 1968 SC 1481) State of Gujarat etc. v. Vakhatsinghji Vajesinghji Vaghela to which two of the members of this Bench were parties is of any assistance to the appellant. Therein this Court was called upon to consider the scope of S. 14 (1) of the Bombay Taluqdari Abolition Act, 1949. The language of that provision is substantially different from the language of S. 14 (1) of the Act. Further therein this Court held that the concerned Taluqdar was not entitled to enjoy the lands with the liability of paying only 60 per cent of the assessed assessment though for some years only 60 per cent of the assessed assessment was collected as a matter of concession. That was only a concession and not a right. Mr. Bindra tried to extract one or two sentences from the decision of the Bombay High Court in Shapurji Jivanji v. Collector of Bombay, (1885) ILR 9 Bom 483 and found an argument on the basis of those sentences to the effect that the right to collect assessment can never be given up. Far from supporting that contention the decision actually proceeded on the basis that the said right can be given up either by contract or on the basis of legislation.

10. For the reasons mentioned above we see no merits in this appeal. It is accordingly dismissed with costs.

D.R.R.

Appeal dismissed.

AIR 1969 SUPREME COURT 273

(V 56 C 52)

(From Kerala: ILR (1968) 2 Kerala 96)

R. S. BACHAWAT AND

K. S. HEGDE, JJ.

M/s. Standard Motor Union Private Ltd., Appellant v. The State of Kerala and others, Respondents.

Civil Appeal No. 921 of 1968, D/- 30-7-1968.

(A) Motor Vehicles Act (1939), Sections 68-C, 68-D, 68-F (2) (iii) and 47 — Kerala Motor Vehicles (State Transport Undertaking) Rules (1960), R. 3 — Notified routes and existing routes having common road sectors — Services of operators on existing routes to public not interfered with — Scheme is one of partial exclusion — No infirmity in scheme because it is in Form II.

A scheme of nationalisation does not suffer any infirmity because it is in Form II where the routes notified are overlapped by the existing routes and both have common road sectors and the scheme in no way interferes with the services on the existing routes and in spite of the scheme the public can get service on the common road sectors from the operators running on the existing routes. In such a case it is impossible to say that the scheme is one of complete exclusion which under R. 3 of the Kerala Motor Vehicles (State Transport Undertaking) Rules (1960) has to be in Form I. From the language of Section 68-C and Rule 3 of the Kerala Motor Vehicles (State Transport Undertaking) Rules it appears that a complete exclusion scheme in relation to any area or route would be a scheme which completely excludes the existing road services of private operators on the area or route in question. The route includes the highway over which it runs. If other existing services are allowed to continue over a part of the highway relating to the notified route, the scheme is not one of complete exclusion. A stage carriage permit is granted under Sections 46 to 48 for a specified area. The words "roads included in the proposed route or area" in Section 47 (1) (f) imply that a route includes the road or the physical track. Section 68-F (2) (iii) implies that a portion of the route of an existing permit may relate to a notified route. This happens when the two routes have a common road sector. Section 68-F (2) (iii) authorises the exclusion of the common portion of

the road from the existing permit for giving effect to the scheme for the notified route. For the purposes of Chapters IV and IVA there is no practical distinction between the route or the notional line from one terminus to another for which the permit is granted and the road over which the transport services are run and operated. When the impugned scheme does not exclude the road transport services of the existing routes over many sections of the highways relating to the notified routes, it follows that the scheme is not in complete exclusion of existing road transport services in respect of the notified routes and is not required to be in form I. There is no infirmity in the scheme because it was in form II: AIR 1962 SC 1135 and AIR 1961 SC 82 and AIR 1966 SC 1661, Rel. on. ILR (1968) 2 Ker 96, Affirmed.

(Paras 3, 4, 5)

(B) Motor Vehicles Act (1939), S. 68E — Section does not require that new scheme should expressly say that it cancels or modifies earlier schemes — New scheme modifying earlier schemes by excluding private operators from notified routes proposed and approved after following procedure laid down in Ss. 68C and 68D — Conditions of S. 68E is thereby satisfied and the earlier scheme will stand modified by implication pro tanto on promulgation of new scheme.

(Para 6)

(C) Kerala Motor Vehicles (State Transport Undertaking) Rules (1960), R. 3 — Scheme in partial exclusion of existing road transport service cannot be in Form IV.

(Para 7)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1661 (V 53)=

1962 Supp (1) SCR 717 C. P. C.

Motor Service v. State of Mysore

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(1962) AIR 1962 SC 1135 (V 49)=

1962 Supp (1) SCR 728, Nilkanth

Prasad v. State of Bihar

5

(1961) AIR 1961 SC 82 (V 48)=

(1961) 1 SCR 642, Kondala Rao

v. Andhra Pradesh State Road

Transport Corporation

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Mr. S. V. Gupte, Senior Advocate (Mr. A. S. Nambiar, Advocate, with him) for Appellant; Mr. Sarjoo Prasad, Senior Advocate (Mr. M. R. K. Pillai, Advocate with him) for Respondent No. 1; M/s. C. M. Kuruvilla, Sardar Bahadur, Vishnu Bahadur Saharya and Miss Yougindra Khushalani, Advocates for Respondent No. 2.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The appellant challenges the scheme of nationalisation of road transport services in respect of 9 routes in the districts of Ernakulam and Kottayam. Chapter IVA of the Motor Vehicles Act, 1939 deals with nationalisation of road transport services. S. 68-C provides for the preparation and publication of a draft scheme of nationalization of road transport services in general or any particular class of such service in relation to any area or route or portion thereof whether to the exclusion, complete or partial, of other persons or otherwise. Section 68-D provides for the filing of objections of persons affected by the scheme, for the consideration of the objections by the Government, for modification or approval of the scheme by the Government and for publication of the approved or modified scheme. Section 68-E provides that a scheme finally settled under S. 68-D may at any time be cancelled or modified by the State transport undertaking. The procedure laid down in Sections 68-C and 68-D shall, so far as it can be made applicable, be followed in every case where the scheme is proposed to be modified as if the modification proposed were a separate scheme. For the purpose of giving effect to the approved scheme in respect of a notified area or a notified route Section 68-F (2) (iii) authorises the Regional Transport Authority to modify the terms of an existing permit so as to curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route. Section 68-I authorises the State Government to make rules for the purpose of carrying into effect the provisions of Chapter IVA and in particular to provide the form in which any scheme or approved scheme may be published under Sections 68-C and 68-D. In exercise of its powers under Section 68-I the State Government framed the Kerala Motor Vehicles (State Transport Undertaking) Rules, 1960. Rule 3 provides that every proposed scheme shall be in form I when it is in complete exclusion of existing road transport service, in form II when the scheme is in partial exclusion of existing road transport service, in form III when the scheme is in supplementation of existing road transport service and in form IV when the scheme is to modify an existing scheme.

2. On December 15, 1965 the Kerala State Transport Corporation published a

draft scheme in form II for nationalization of 9 specified routes in the districts of Ernakulam and Kottayam in partial exclusion of the existing passenger transport services concerned, giving the particulars of the stage carriage permits to be excluded. On October 17, 1966 after hearing the objections the State Government approved the scheme. On October 24, 1966 the Government published the approved scheme. On December 7, 1966 the appellant filed a writ petition in the Kerala High Court to quash the scheme. V. P. Gopalan Nambiyar J. dismissed the petition. A Divisional Bench of the High Court affirmed his order. The present appeal has been filed after obtaining special leave.

3. The appellant's contention is that the impugned scheme is a complete exclusion scheme and should have been in form I and as it is in form II it is in contravention of Rule 3 read with Section 68-C and is therefore invalid. Let us examine this contention. The scheme is in respect of 9 specified routes. The scheme excludes all private operators holding stage carriage permits for those routes. Take the route Kottayam-Ernakulam. All the private operators holding stage carriage permits for that route are excluded. It is therefore argued that the scheme is one of complete exclusion. But it appears that there are 33 existing routes partially overlapping the notified routes. The 33 existing routes and the notified routes have many common road sectors. The scheme does not interfere with the services on the 33 routes. In spite of the scheme the public can get services on the common road sectors from the operators running on the 33 routes. Take the notified Kottayam-Ernakulam route. There is an existing Kottayam-Muttupetty route. A portion of the Kottayam-Muttupetty route overlaps the Kottayam-Ernakulam route. The impugned scheme does not exclude the services of the operators of the Kottayam-Muttupetty route on the road sector common to the Kottayam-Ernakulam and Kottayam-Muttupetty routes. On these facts, it is impossible to say that the impugned scheme is one of complete exclusion.

4. Section 68-C envisages schemes of road transport services in relation to any area or route or portion thereof whether to the exclusion, complete, or partial of other persons or otherwise. Rule 3 of the Kerala Motor Vehicles (State Transport Undertaking) Rules, 1960 speaks of

schemes of road transport service in complete or partial exclusion of existing road transport services. From the language of Section 68-C and Rule 3 it appears that a complete exclusion scheme in relation to any area or route would be a scheme which completely excludes the existing road services of private operators on the area or route in question. The route includes the highway over which it runs. If other existing services are allowed to continue over a part of the highway relating to the notified route, the scheme is not one of complete exclusion.

5. A stage carriage permit is granted under Sections 46 to 48 for a specified area. The words "roads included in the proposed route or area" in Section 47 (1) (f) imply that a route includes the road or the physical track. Section 68F (2) (iii) implies that a portion of the route of an existing permit may relate to a notified route. This happens when the two routes have a common road sector. Section 68F (2) (iii) authorises the exclusion of the common portion of the road from the existing permit for giving effect to the scheme for the notified route. For the purposes of Chapters IV and IVA there is no practical distinction between the route or the notional line from one terminus to another for which the permit is granted and the road over which the transport services are run and operated. As pointed out in *Nilkanth Prasad v. State of Bihar*, 1962 Supp (1) SCR 728 at p. 737 = (AIR 1962 SC 1135 at p. 1139) "the distinction between 'route' as the notional line and 'road' as the physical track disappears in the working of Chapter IVA." The route is also an area. (see *Kondala Rao v. Andhra Pradesh State Road Transport Corporation*, AIR 1961 SC 82 at p. 93 and *C. P. C. Motor Service v. State of Mysore*, AIR 1966 SC 1661). The impugned scheme does not exclude the road transport services of the 33 existing routes over many sections of the highways relating to the notified routes. It follows that the scheme is not in complete exclusion of existing road transport services in respect of the notified routes and is not required to be in form I. There is no infirmity in the scheme because it was in form II.

6. The impugned scheme is in partial exclusion of operators from Kottayam-Ernakulam and Kottayam-Erattupettah routes and 7 other routes. It is common case that there were earlier

schemes relating to the Kottayam-Ernakulam and Kottayam-Erattupettah routes. In so far as the impugned scheme excludes private operators from those routes, it has the effect of modifying the earlier schemes. The appellant's contention is that the impugned scheme is invalid as the modifications of the earlier schemes were made without complying with the provisions of Section 68E. In our opinion, this contention is baseless. The new scheme has been proposed and approved after following the procedure laid down in Sections 68C and 68D. In so far as the new scheme modifies the earlier schemes, the modifications could be made under Section 68E. As the procedure laid down in Sections 68C and 68D were followed the conditions of Sec. 68E were satisfied. S. 68E does not require that the new scheme should expressly say that it cancels or modifies the earlier schemes. On the promulgation of the new scheme the earlier schemes stand modified by implication pro tanto.

7. A scheme to modify an existing scheme simpliciter is required by Rule 3 of the Kerala Motor Vehicles (State Transport Undertaking) Rules, 1960, to be in Form IV. The impugned scheme was in Form II as it was in partial exclusion of the existing road transport service. Such a scheme could not be in form IV. The partial exclusion scheme was rightly proposed in form II and when approved it had the effect of modifying the earlier schemes.

8. Counsel suggested that the approval of the scheme by the State Government on October 17, 1966 was defective as the Government was merely of the opinion that the proposed scheme was necessary to provide efficient, adequate and co-ordinated road transport services and it did not form the opinion that the scheme was necessary to provide economical road transport service. The point was not taken in the courts below and we therefore indicated in the course of the arguments that the appellant will not be permitted to raise this point at this late stage. Several other objections were taken in the courts below but they are not pressed in this Court.

9. The appeal is dismissed with costs. MKS/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 276
(V 56 C 53)

(From: Industrial Tribunal, Maharashtra)*
J. M. SHELAT, V. BHARGAVA, AND
C. A. VAIDIALINGAM, JJ.

Cricket Club of India, Appellant v.
Bombay Labour Union and another, Res-
pondents.

Civil Appeal No. 833 of 1966, D/- 7-8-
1968.

Industrial Disputes Act (1947), S. 2 (j)
— Industry — Activity of Cricket Club
of India is not an industry — It is
members' self-service institution — Vari-
ous activities of the club considered —
Order dated 30-6-1965 of Industrial Tri-
bunal Maharashtra (I-T.) No. 347 of
1964, Reversed.

The question was whether the Cricket Club of India, Bombay was an "industry" within the meaning of Section 2 (j) of the Industrial Disputes Act. The Club was a Members' Club and not a proprietary Club though it was incorporated as a company under the Companies Act. At the relevant time, the Club had a membership of about 4800 and was employing 397 employees. The principal objects of the Club were to encourage and promote various sports, particularly the game of cricket in India and elsewhere, to lay out grounds for the game of cricket, and also to finance and assist in financing cricket matches and tournaments. In addition, it provided a venue for sports and games as well as facilities for recreation and entertainment for the Members. It maintained Tennis Courts. The indoor games included Billiards, table tennis, badminton and squash. It also maintained a swimming pool. The Club had also provision for residence of members, for which purpose it had constructed 48 residential flats and 40 residential rooms, some of which were air-conditioned. Members occupying these residential flats and rooms were charged. There was also a Catering Department which provided food and refreshments for the members coming to the Club as well as those residing in the residential portion, and it also made arrangements for dinners and parties for outside agencies on special occasions at the request of Members. But such occasions were very few and were not such as to amount

*(Ref. (I-T.) No. 347 of 1964, D/- 30-6-1965—I-T. Maharashtra).

BM/BM/D622/68

to a regular feature. The affairs of the Club were managed by an Executive Committee and various honorary office-bearers. Apart from all these, there were a certain number of buildings just outside the Stadium which were let out for use as shops and offices by business concerns. The income that the Club earned was primarily from these last mentioned constructions. There were life members, ordinary members, temporary members, service members and honorary members. Guests both local and from outstation, were admitted only when they were introduced by a member. The club owned immovable properties of the value of about Rs. 67 lakhs from which an income in the range of about Rs. 4 lakhs a year accrued to the club. The other regular source of income was the subscription paid by each member. Entrance fees paid by the members were treated as contribution to the capital of the Club. In the Cricket ground, which had a stadium attached to it, matches and various tournaments were held, including Test Matches between the Indian teams and foreign teams visiting India. On these occasions, public were admitted on tickets sold by the Club. In the Catering Department alone, the turnover of the Club is in the region of Rs. 10 lakhs a year. Out of 397 employees, only 14 attended the three immovable properties consisting of the Club Chambers, North Stand Building, and Stadium House. As regards the buildings let out as shops and offices there would be no need at all for the Club to maintain an employee-staff in order to look after those buildings so that it was likely that all the 14 employees, who attended the immovable properties, must be doing so primarily in order to look after the Club buildings and the residential accommodation. Apart from Members, no one was allowed to stay in the residential rooms and in exceptional cases where some important visitors came to the Club or competitors taking part in tournaments visited this place, they were permitted to stay in these residential rooms but in such cases, they were all made Honorary Members of the Club.

Held (applying AIR 1968 SC 554) that the club was not an "industry". It was a self-service club.

It was wrong to equate the catering facilities provided by the club to its members or their guests (members paying for that) with an hotel. The catering facility also was in the nature of a

self-service by the club to its members.
(Paras 9, 10)

Provision for stall twice a year at the time of open badminton and table tennis tournaments, for providing snacks and soft drinks to competitors and spectators at concessional rates was not for the purpose of carrying on an activity of selling snacks and soft drinks to outsiders but was really intended as provision of a facility to persons participating in or coming to watch the tournament in order that the tournaments may be run successfully. These stalls were thus brought into existence as a part of the activity of promotion of games and was not a systematic activity for the purpose of carrying on transactions of sale of snacks and soft drinks to outsiders. The opening of stalls on two such occasions in a year with this limited object could not be held to be an undertaking of the nature of business or trade. (Para 11)

The fact that the club catered for functions of outside agencies on certain occasions, did not make the club an industry, inasmuch as, these functions were arranged at the request of the members of the club from whom the club realised the dues and who were responsible for payment to the club. The club in thus catering for such functions, was in fact catering for its Members and was not at all intending to carry on an activity of providing the facility of catering at the instance of outsiders. Moreover such functions did not form a systematic arrangement. (Paras 12, 13)

One of the principal objects of the club being promotion of the game of cricket in India, selling tickets to spectators for entry in the stadium at the time of test matches and selling a block of seats to organisations at concessional rates did not make this activity of the club an undertaking in the nature of trade or business. It was, in fact, an activity in the course of promotion of the game of cricket and it was incidental that the club was able to make an income on these few occasions which income was later utilised for the purpose of fulfilling its other objects as incorporated in the Memorandum of Association. The holding of the Test Matches was primarily organised by the club for the purpose of promoting the game of cricket. This activity by the club could not by itself, lead to the inference that the Club was carrying on an industry.

The income which accrued to the club from renting out buildings outside stadium for the use of shops and offices of business concerns, could not be considered in considering the question whether the club was an industry, as this income could not be held to be income that accrued to it with the aid and co-operation of the employees.

(Para 8)

The circumstances of incorporation of the Club as a Limited Company was not of importance. It was true that for purposes of contract law and for purposes of suing or being sued, the fact of incorporation made the club a separate legal entity, but the decision whether the Club was an industry or not could not be based on such legal technicalities. What had to be seen was the nature of the activity in fact and in substance. Though the Club was incorporated as a Company, it was not like an ordinary Company constituted for the purpose of carrying on business. There were no share holders. No dividends were ever declared and no distribution of profits took place. Admission to the club was by payment of admission fee and not by purchase of shares. Even this admission was subject to balloting. The membership was not transferable like the right of shareholders. There was the provision for expulsion of a Member under certain circumstances which feature never exists in the case of a shareholder holding shares in a Limited Company. The membership was fluid. A person retained rights as long as he continued as a member and got nothing at all when he ceased to be a member, even though he might have paid a large amount as admission fee. He even lost his rights on expulsion. In these circumstances, it was clear that the Club could not be treated as a separate legal entity of the nature of a limited company carrying on business. The club in fact, continued to be a Members' club without any shareholders and, consequently all services provided in the club for Members had to be treated as activities of a self serving institution. AIR 1968 SC 554, Foll. Ref. (I.-T.) No. 347 of 1964, D/- 30-6-1965 (I. T. Maharashtra), Reversed.

(Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 554 (V 55) =
1968 Lab IC 547, Secy. Madras
Gymkhana Club Union v.
Management of Gymkhana

M/s. S. D. Vimadlal and C. M. Mehta, Advocates and Mr. B. R. Agarwala, Advocate of M/s. Gagrut and Co., for Appellant; M/s. S. B. Naik, K. Rajendra Chaudhuri, K. R. Chaudhuri and C. S. Srinivasa Rao, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by:

BHARGAVA, J.: The Deputy Commissioner of Labour, Bombay, referred for adjudication by the Industrial Tribunal, Maharashtra, Bombay (hereinafter referred to as "the Tribunal"), under S. 10 (2) of the Industrial Disputes Act (hereinafter referred to as "the Act"), a dispute between the Cricket Club of India Ltd. (hereinafter referred to as "the Club") and the workmen employed by it in respect of various demands made by the workmen relating to classification of employees, dearness allowance, leave facilities, payment for overtime, permanency, shift allowance, etc. A preliminary objection was taken on behalf of the Club that it is not an industry and, consequently, the provisions of the Act were inapplicable and no reference could be competently made under Sec. 10 (2) of the Act. The Tribunal rejected this preliminary objection holding that the Club came within the definition of "industry" in Section 2 (j) of the Act and made a direction that the case be set down for hearing on merits. The Club has appealed against this interim award of the Tribunal of the preliminary question, by special leave.

2. The Club is admittedly a Members' Club and is not a proprietary Club, though it is incorporated as a Company under the Indian Companies Act. At the relevant time, the Club had a membership of about 4800 and was employing 397 employees who claimed to be workmen. The principal objects of the Club are to encourage and promote various sports, particularly the game of cricket in India and elsewhere, to lay out grounds for the game of cricket, and also to finance and assist in financing cricket matches and tournaments. In addition, it provides a venue for sports and games as well as facilities for recreation and entertainment for the Members. It maintains Tennis Courts in pursuance of another outdoor activity. The indoor games for which provision is made include Billiards, Table Tennis, Badminton and Squash. It also maintains a swimming pool. The Club has

also provision for residence of members, for which purpose it has constructed 48 residential flats and 40 residential rooms some of which are air-conditioned. Persons occupying these residential flats and rooms are charged at different rates according to the accommodation provided. There is also a Catering Department which provides food and refreshments for the members coming to the Club as well as those residing in the residential portion, and it also makes arrangements for dinners and parties on special occasions at the request of Members. The affairs of the Club are managed by an Executive Committee and various honorary office-bearers.

3. As is usual in most Clubs, the membership is varied. There are life members, ordinary members, temporary members, service members and honorary members. Guests both local and from outstation, are admitted, but subject to certain restrictions and only when they are introduced by a member. The Club owns immovable properties of the value of about Rs. 67 lakhs from which an income in the range of about Rs. 4 lakhs a year accrues to the Club. The other regular source of income is the subscription paid by each member. Entrance paid by the members is treated as a contribution to the capital of the Club. There are regular games for members of the Club; but, apart from those games, in the cricket ground, which has a Stadium attached to it, matches and various tournaments are held, including Test Matches between the Indian teams and foreign teams visiting India. On these occasions, public are admitted to watch the matches on tickets sold by the Club. In addition, it appears that four sports organisations, amongst which mention may be made particularly of the Catholic Gymkhana Ltd., have been given the right, under agreements entered into with the Club, to exclusive use of a number of seats in the stadium whenever there are official and/or unofficial test matches and/or matches of similar status sponsored by the Board of Control for Cricket in India, or when a fixture is played by a foreign team on the Club grounds, though not sponsored by the Board. Under these agreements, these organisations make payment to the Club for the members' seats reserved at prescribed rates and they are at liberty to charge whatever they like from their own members who are admitted to those seats, with the further facility that they

can make their own provision for catering and supply of refreshments to their members over part of the land made available to them by the Club. On the occasion of annual Badminton and Table Tennis open tournaments, a stall is run by the Club where both competitors and spectators are allowed to buy snacks and soft drinks at concessional rates. In the Catering Department alone, the turnover of the Club is in the region of Rs. 10 lakhs a year. The Tribunal, after considering these facts and the various decisions which were available to it when it gave its award, has come to the conclusion that the Club is an 'industry', so that this reference under the Act is competent. The Club, which has come up in appeal, contends that the decision of the Tribunal is not correct and that, on the ratio of the decision of this Court in *The Secretary, Madras Gymkhana Club Employees' Union v. The Management of the Gymkhana Club*, AIR 1968 SC 554 this Court should hold that the Club is not an industry.

4. Our task for the decision of this case has been simplified, because this Court, in the case of *Madras Gymkhana Club* (supra), has clearly laid down the principles of law which have to be applied in determining when a Club can be held to be an industry. In that case, the entire previous case-law relating to various institutions was fully discussed. After that discussion, the conclusion of the Court was mainly expressed in the following words:—

"The principles so far settled come to this. Every human activity in which enters the relationship of employers and employees, is not necessarily creative of an industry. Personal services rendered by domestic and other servants, administrative services of public officials, service in aid of occupations of professional men, such as doctors and lawyers, etc., employment of teachers and so on may result in relationship in which there are employers on the one side and employees on the other, but they must be excluded because they do not come within the denotation of the term "industry". Primarily, therefore, industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services. The

normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expression 'trade, business and manufacture'."

Further, it was held that:—

"before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking in material goods or material services. Now, in the application of the Act, the undertaking may be an enterprise of a private individual or individuals. On the other hand, it may not. It is not necessary that the employer must always be a private individual who carries on the operation with his own capital and with a view to his own profit. The Act in terms contemplates cases of industrial disputes where the Government or a local authority or a public utility service may be the employer."

Dealing with the scope of the word "undertaking", it was held that:—

"the word 'undertaking' must be defined as any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade."

Further essential features were indicated by laying down that:—

"where the activity is to be considered as an industry, it must not be casual but must be distinctly systematic. The work for which labour of workmen is required, must be productive and the workmen must be following an employment, calling or industrial avocation. The salient fact in this context is that the workmen are not their own masters but render service at the behest of masters. This follows from the second part of the definition of industry. Then again when private individuals are the employers, the industry is run with capital and with a view to profits. These two circumstances may not exist when Government or a local authority enter upon business, trade, manufacture or an undertaking analogous to trade."

It was also decided by the Court that if a Club is a member's self-serving institution it cannot be held to be an industry. These are the main principles which have to be kept in view in arriving at the decision whether the Club is an industry or not.

5. The principal argument of Mr. Vimadalal, learned counsel for the Club, was that there is a basic and overall similarity between the Club and the Madras Gymkhana Club, so that the decision of this Court in the case of the latter is fully applicable. It was pointed out that both Clubs are Members' Clubs and not proprietary Clubs. The primary objects of both the Clubs are to provide venues for sports and games and facilities for recreation and entertainment of Members and guests introduced by Members. Both Clubs are sports, social and recreational Clubs. Grounds are maintained by both Clubs for promotion of sports, with the slight difference that, while in the Madras Gymkhana Club the outdoor games promoted are Golf, Rugby, Football and Tennis, in the Club the two outdoor games on which the Club concentrates are Cricket and Tennis. Both have indoor games, while the Club, in addition, maintains a Swimming Pool for the Members. Both Clubs run tournaments and matches for the benefit of members and open tournaments are held for exhibition to members as well as non-members. Both Clubs are maintaining Catering Departments for the entertainment of members and their guests. In both Clubs guests are allowed only when introduced by members. The annual turnover in both Clubs in the Catering Department is in the region of about Rs. 9 to 10 lakhs. Residential accommodation is maintained in both Clubs and is open only to Members. Both clubs have capital investments from which income accrues to them, though the scale of investments by the Madras Gymkhana Club is much smaller inasmuch as its total investment is of the region of Rs. 4½ lakhs, while the Club has investment of immovable property to the tune of about Rs. 67 lakhs. In both Clubs, admission to outsiders is restricted in similar manner. The management in both cases is by Committees elected by Members and annual accounts are made up, audited and laid before and adopted at the annual general meetings. Even in other respects, such as in the matter of admission of Members, relations between members inter se, convening of meetings, and expulsion of members, the rules are similar. In neither of the two Clubs are profits distributed between members. It was thus urged that there is, in fact, no substantial difference between the nature of the Club and the Madras Gymkhana Club

and, consequently, it should be held that this Club is not an industry. It was further urged that a few minor differences will not alter the legal inference and will not make the ratio of the Madras Gymkhana Club case (supra) inapplicable.

6. Mr. S. B. Naik, counsel appearing for the Union, however, urged that the differences that exist are not minor and they are such as should lead to the inference that this Club carries on its activities in such a manner that it must be held to be an 'industry' as explained in the Madras Gymkhana Club case, AIR 1968 SC 554 (Supra).

7. The first point urged before us was that an examination of the objects of the Club would show that it is not purely a social or recreational Club confining its activities to Members like the Madras Gymkhana Club. Our attention was drawn to objects of the Club as given in paragraph 3, Clauses (a), (c), (d), (g), (I) and (na) of the Memorandum of Association of the Club. It was argued that the activity of encouraging and promoting the game of cricket in India and elsewhere mentioned in Clause (a), financing and assisting in financing visits of foreign teams and of visits of Indian teams to foreign countries in Clause (c), organising and promoting or assisting in the organisation or promotion of Provincial Cricket Associations and Inter-Provincial Tournaments in Clause (d), buying, repairing, making, supplying, selling and dealing in all kinds of apparatus and appliances and all kinds of provisions, liquid and solid, required by persons frequenting the Club buildings or the cricket grounds or other premises of the Club in Clause (g) and paying all or any part of the expenses of any cricket match, tour or tournament, or any other sporting events or match or competition in any other form of game, athletics, or sports and any kind of entertainment, exhibition or display in Clause (I), are not activities which should form part of a social and recreational Club. The argument ignores the fact that the Club is not only a social and recreational Club, but is a Club of Members organised with one of the primary objects encouraging and promoting sports and games. The activity of promotion of sports and games by a set of people combining together to form a Club cannot be said to be an undertaking in the nature of a trade or business in which material goods or material services are provided with the

aid of the employees. In Clause (na), the object mentioned is to construct on any premises of the Club buildings of any kind for residential, commercial, sporting or other uses and to repair, or alter or pull down, or demolish the same. In this clause, emphasis was laid on the word "commercial" and it was urged that if buildings are constructed for commercial purposes, this object will make the Club an 'industry'. We do not consider it necessary to deal with this point at this stage, because the very next point relating to investment of large sums of money in immovable properties indicates how this object is being carried out in practice and, when dealing with this point, we shall indicate that this activity is not of such a nature as to make the Club an 'industry'.

8. We have already mentioned earlier that the Club has acquired immovable properties of the value of about Rs. 67 lakhs. Some of these properties consist of buildings which are being used by the Members of the Club. These are the main Club building and the residential flats and rooms. In addition, there is a Stadium that is used on occasions when Cricket Matches are held on the grounds maintained by the Club. Apart from all these, there are a certain number of buildings just outside the Stadium which are let out for use as shops and offices by business concerns. The income that the Club earns is primarily from these last-mentioned constructions. It was urged that the Club in thus constructing buildings for the purpose of earning income from rents payable by business concerns, to whom those premises are let out, is carrying on an activity which is in the nature of trade or business and, consequently, it should be held that the Club is an industry. The Tribunal accepted this submission and held—

"A company which has as its business acquiring of immovable properties on a large scale and for making profit out of the rents thereof would come within the definition of 'industry'. The properties of the C. C. I. which are let out, viz., 48 residential flats, 40 ordinary and air-conditioned rooms; and the premises let to shops and offices form a very large group of properties, the management of them as well as the earnings from them, particularly in the case of the rooms which are let out with compulsory boarding require co-operation between capital and labour."

In examining this aspect, the Tribunal appears to have fallen into an error in ignoring the circumstance that the income, which is earned by the Club from investment on these immovable properties, cannot be held to be income that accrues to it with the aid and co-operation of the employees. The material on the record shows that, out of 397 employees, only 14 attend the three immovable properties consisting of the Club Chambers, North Stand Building, and Stadium House. It may be presumed that the buildings which are let out for use as shops and offices are part of the Stadium House; but there is nothing to show how many of these employees are employed in the work connected with these buildings. In fact, on the face of it, it would appear that, once those buildings have been let out to other persons for use as shops and offices, there would be no need at all for the Club to maintain an employee-staff in order to look after those buildings, so that it is likely that all the 14 employees, who, it is admitted, attend the immovable properties, must be doing so primarily in order to look after the Club buildings and the residential accommodation. It has already been mentioned earlier that the income which the Club is earning from these immovable properties is primarily from the buildings let out for use as shops and offices and that income, in the circumstances, cannot be held to have been earned as a result of any co-operation between the Club and its employees. In earning this income, the Club is not carrying on an activity as a result of which material goods or material services are produced with the co-operation of employees.

9. So far as the residential buildings are concerned, where it appears that some employees must be contributing their labour, the principal consideration for holding that it does not amount to an activity of the nature of an industry is that this residential accommodation is provided exclusively for the Members of the Club. It has been stated that it is meant primarily for outstation Members of the Club who occupy this residential accommodation when they visit Bombay. In addition, it seems that there are 11 Members of the Club who are residing more or less permanently in 11 of these residential rooms. It is also true that members occupying the residential accommodation are required to take advantage of the catering facilities provided by the Club. They are charged consolidated amounts for occupation of the rooms as

well as for the food served to them. The Tribunal has held that this activity is in the nature of keeping a Hotel. The view taken by the Tribunal is clearly incorrect, because it ignores the circumstance that this facility is available only to Members of the Club and to no outsider. It is in the nature of a self-service by the Club organised for its Members. The rules which have been brought to our notice make it clear that, apart from Members, no one is allowed to stay in these residential rooms and that, in exceptional cases where some important visitors come to the Club or competitors taking part in tournaments visit this place, they are permitted to stay in these residential rooms, but, in such cases, they are all made Honorary Members of the Club. The facility is thus availed of by them in the capacity of Members of the Club, even though that membership is honorary. The principle of having honorary members is quite common to most Clubs and existed even in the Madras Gymkhana Club. Once a person becomes an honorary member, provision of facilities of the Club for him partakes of the same nature as for other members and, consequently, such an activity by the Club continues to remain a part of it as a self-serving institution. It is quite wrong to equate it with the activity of a Hotel. It may also be mentioned that there is definite evidence given on behalf of the Club that the charges for the residential accommodation with catering are much lower in the Club than the charges made for similar facility in any decent Hotel in Bombay where comparable accommodation may be provided. This further clarifies the position that this is a facility provided by the Club at concessional rates exclusively for its Members.

10. We may at this stage also deal with the argument advanced on behalf of the Union in respect of the nature of catering activities of the Club. So far as the catering in the Refreshment Room maintained by the Club and for persons occupying the residential accommodation is concerned, it is confined to Members of the Club only. No outsider is allowed to take advantage of this facility. In fact, the bye-laws of the Club clearly lay down that, even if a guest is introduced by a Member, the guest is not entitled to pay for any refreshment served to him. The transaction continues to be confined to the Member of the Club who introduces the guest. The Club is of course, not open to public in general and, even when non-

members are admitted in the Club, they are only allowed as guest of members with the certain restrictions. Such guests cannot enter into any transaction with the Catering Department of the Club. Consequently, this catering activity is also in the nature of a self-service by the Club for its members.

11. In connection with this activity of catering, reliance was, however, placed by the respondent Union on two aspects. One is that it has been admitted that, on occasion when Badminton and Table Tennis open tournaments are held, a stall is kept by the Club where, apart from Members, competitors and spectators can also buy snacks and soft drinks; and it was urged that this sale of snacks and soft drinks to non-members is clearly an activity in the nature of business or trade. It appears, however, that these stalls are opened as a rare feature only on occasions when annual Badminton and Table Tennis open tournaments are held. We have been informed that there is only one Badminton and one Table Tennis open tournament every year, so that these stalls are run only twice a year. Further, there is a clear statement that the snacks and soft drinks are provided to competitors and spectators at concessional rates. This indicates that the provision of these stalls is not for the purpose of carrying on an activity of selling snacks and soft drinks to outsiders, but is really intended as provision of a facility to persons participating in or coming to watch the tournament in order that the tournaments may be run successfully. These stalls are thus brought into existence as a part of the activity of promotion of games and is not a systematic activity for the purpose of carrying on transactions of sale of snacks and soft drinks to outsiders. The opening of stalls on two such occasions in a year with this limited object cannot be held to be an undertaking of the nature of business or trade.

12. It was then pointed out that there have been occasions when very big parties have been held in this Club where catering has been provided by the Club and at these parties, non-members have attended in large numbers. On behalf of the respondent Union, an example was cited of an occasion when a function was held to celebrate the Golden Jubilee of the Bank of India and catering was provided for a large number of guests at the Club. In answer to interrogatories served by the workmen, it was admitted

by the Secretary of the Club that there was also another function of celebration of the Silver Jubilee of the Bombay Merchantile Co-operative Bank Ltd. when also catering was provided by the Club. It was stated on behalf of the workmen that, on these occasions, the invitations were issued not in the name of any Member of the Club, but in the name of the organisations which held the functions. The affidavit filed by the Secretary of the Club, however, shows that in these two cases or in other cases where parties or functions are held in the Club, the Club never enters into any contract with any outsider. The Club, in fact, provides the catering at the instance of a Member of the Club. It appears that some Members of the Club are connected with organisations like the Bank of India or the Bombay Merchantile Co-operative Bank Ltd., and they adopted the course of arranging the function with the Club in their capacity as Members. The privity of contract was between them and the Club, and the Club itself had nothing to do with the two organisations. May be that, in arranging such functions, the Members of the Club, to some extent, abused their privilege of having functions arranged by the Club, but it cannot be held that the Club, in agreeing to cater at such functions, was really intending to sell its goods to persons other than Members. The Club, in fact, realised the dues for such functions from the Members only. The Members were responsible for payment to the Club and did, in fact, make the payments. The Club, in thus catering for such functions, was in fact catering for its Members and was not at all intending to carry on an activity of providing the facility of catering at the instance of outsiders. On behalf of the workmen, it was urged that functions of this nature are numerous and a regular feature in this Club. In fact, the Tribunal in its order has held that:—

“a systematic arrangement by which Companies and other institutions book the grounds through members, whereby the Club makes profit by charging refreshments per head would bring a Club on the other side of the border line so as to make it an industry.”

In accepting this view, the Tribunal again fell into an error for two reasons. The first was that the Tribunal did not attach due importance to the circumstance that the functions were arranged

by the Club only because of the request of a Member and the Club confined its contract with the Member without in any way dealing with outside organisations. The second point is that there was no material to show that such functions form a systematic arrangement. In fact, only two instances were put forward on behalf of the workmen where functions were arranged for purposes of celebrating the Jubilee functions of two Banks. Further, the affidavit of K. K. Tarapor filed on behalf of the Club shows that, during the four years 1961-62, 1962-63, 1963-64 and 1964-65, the total number of functions at which the attendance was 800 and more, including Members of the Club was 28. We were told that the Tribunal had asked for the figures of functions held during these four years at which the attendance was 800 or more, and, thereupon, this information was supplied in the affidavit of Tarapor. There is no material to show how many of these 28 functions were of the nature of the two functions held for celebration of Jubilees of the two Banks. It is quite likely that a large number of these parties at which the attendance was 800 or more may have been given personally by Members of the Club on their own account in order to entertain people for their own personal celebrations on occasions such as marriages of sons or daughters. In fact, the evidence given before the Tribunal was limited to only two specific instances where functions were held for celebration by organisations and not by Members of the Club themselves. In the absence of any material showing that a large number of parties were of that nature, no inference could follow that this was a systematic arrangement by which the Club was attempting to make profit; and the Tribunal, in basing its decision on this ground, was not correct. The few instances cited do not, in our opinion, indicate that the Club is carrying on this activity in such a manner that it must be held to be an industry.

13. Very great reliance was placed in support of the decision of the Tribunal on the fact that the Club has erected a Stadium at the Cricket field where matches are held and makes an income of about Rs. 2 lakhs on each occasion when a Test Match is held on the Cricket ground by charging for admission tickets sold to persons who come as spectators to watch the Test Matches.

It was further pointed out that, apart from charging for admission to the Stadium from spectators by selling tickets to them, the Club has also entered into agreements with four organisations under which a number of seats in the Stadium are given exclusively for the use of those organisations. We have already had occasion to mention earlier one such organisation, viz., the Catholic Gymkhana Ltd. The nature of these agreements is clear from the copy of the agreement filed before the Tribunal which was entered into between the Club and the Catholic Gymkhana Ltd. Under that agreement, the Club allotted for seating accommodation to the Gymkhana 631 seats in the North Stand for a period of 12 years. The allotment was for use by the Gymkhana on all occasions when official and/or unofficial Test Matches and/or matches of similar status sponsored by the Board of Control for Cricket in India were held, or a fixture played by a foreign touring team not sponsored by the said Board. Under the agreement, the Gymkhana had to pay Rs. 5/- per seat for the first fixture; Rs. 5/- per seat for the second fixture; Rs. 4/- per seat for the third fixture and Rs. 4/- per seat for the fourth fixture. The question that arises is whether these charges made by the Club from these organisations, like the Catholic Gymkhana Ltd., or from spectators to whom tickets are sold, bring into existence an activity of the nature of business or trade so as to convert it into an industry. It is to be noted that one of the principal objects of the Club is the promotion of the game of cricket. In fact, the very first object mentioned in the Memorandum of Association is to encourage and promote the game of cricket in India and elsewhere. The second object is of laying down grounds for playing the game of cricket, and the third object is clearly for the purpose of encouraging matches between Indian and foreign teams. It is clear that the Cricket grounds are being maintained by the Club in pursuance of these objectives. The game of cricket can only be promoted and encouraged if, when matches are held, facilities are provided not merely for holding the matches, but also for people to watch the matches and to create interest in the public in general in the game of cricket. It was obviously with this object that the Stadium was constructed. Its use by spectators interested in the matches or by

members of other organisations interested in the game of cricket is purely for the purpose of encouraging and promoting the game of cricket in pursuance of that primary object of forming the Club. It is true that, in carrying on this object of the Club, the Club has been charging the spectators by selling tickets to them and also charging organisations to whom seats are specially allotted. So far as seats allotted to those organisations are concerned, we are inclined to accept the argument advanced by Mr. Vimadalal that this arrangement, instead of enuring to the benefit of the Club, in fact is to its disadvantage. We have already indicated that at least in one case of the Catholic Gymkhana Ltd., the charge that is made from the Gymkhana is at a very low rate of Rs. 5/- or Rs. 4/- per seat. On the face of it, if the Club was intending to make profits, it need not have given those seats to the Gymkhana and could have sold the seats to outsiders at much higher rates. The very fact that such agreements have been entered into with organisations connected with the game of cricket shows that, in entering into these agreements, the primary object of the Club was to encourage persons who are interested in the game of cricket, even though at the disadvantage of charging them at much lower rates. So far as charges from spectators are concerned by selling tickets to them, they are obviously realised in order to ensure that the Club can carry on its activity of the promotion of game of cricket and also make up losses for purposes of providing other facilities and amenities to the Members of the Club. It is to be noticed that, in the whole period of 37 years, only 13 Test Matches have been held on the grounds of the Club. Even these Matches are not organised by the Club itself. They are, in fact, organised by the Board of Control for Cricket in India. The Board then arranges with the Bombay Cricket Association, which is the controlling body, for the venue of the Test Match. The Bombay Cricket Association has no ground or Stadium of its own. It is the Bombay Cricket Association that approaches the Club to promote the Test Matches to be played at the Brabourne Stadium of the Club, and the Club accedes to these requests. It will thus be seen that the Club comes in at the last stage of providing the venue and making arrangements for the successful holding of the Test Matches and

it is for that purpose, on the few occasions when Test Matches are allotted to the grounds of the Club, that the Club is able to sell tickets in the Stadium and make some income. In these circumstances, we are not inclined to accept the submission made on behalf of the workmen that this activity by the Club is an undertaking in the nature of trade or business. It is, in fact, an activity in the course of promotion of the game of cricket and it is incidental that the Club is able to make an income on these few occasions which income is later utilised for the purpose of fulfilling its other objects as incorporated in the Memorandum of Association. The holding of the Test Matches is primarily organised by the Club for the purpose of promoting the game of cricket. This activity by the Club cannot, by itself, in our opinion, lead to the inference that the Club is carrying on an industry.

14. Lastly, reference was made to the circumstance that, unlike the Madras Gymkhana Club, the Club has been incorporated as a Limited Company under the Indian Companies Act. It was urged that the effect of this incorporation in law was that the Club became an entity separate and distinct from its Members, so that, in providing catering facilities, the Club, as a separate legal entity, was entering into transactions with the Members who were distinct from the Club itself. In our opinion, the Tribunal was right in holding that the circumstance of incorporation of the Club as a Limited Company is not of importance. It is true that, for purposes of contract law and for purposes of suing or being sued, the fact of incorporation makes the Club a separate legal entity; but, in deciding whether the Club is an industry or not, we cannot base our decision on such legal technicalities. What we have to see is the nature of the activity in fact and in substance. Though the Club is incorporated as a Company, it is not like an ordinary Company constituted for the purpose of carrying on business. There are no shareholders. No dividends are ever declared and no distribution of profits takes place. Admission to the Club is by payment of admission fee and not by purchase of shares. Even this admission is subject to balloting. The membership is not transferable like the right of shareholders. There is the provision for expulsion of a Member under certain circumstances which fea-

ture never exists in the case of a shareholder holding shares in a Limited Company. The membership is fluid. A person retains rights as long as he continues as a Member and gets nothing at all when he ceases to be a Member, even though he may have paid a large amount as admission fee. He even loses his rights on expulsion. In these circumstances, it is clear that the Club cannot be treated as a separate legal entity of the nature of a Limited Co. carrying on business. The Club, in fact, continues to be a Members' Club without any shareholders and, consequently, all services provided in the Club for Members have to be treated as activities of a self-serving institution.

15. For these reasons, we consider that the Order made by the Tribunal, holding that the Club is an 'industry' is incorrect and must be set aside. The appeal is allowed, and the order of the Tribunal, dismissing the preliminary objection of the Club, is set aside. In the circumstances of this case, we direct parties to bear their own costs of this appeal.

RGD

Appeal allowed.

AIR 1969 SUPREME COURT 285 (V 56 C 54)

(From Andhra Pradesh: (1966) 59 ITR 315)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Kalva Suryanarayana, Appellant v. Income-tax Officer, A-3 Ward, Hyderabad, Respondent.

Civil Appeal No. 998 of 1966, D/- 23-8-1968.

Income-tax Act (1922), Section 44 (prior to its amendment by Act 11 of 1958) and S. 23 (5) (a) (prior to its amendment by Finance Act (18 of 1956)) — Dissolution of registered partnership firm — Assessment of partners under S. 23(5)(a) — There can be no joint and several liability of partners under Section 44. (1966) 59 ITR 315 (AP), Reversed.

Where income of the registered partnership firm is computed after its dissolution and such income is apportioned among the partners of the partnership in proportion of their respective shares, the partner, who has paid his share of tax, as assessed under Section 23 (5) (a), cannot be held liable for payment of the

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tax due from other partners under Section 44. When the partnership is registered, tax is collected from the partners individually and there is no levy of tax against the partnership. (1966) 59 ITR 815 (AP), Reversed; AIR 1968 SC 46, Rel. on. (Para 4)

The object of enacting Section 44 is to prevent evasion of tax by discontinuance of the business of a firm or dissolution of an association of persons. There is nothing in the section which supports the argument that for payment of tax assessed against the partners of a registered partnership individually under Section 23 (5) (a) of the Act, one partner becomes liable jointly and severally with another partner to pay tax. The entire scheme of taxing the income of a registered partnership in the hands of individual partners is inconsistent with any argument that for payment of tax assessed against a partner, other partners are liable. It should be noticed that the tax assessed against a partner of a registered partnership is assessed on his total income inclusive of the share in the income of the partnership and the rate applicable is determined by the quantum of the total income of the partner. Section 44 on the contrary contemplates cases of joint and several assessment of income of the business of a partnership which is discontinued. When such assessment is made, each member of the partnership may be liable to pay jointly and severally tax payable by the partnership. But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the partnership, the principle of joint and several liability under Section 44 cannot be invoked. It is true that under the Partnership law the contractual obligations of a partnership are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory and does not arise out of any contract and its incidence will be determined by the provisions of the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can be drawn merely because the contractual liabilities of a partnership may be jointly and severally enforced against the partners. (Para 4)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 46 (V 55) =
1967-68 ITR 590, Income Tax
Officer, Agra v. Radha Krishan 4

Mr. P. Ram Reddy, Senior Advocate, (Mr. R. Thiagarajan, Advocate, with him), for Appellant; Mr. C. K. Daphtary, Attorney-General for India, (M/s. T. A. Ramachandran, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought, by special leave, from the judgment of the High Court of Andhra Pradesh dated December 21, 1964 in Writ Petition No. 1294 of 1961.

2. The appellant had entered into a partnership with three others named D. Sayappa, H. Siddappa and M. Verraiah to carry out a "Gulmoha" contract for the year 1949-50. The firm was known as Messrs Kalva Suryanarayana. After completion of the contract the partnership came to an end. For the assessment year 1951-52, the partners of the dissolved firm made an application for registration of the partnership to the respondent who granted the registration on February 28, 1953, and on that basis proceeded to assess the total income of the partnership which he determined at Rs. 1,64,546/- (O.S.), and the total income was apportioned among the four partners in proportion of their respective shares. Subsequently, the Commissioner of Income Tax in exercise of his revisional power under Section 33B of the Income Tax Act passed an order on February 26, 1955 holding that the partnership had suppressed income to the extent of Rs. 1,72,149 (I.G.) by inflating the expenses under railway freight and by not accounting for the sale of old gunnies. The Commissioner of Income Tax accordingly directed that the assessment already made should be enhanced by a sum of Rs. 1,72,149. In pursuance of this order the respondent revised the assessment on March 11, 1955 and determined the total income of the partnership at Rs. 3,13,189/- (I.G.) and apportioned it among the several partners in proportion to their shares and demand notices were issued accordingly against individual partners of the dissolved firm. It appears that the appellant and D. Sayappa paid their shares of the tax but M. Veeraiah and H. Siddappa failed to pay their shares which were Rs. 10,654 62 and Rs. 5,640 62 respectively. After about six years the respondent issued a notice to the appellant under Section 45 of the Income Tax Act, 1922, herein-

after called the 'Act' calling upon him to pay up the arrears on the footing that under the provisions of Section 44 of the Act there was joint and several liability of each and every partner of the dissolved firm in respect of the arrears of tax. The appellant thereafter moved the High Court for grant of a writ to quash the notice. The writ petition was dismissed by the High Court by its judgment dated December 21, 1964.

3. The provisions of Section 23 (5) and Section 44 of the Act as they stood at the material time are reproduced below:

"23 (5). Notwithstanding anything contained in the foregoing sub-sections when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4) as the case may be;

(a) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined....."

"44. Liability in case of a discontinued firm or association, where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be applied to any such assessment."

4. In support of this appeal, the argument was addressed that the appellant who was an individual assessee under Section 23 (5) could not be held liable for payment of the tax due from the ex-partners of the partnership and there was no joint and several liability imposed under the provisions of the Act in such a case. In our opinion, the argument put forward on behalf of the appellant is well founded and must be accepted as correct. Under the scheme of the Act a partnership is a unit of assessment

and the income of the partnership is computed as that of the unit irrespective of whether the partnership is registered or unregistered. After the income of the partnership is computed in a case where the partnership is registered under Section 26A the share of each partner in the income of the partnership is determined and is added to his other income and the total income so computed is brought to tax. If the partnership is unregistered, the tax payable by the partnership is, except when the Income-tax Officer otherwise directs in the interests of revenue, determined as in the case of any other entity, and the demand for tax is made on the partnership itself. The result is that, if the partnership is registered, tax is collected from the partners individually and there is no levy of tax against the partnership. If the partnership is unregistered, the tax may, unless otherwise directed, be levied against the partnership. In either case, the machinery set up by Section 23 (5) is for assessment of tax payable on the income of the partnership. The income of the partnership is computed, but tax is assessed on that income on the partners or the partnership, according as the income is of a partnership registered or unregistered. In *Income Tax Officer, Agra v. Radha Krishan*, (1967) 66 ITR 590 = (AIR 1968 SC 46) it was argued that in the case of assessment made under Section 23 (5) (a) of the Act the tax liability was joint and several and the Income Tax Officer could recover from other partners the share of the tax attributable to one partner which cannot be recovered from him. The argument was rejected by this Court and it was pointed out that under the scheme of the Act tax is assessed individually against each partner and no tax is made payable by the partnership and therefore the principle of joint and several liability has no application. It was also held in that case that there is nothing in S. 44 of the Act which supports the contention that for payment of tax assessed against a partner of a registered partnership under Section 23 (5) (a) another partner becomes liable jointly and severally with the first partner to pay tax. In our opinion, the principle of this decision governs the present case also. It is true that in the present case we are dealing with the assessment of a partnership after its dissolution and S. 44 of the Act is directly applicable but this circumstance makes no difference to

the application of the principle laid down in (1967) 66 ITR 590=(AIR 1968 SC 46). The object of enacting S. 44 is to prevent evasion of tax by discontinuance of the business of a firm or dissolution of an association of persons. On discontinuance of the business of a firm or dissolution of the association of persons, it is declared that every person who was at the time of such discontinuance or dissolution, a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the partnership or association be jointly and severally liable to assessment and for the amount of tax payable. There is, however, nothing in the section which supports the argument of the respondent that for payment of tax assessed against the partners of a registered partnership individually under S. 23 (5)(a) of the Act, another partner becomes liable jointly and severally with that first partner to pay tax. The entire scheme of taxing the income of a registered partnership in the hands of individual partners is inconsistent with any argument that for payment of tax assessed against a partner, other partners are liable. It should be noticed that the tax assessed against a partner of a registered partnership is assessed on his total income inclusive of the share in the income of the partnership and the rate applicable is determined by the quantum of the total income of the partner. Section 44 on the contrary contemplates cases of joint and several assessment of income of the business of a partnership which is discontinued. When such assessment is made, each member of the partnership may be liable to pay jointly and severally tax payable by the partnership. But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the partnership, the principle of joint and several liability under Section 44 cannot be invoked. It is true that under the Partnership Law the contractual obligations of a partnership are enforceable jointly and severally against the partners. But the liability to pay income-tax is statutory and does not arise out of any contract and its incidence will be determined by the provisions of the statute. If the statute which imposes liability has not made it enforceable jointly and severally against the partners no such implication can be drawn merely because the contractual liabilities of

a partnership may be jointly and severally enforced against the partners.

5. For these reasons we hold that the respondent had no jurisdiction to issue the impugned notice dated June 22, 1961 under Section 45 of the Act and the proceedings taken against the appellant in pursuance of that notice should be quashed by grant of a writ in the nature of certiorari under Article 226 of the Constitution. We accordingly set aside the judgment of the High Court of Andhra Pradesh dated December 21, 1964 and allow this appeal with costs here and in the High Court.

CWM/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 288 (V 56 C 55)

(From Delhi, Himachal Bench)*

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Vidya Sagar Joshi, Appellant v. Surrinder Nath Gautam, Respondent.

Civil Appeal No. 853 of 1968, D/- 18-9-1968.

Representation of the People Act (1951), Sections 123 (6) and 77 — Expression “expenditure in connection with election incurred or authorised” in Section 77 (1), meaning of — Payment to party to secure a ticket for standing as party candidate is an expenditure in connection with election — Deposit made by returned candidate for securing Congress ticket forfeited in accordance with Party rules between the two dates prescribed under Section 77 (1) — Amount of deposit if included in return of election expenses declared by him exceeding the prescribed limit — Held, there was contravention of Section 77 (3) and the candidate was guilty of corrupt practice under Section 123 (6) read with Section 77 (3).

The payment to secure a seat is an expenditure in connection with the election. The critical words of Section 77 are ‘expenditure’, ‘in connection with election’ and ‘incurred or authorised’. ‘Expenditure’ means the amount expended and ‘expended’ means to pay away, lay out or spend. It really represents money out of pocket, a going out. It is money

*(C. O. P. No. 4 of 1967, D/- 15-1-1968—Delhi, H. B.)

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'in connection with' his election. These words mean not so much as 'consequent upon' as 'having to do with'. All money laid out and having to do with the election is contemplated. But here again money which is liable to be refunded is not to be taken note of. The word 'incurred' shows a finality. It has the sense of rendering oneself liable for the amount. Therefore the section regards everything for which the candidate has rendered himself liable and of which he is out of pocket in connection with his election that is to say having to do with his election. (Paras 8, 12)

The returned candidates, before the publication of notification calling the election, deposited a sum of Rs. 500 with the Congress Party for securing the ticket. He was denied the Congress ticket but he did not withdraw from the contest and offered himself as a contesting candidate against the official Congress Candidate and incurred the penalty of forfeiture of the deposit according to rules of party. The amount was forfeited after the date of withdrawal but before the date of declaration of the result. In his return of election expenses he did not include that amount of Rs. 500 and if that amount were added to election expenses as declared by him the limit of expenditure would have exceeded:

Held that the deposit with the party was an expenditure in connection with the election. If he had got the ticket and the money was refunded to him, that would not have counted as an expenditure since the expenses would not have incurred. As he became a contesting candidate the forfeiture of the deposit became a fact between the two dates prescribed under Section 77 (1) and thus was an election expense. But since inclusion of this amount in the expenses, would have exceeded the limit of the election expenses there was contravention of Section 77 (3) and the candidate was guilty of corrupt practice under Section 123 (6) read with Section 77 (3). AIR 1961 SC 663, Dist.; C. O. P. No. 4 of 1967, D/- 15-1-1968 (Delhi, H. B.), Affirmed. (Paras 6, 7, 9, 12 and 15)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 663 (V 48) =

(1961) 2 SCR 651, Haji Aziz and
Abdul Shakoor Bros. v. Commr.
of Income Tax, Bombay City 12

Mr. C. B. Agarwala, Senior Advocate
(Mr. S. K. Bagga and Mrs. S. Bagga,

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Advocates, with him), for Appellant; Mr. Sarjoo Prasad, Senior Advocate, (Mr. Naunit Lal, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal against the judgment, dated January 15, 1968, of the High Court of Delhi (Himachal Bench) setting aside the election of the appellant to the Santokhgarh Assembly Constituency of Himachal Pradesh. The election has been set aside on the ground of corrupt practice under Section 123 (6) of the Representation of the People Act read with S. 98 (b) of the Act.

2. By a notification dated January 13, 1967 the electors of this constituency were invited to elect a member to the Assembly. The last date for filing of nomination papers was January 20, 1967. Scrutiny of the nomination papers was held the following day and the last date of withdrawal was January 23, 1967. Three candidates contested the election. The appellant was an independent candidate opposed by the respondent who was a Congress nominee and one Shanti Swarup, Jansangh candidate. The poll took place throughout the constituency on February 18, 1967. Votes were counted four days later at Una and the result was declared as follows:

Vidya Sagar Joshi (Appellant)	8437 votes
Surinder Nath Gautam (Election Petitioner)	7695 votes
Shanti Swarup	2067 votes

1267 ballots were rejected as invalid. Thus the present appellant was returned with a margin of 742 votes. The returned candidate filed his return of election expenses showing an expenditure of Rs. 1862 05 P. The limit of expenditure in this constituency was Rs. 2000. One of the contentions of the election petitioner was that he had filed a false return of his election expenses, that he had spent an amount exceeding Rs. 2000 in the aggregate and therefore contravened the provisions of Sec. 77 (3) of the Representation of the People Act 1951 and therefore committed corrupt practice under Section 123 (6) of the Act. The election petitioner therefore asked that his election be declared void. There were other grounds also on which the election was challenged, but we need not refer to them since no point has been made before us.

3. The main item on which the expenses were said to be false was a deposit of Rs. 500 as security and Rs. 200 as application fee which the returned candidate had made with the Congress party on or before January 2, 1967. The fee was not returnable, but as this payment was made before the notification calling upon the voters to elect a member to the Assembly nothing turns upon it. The returned candidate was denied the Congress ticket on or about January 10, 1967. This was also before the said notification. According to the rules of the Congress Party the security deposit was refundable to a candidate if he or she was not selected. It was however provided in the same rules that if the candidate contested the election against the official Congress candidate, the security deposit would be forfeited. The returned candidate chose to stand as an independent candidate against the official Congress nominee and incurred the penalty of forfeiture. This was after the date for the filing of the nomination paper (January 20, 1967). He had time till January 23, 1967 to withdraw from the contest. If he had done so the deposit would have presumably been returned to him. As he became a contesting candidate the forfeiture of the deposit became a fact.

4. The case of the election petitioner was that if this deposit were added to the election expenses, the limit of Rs. 2000 was exceeded and therefore this amounted to a corrupt practice under S. 123 (6) read with Sec. 77 (3) of the Representation of the People Act. The High Court held in favour of the election petitioner and hence the appeal.

5. Section 77 of the Representation of the People Act provides as follows:

Section 77. Account of election expenses and maximum thereof—

(1) Every candidate at an election shall either by himself or by his election agent keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

6. The third sub-section creates a bar against expenditure in excess of the prescribed amount. In this case the prescribed amount was Rs. 2000. Section 123 (6) provides that "the incurring or authorising of expenditure in contravention of Section 77 is a corrupt practice." Therefore, if the amount of Rs. 500 was added to the election expenses as declared by the returned candidate he would be guilty of a corrupt practice, under the two sections quoted above. The question, therefore, is whether this amount can be regarded as an election expense.

7. The first sub-section of Section 77 discloses that the candidate has to declare as part of his election expenses. It speaks of "all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive." In the present case, therefore, the critical dates were January 13, 1967 and February 22, 1967. The amount in question was paid before the first date. It was liable for confiscation not on the date on which the Congress ticket was refused to the returned candidate but on January 23, 1967 when he did not withdraw from the contest and offered himself as a contesting candidate against the official Congress candidate. In other words, the payment was made before the period marked out by Section 77 (1) but the expenditure became a fact between the two dates. The contention of the returned candidate was that this was not an expenditure within the meaning of Sec. 77 (1) of the Representation of the People Act and this is the short question which falls for consideration in the present case.

8. Section 77 as framed now departs in language from the earlier provision on the subject which was rule 117. It read:

"117. Maximum election expenses — No expense shall be incurred or authorised by a candidate or his election agent on account of or in respect of the conduct and management of an election in any one constituency in a State in excess of the maximum amount specified in respect of that constituency in Schedule V."

The words "conduct and management of election" are not as wide as the words "all expenditure in connection with elec-

tion incurred or authorised by him," which now finds place in Section 77. The question thus is what meaning must be given to the words used in Section 77. The critical words of Section 77 are 'expenditure' 'in connection with election' and 'incurred or authorised'. 'Expenditure' means the amount expended and 'expended' means to pay away, lay out or spend. It really represents money out of pocket, a going out. Now the amount paid away or paid out need not be all money which a man spends on himself during this time. It is money 'in connection with' his election. These words mean not so much as 'consequent upon' as 'having to do with'. All money laid out and having to do with the election is contemplated. But here again money which is liable to be refunded is not to be taken note of. The word 'incurred' shows a finality. It has the sense of rendering oneself liable for the amount. Therefore the section regards everything for which the candidate has rendered himself liable and of which he is out of pocket in connection with his election that is to say having to do with his election.

9. The candidate here put out this money for his election since he was trying to obtain a Congress ticket. If he had got the ticket and the money was refunded to him, this would not have counted as an expenditure since the expense would not have been incurred. When the candidate knowing that the money would be lost went on to stand as an independent candidate, he was willing to let the money go and take a chance independently. The case of the appellant is that this money was not used in furthering the prospect of his election. On the other hand, it was in fact used against him by the Congress Party as he was opposed to that party's candidate. He contends that such an expense cannot be regarded as expense in connection with the election. According to him the connection must be a connection of utility and not something which is of no use but rather against the chances of victory. In this connection the learned counsel draws our attention to Halsbury's 'Laws of England' Third Edition Volume 14, at page 177 paragraph 314. It is stated there as follows:

"While no attempt has been made by judges to define exhaustively the meaning of expenses incurred in the conduct or management of an election, it has

been said that if expenses are, primarily or principally, expenses incurred for the promotion of the interests of the candidate, they are election expenses."

10. It will be seen that the above passage refers to expenses incurred in the conduct or management of an election.

11. The learned counsel for the appellant and respondent relied upon two decisions of this Court. Reliance was also placed upon two decisions of the Election Tribunal. The decisions of the Election Tribunal are of the same Bench and concern Rule 117. They need not be considered. The two cases of this Court may be noticed.

12. In *Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income Tax, Bombay City*, (1961) 2 SCR 651 = (AIR 1961 SC 663) the question arose under the Indian Income-tax Act. A firm importing dates was found to have breached some law and a penalty was imposed on it under the Sea Customs Act. The firm sought to treat the penalty as expenses and they were disallowed by this Court. Learned Counsel for the appellant relied on this case and claimed that the same principle applies and this penalty cannot be said to be an expenditure in connection with the election. The analogy is not apt because not only the prescriptions of the two laws are different but the underlying principle is different also. In Income-tax laws the expenditure must be laid out wholly or exclusively for the purpose of the business etc. Breaking laws and incurring penalty is not carrying on business and therefore, the loss is not for the purposes of business. Here the expenditure is to be included if it is incurred in connection with the election and the payment to secure the seat is an expenditure in connection with the election. The ruling, therefore, does not apply.

13. In the second case a Congress candidate had paid a sum of Rs. 500 of which Rs. 100 were subscription for membership and Rs. 400 were a deposit. Later he paid Rs. 500 as donation to the Congress. He failed to include the two sums of Rs. 500 each in his return of expenses. The Tribunal found that both the sums were spent in connection with the election and by including them the limit was exceeded. This Court affirmed the decision of the Tribunal. The case was decided under R. 117. The two

sums were considered separately. The contention was that under S. 123 (7) and R. 117 the candidate was nominated only on November 16, 1951 and the first sum was paid on September 12, 1951. The question then arose when the candidate became a candidate for the application of the Rule and S. 123 (7). It was held that the candidate became a candidate when he unequivocally expressed his intention by making the payment.

14. The question of commencement of the candidature is now obviated by prescribing the two termini between which the expense is to be counted. In so far as the case goes it supports our view. It is risky to quote the decision because the terms of the law on which it was declared were entirely different. We can only say that there is nothing in it which militates against the view taken by us here.

15. On the whole, therefore, the judgment under appeal is correct. The appeal fails and will be dismissed with costs.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 292
(V 56 C 56)

(From Bombay: (1968) 49 ITR 869)
J. C. SHAH, V. RAMASWAMI AND
V. BHARGAVA, JJ.

The Commissioner of Income-tax, Bombay City II, Appellant v. M/s. Shri Goverdhan Ltd., Bombay, Respondent.

Civil Appeal No. 17 of 1967, D/- 9-1-1968.

Income-tax Act (1922) (as it stood before its amendment by Finance Act of 1955), Sections 23-A (1) and 2 (11) — Expression "previous year" in S. 23A (1) — Interpretation of — Assessee having two different sources of income, and two businesses having separate accounting years, may have two previous years — (1963) 49 ITR 869 (Bom), Partly Reversed.

The provisions of Section 23A (1) must be construed in the context of S. 2 (11) and the expression "previous year" of the Company in Section 23-A (1) must be interpreted as meaning two previous years where the Company carries on two different businesses with two different sources of income for which there are separate accounting periods. Under the scheme of the Act the income of the

varying previous years from different sources should be lumped together to arrive at the total income of the assessee. The provisions of Section 2 (11) make it clear that except in cases where the previous year is determined by the Department under Clause (b), the varying previous years must all necessarily end with or within the financial year next preceding the assessment year. (Para 5)

Thus where the assessee company had two different sources of income: (i) from its own business and (ii) from the share of partnership business with separate accounting years, the income-tax authorities were entitled, while making an order under Section 23A (1), to include the income from partnership business to the assessable profit of the Company from its own business, even though such income had accrued after the close of the previous year of its own business. (1963) 49 ITR 869 (Bom), Partly Reversed.

(Paras 5 and 7)

It is well established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on on its being ascertained. The legal position is that a liability depending upon a contingency is not a debt in praesenti or in futuro till the contingency happens. But if it is a debt the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount: debitum in praesenti, solvendum in futuro. (1949) 29 Tax Cas 69, Rel. on.

(Para 6)

Cases Referred: Chronological Paras
(1949) 29 Tax Cas 69, Commrs.
of Inland Revenue v. Gardner
Mountain and D'Ambrumenil
Ltd.

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Mr. C. K. Daphtary, Attorney-General for India, (M/s. T. A. Ramachandran and R. N. Sachthey, Advocates, with him), for Appellant; Mr. Radhyelal Aggarwal, Senior Advocate, (M/s. Bishambar Lal and H. K. Puri, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought, by special leave, on behalf of the Commissioner of Income-tax against the judgment of the Bombay High Court dated September 18, 1962 in Income Tax

Reference No. 34 of 1961 whereby the High Court held that the order passed against the respondent, hereinafter referred to as the 'assessee' under Sec. 23A of the Indian Income Tax Act, 1922 (hereinafter referred to as the "Act") was not justified and valid for the assessment year 1951-52.

2. The assessee is a public limited company registered under the Indian Companies Act. Its share capital consists of 50,000 shares subscribed and paid up. Out of these shares, 47,493 are held by Shree Raghunath Investment Trust Ltd., a company incorporated as a private company under the laws of Jammu and Kashmir (hereinafter referred to as "The Jammu Co.") and having its registered office there. Out of the remaining 2507 shares, 2500 shares were held by another private limited company incorporated in India and having its registered office in New Delhi and the remaining 7 shares were held by seven individuals. The shares of the assessee are not quoted on the Stock Exchange any where in India. There is nothing, however, in its Memorandum and Articles of Association placing any restriction on the free transfer of its shares. The assessee entered into a partnership on April 20, 1950 with a firm called "The Indian Steel Syndicate". There was a reconstitution of this firm on December 2, 1950. The shares of profit of the assessee from this firm (which was registered under Section 26-A of the Act) as upto November 30, 1950 and upto March 31, 1951 totalling Rs. 70,895 were included in the assessment of the assessee for the assessment year 1951-52.

3. During the assessment years 1950-51 and 1951-52, for which the previous years ended on September 30, 1949 and September 30, 1950, the Income Tax Officer determined the assessable income of the assessee at Rs. 60,350 and Rupees 93,884 respectively. After deduction of the taxes payable the balance was Rs. 35,834 in the first year and Rs. 53,103 in the second year. As the assessee had not declared any dividend at its Annual General Meetings during either of the aforesaid two years or within six months thereafter, the Income Tax Officer issued notices to the assessee to show cause why an order under Section 23A (1) of the Act should not be passed for the two years. The assessee, however, contended that Section 23A was not appli-

cable inasmuch as the public were substantially interested within the meaning of the Explanation appended to the third proviso to Section 23-A (1): Overruling this contention the Income Tax Officer made an order under Section 23A against the assessee in respect of the undistributed profits for the said two years. Against these orders the assessee appealed to the Appellate Assistant Commissioner. A further ground was taken in the appeal that the order under Section 23A was unwarranted so far as assessment year 1950-51 was concerned inasmuch as the assessable profits included a sum of Rs. 70,895 being the share of the assessee's income which arose in its partnership with the Indian Steel Syndicate as upto November 30, 1950 and March 31, 1951, and that the income accrued after the accounting year of the assessee which ended on September 30, 1950. The Appellate Assistant Commissioner dismissed the appeals and his order was affirmed by the Appellate Tribunal on June 28, 1959 for both the assessment years. At the instance of the assessee the Appellate Tribunal stated a case to the High Court under S. 66 (1) of the Act on the following question of law:

"Whether the order passed against the assessee for assessment years 1950-51 and 1951-52 under Section 23A are justified and valid?"

By its judgment dated September 18, 1962, the High Court answered the question in so far as it pertained to assessment year 1950-51 in the affirmative and in so far as it pertained to assessment year 1951-52 in the negative and against the appellant.

4. Section 23A of the Act, as it stood before its amendment by the Finance Act, 1955 was to the following effect:

"23A. Power to assess individual members of certain companies.—(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied

that having regard to losses incurred by the company in earlier years or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income.

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company, together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the words 'sixty per cent' the words 'one hundred per cent' were substituted:

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five per cent of the assessable income of the company as reduced by the amount of income-tax and super-tax payable by the company in respect thereof, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent of the assessable income of the company of the previous year concerned as reduced by the amount of income-tax and super-tax payable by the company in respect thereof:

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof....."

Section 2 (11) of the Act states:

"2. In this Act, unless there is anything repugnant in the subject or context,—

(11) 'previous year' means—

(i) in respect of any separate source of income, profits and gains—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then, at the option of the assessee, the year ending on the date to which his accounts have been so made up:

Provided that where in respect of a particular source of income, profits and gains an assessee has once been assessed, or where in respect of a business, profession or vocation newly set up an assessee has exercised the option under sub-clause (c), he shall not, in respect of that source or, as the case may be, business, profession or vocation, exercise the option given by this sub-clause so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit to impose; or

....."

(ii) in respect of the share of the income, profits and gains of a firm where the assessee is a partner in the firm and the firm has been assessed as such, the period as determined for the assessment of the income, profits and gains of the firm;"

5. On behalf of the appellant the Attorney-General put forward the argument that the High Court was in error in holding that the sum of Rs. 70,895 which was the assessee's share of income in its partnership with the Indian Steel Syndicate should be left out of consideration so far as the assessment year 1951-52 was concerned. It was pointed out that the assessee had two different sources of income: (1) from its own business, and (2) from the share of the partnership business with the Indian Steel Syndicate and that under Section 2 (11) of the Act the assessee must be deemed to have two previous years with regard to two different sources of income. It was therefore argued that the High Court was in error in holding that the

income from the partnership could not be included in the assessment income of the assessee for the assessment year 1951-52. On behalf of the assessee the contrary view-point was put forward by Mr. Radhley Lal Aggarwal. It was submitted that the sum of Rs. 70,895 related to the share of the profits of the assessee from out of the partnership for the period between November 30, 1950 to March 31, 1951 and this period was after the accounting year of the assessee which ended on September 30, 1950. It was contended that at its general meeting held on May 17, 1951 the assessee could not be expected to declare a dividend for the assessment year 1951-52 which related to the accounting year ending on September 30, 1950 out of its profits that accrued during the subsequent accounting period. In our opinion, the argument put forward by the Attorney-General on behalf of the appellant is well founded and must be accepted as correct. It is true that the assessee had prepared a balance sheet on the basis that its accounting year ended on September 30, 1950. It is, however, admitted that the assessee had two sources of income: (1) from its own business, and (2) from the share of the partnership business with Indian Steel Syndicate. Under S. 2 (11) of the Act an assessee may have different previous years in respect of different sources of income and under the scheme of the Act the income of the varying previous years from the different sources should be lumped together to arrive at the total income of the assessee. The provisions of Sec. 2 (11) of the Act make it clear that except in cases where a previous year is determined by the Department under Cl. (b) the varying previous years must all necessarily end with or within the financial year next preceding the assessment year. In the present case, the previous year so far as the personal business of the assessee was concerned, was the previous year ended on September 30, 1950, but with regard to the income of the partnership the previous year was the period between November 30, 1950 and March 31, 1951 when the accounts of the partnership were made up and closed. In our opinion, the provisions of Section 23-A (1) must be construed in the context of Section 2 (11) of the Act and the expression 'previous year' of the company in Section 23A (1) must be interpreted as meaning two previous years

where the company carries on two different businesses with two different sources of income for which there are separate accounting periods. It follows therefore in the present case that the Income Tax Officer was right in holding that the assessable income of the company included the share of the assessee's profits in its partnership with the Indian Steel Syndicate for the purpose of application of Section 23A of the Act so far as the assessment year 1951-52 was concerned.

6. The argument was, however, stressed on behalf of the respondent that in any event the share of the profit of the assessee from the partnership business for the period from October 1, 1950 to March 31, 1951 was not known to the assessee before its annual general meeting on May 17, 1951. It was pointed out that for the first time the Income Tax Officer was intimated on August 11, 1953 that the share of the profit of the assessee in the partnership was to the extent of Rs. 70,895 and should be included in its assessment. After receipt of the intimation the Income Tax Officer rectified the original assessment made on February 29, 1952 and included the said amount of Rs. 70,895. In our opinion, there is no warrant for the argument put forward on behalf of the respondent. It is conceded in this case that the annual general meeting of the assessee was held on May 17, 1951 after the close of the accounting year of the Indian Steel Syndicate. It is true that the actual profits of the assessee from its partnership business were ascertained after the close of the accounting period i. e., March 31, 1951. It is, however, well established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on on its being ascertained. The legal position is that a liability depending upon a contingency is not a debt in praesenti or in futuro till the contingency happens. But if it is a debt the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount: debitum in praesenti, solvendum in futuro. Reference may be made in this connection to the decision in Commrs. of Inland Revenue v Gardner Mountain and D'Ambrumenil, Ltd.,

(1949) 29 Tax Cas 69. The assessee in that case carried on the business of underwriting agents, and entered into agreements with certain underwriters at Lloyds under which it was entitled to receive as remuneration for its services in conducting the agency, commissions on the net profits of each year's underwriting. The agreements provided that 'accounts should be kept for the period ending 31st December in each year and that each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the company shall be calculated and paid thereon.' The accounts for the underwriting done in the calendar year 1936 were made up at the end of 1938 and the question that arose was whether the assessee was liable to additional assessment in respect of the commission on underwriters' profits from the policies underwritten in calendar year 1936 in the year in which the policies were underwritten or in the year when the accounts were thus made up. The assessee contended that the contracts into which it entered were executory contracts under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account; the profit in the form of commission was not ascertainable or earned, and did not arise, until that time and the additional assessment which was made in the year in which the policies were underwritten should accordingly be discharged. The Special Commissioners allowed the assessee's contention and discharged the additional assessment. The decision of the Special Commissioners was confirmed on appeal by Macnaghten, J. in the King's Bench Division of the High Court. The Court of Appeal however reversed this decision and a further appeal was taken by the assessee to the House of Lords. The House of Lords held that on the true construction of the agreements, the commissions in question were earned by the assessee in the year in which the policies were underwritten, and must be brought into account accordingly and confirmed the decision of the Court of Appeal. At page 98 of the Report Lord Wright observed:

"I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned, though the profits resulting from the insurance cannot be then ascertained, but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested, though its valuation is postponed, and is not merely postponed but depends on all the contingencies which are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance, and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case, however, they may affect the profit, do not affect the right for what it eventually proves to be worth."

Lord Simonds also stated at page 110 of the Report as follows:

"It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not accrue for Income Tax purposes in that same year, though it was not ascertainable until later."

It is admitted in the present case that the Indian Steel Syndicate closed the accounts of the partnership for the first time for the first set of partners on November 30, 1950 and for the other set of partners on March 31, 1951 and the assessee as a partner was therefore entitled to the share of the profits as on the last day of the accounting period of the partnership i. e., March 31, 1951.

7. For these reasons we hold that the Income Tax Officer was right in holding that the amount of Rs. 70,895 which was the share of the assessee's income from its partnership with Indian Steel Syndicate for the period ending March 31, 1951 should be included in the assessable profits of the company for the assessment year 1951-52 and should be treated as part of the distributable profits of the company for the purpose of Section 23A (1) of the Act. In other words, the order made by the Income

Tax Officer against the assessee under Section 23A of the Act for the assessment year 1951-52 must be held to be justified and valid and the question of law referred by the Appellate Tribunal must be answered against the assessee and in favour of the Income Tax Department for the year 1951-52 also. We accordingly set aside the judgment of the Bombay High Court dated September 18, 1962, so far as the assessment year 1951-52 is concerned and allow this appeal with costs.

CWM/D.V.C. Order accordingly.

AIR 1969 SUPREME COURT 297

(V 56 C 57)

(From Patna)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

The Bank of Bihar Ltd., Appellant v. Dr. Damodar Prasad and another, Respondents.

Civil Appeal No. 1109 of 1965, D/- 8-8-1968.

Contract Act (1872), Sections 128 and 140 — Liability of surety — Nature of — Liability not deferred until remedies against principal debtor are exhausted — Decree obtained by creditor against debtor and surety directing creditor to first exhaust remedies against principal debtor — Direction held not justified under Order 20, Rule 11 (1) or Section 151, Civil P. C. — (Civil P. C. (1908), S. 151 and Order 20, Rule 11 (1)): Judgment and decree in A. F. O. D. No. 300 of 1959, D/- 3-12-1962 (Pat), Reversed.

Under Section 128, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety thus becomes liable to pay the entire amount. His liability is immediate. It is not deferred until the creditor exhausts his remedies against the principal debtor. In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against principal in some other proceedings. Likewise where the creditor has obtained a decree against the surety and the principal, the surety

has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. (1802) 31 ER 1272 and (1869) 6 Bom HCR 241, Rel. on. (Paras 4 and 5)

The plaintiff Bank lent money to defendant 1 on the guarantee of defendant 2. The guarantee was a collateral security. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. The plaintiff filed a suit and obtained a decree against both containing a direction that plaintiff should be at liberty to enforce its dues against the surety only after exhausting its remedies against the principal debtor.

Held that the direction for postponing the payment of decretal amount must be specific and must give sufficient reasons. The direction here was of the vaguest character. (Para 6)

It was the duty of the surety to pay the decretal amount. On such payment he would be subrogated to the rights of the creditor under Section 140. The security would become useless if rights against the surety could be so easily cut down. The direction in the decree could not be justified under O. 20, R. 11 (1). Assuming that apart from Order 20, Rule 11 (1) the Court had the inherent power under Section 151, Civil P. C. to direct postponement of execution of the decree against the surety, the ends of justice did not require such postponement. Judgment and decree in A. F. O. D. No. 300 of 1959, D/- 3-12-1962 (Pat), Reversed. (Para 6)

Cases Referred: Chronological Paras
(1869) 6 Bom HCR 241, Lachhman
Joharimal v. Bapu Khandu 5
(1802) 6 Ves Jun 714 = 31 ER
1272, Wright v. Simpson 4

Mr. S. Mitra, Senior Advocate (Mr. R. C. Prasad, Advocate with him), for Appellant; Mr. K. K. Sinha, Advocate, for Respondent No. 2.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The plaintiff Bank lent moneys to defendant No. 1 Damodar Prasad on the guarantee of defendant No. 2 Paras Nath Sinha. On the date of the suit Damodar Prasad was indebted

* (A. F. O. D. No. 300 of 1959, D/- 3-12-1962—Pat.)

to the plaintiff for Rs. 11723 56 nP. on account of principal and Rs. 2769.37 nP. on account of interest. In spite of demands neither he nor the guarantor paid the dues. The plaintiff filed a suit against them in the Court of the Subordinate Judge, Ist Court, Patna, claiming a decree for the amount due. The Trial Court decreed the suit against both the defendants. While passing the decree, the Trial Court directed that the "plaintiff bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1". The plaintiff filed an appeal challenging the legality and propriety of this direction. The High Court dismissed the appeal. The plaintiff has filed the present appeal after obtaining a certificate.

2. The guarantee bond in favour of the plaintiff bank is dated June 15, 1951. The surety agreed to pay and satisfy the liabilities of the principal debtor upto Rs. 12000 and interest thereon two days after demand. The bond provided that the plaintiff would be at liberty to enforce and to recover upon the guarantee notwithstanding any other guarantee, security or remedy which the Bank might hold or be entitled to in respect of the amount secured.

3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor.

4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in *Wright v. Simpson*, (1802) 6 Ves Jun 714 at p. 734 = 31 ER 1272 at p. 1282: "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of creditor." In the absence of some special equity the surety has no right to

restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.

5. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In *Lachhman Joharimal v. Bapu Khandu*, (1869) 6 Bom HCR 241, the judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties, presented applications for the imprisonment of the sureties before levying execution against the principals. The judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C. J. and Melvill, J. agreed with this opinion and observed:—

"The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

6. It is now suggested that under Order 20, Rule 11 (1) and Section 151 of the Code of Civil Procedure the Court passing the decree had the power to impose the condition that the judgment-creditor would not be at liberty to enforce the decree against the surety until the creditor has exhausted his remedies against the principal. Order 20, R. 11 (1) provides that "where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable." For making an order under Order 20, Rule 11 (1) the Court must give sufficient reasons. The direction postponing payment of the amount decreed must

be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal is of the vaguest character. It is not stated how and when the creditor would exhaust his remedies against the principal. Is the creditor to ask for imprisonment of the principal? Is he bound to discover at his peril all the properties of the principal and sell them; and if he cannot, does he lose his remedy against the surety? Has he to file an insolvency petition against the principal? The Trial Court gave no reasons for this extraordinary direction. The Court rejected the prayer of the principal debtor for payment of the decretal amount in instalments as there was no evidence to show that he could not pay the decretal amount in one lump sum. It is therefore said that the principal was solvent. But the solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under Order 20, Rule 11 (1). Assuming that apart from Order 20, R. 11 (1) the Court had the inherent power under Section 151 to direct postponement of execution of the decree, the ends of justice did not require such postponement.

7. In the result, the appeal is allowed, the direction of the courts below that the "plaintiff-bank shall be at liberty to enforce its dues in question against defendant No. 2 only after having exhausted its remedies against defendant No. 1" is set aside. The respondent Dr. Paras Nath Sinha shall pay to the appellant costs in this Court and in the High Court.

GMJ/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 299
(V 56 C 58)

(From: Mysore)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The Commissioner of Income-tax, Bangalore (In all the Appeals), Appellant v. The Union Tile Exporters, Bangalore (In all the Appeals), Respondent.

Civil Appeals Nos. 1769 to 1771 of 1967, D/- 10-9-1968.

Income-tax Act (1922), Ss. 4 (1) (a) and 42 (3) — Part B States (Taxation Concessions) Order (1950), Paragraphs 4 (1) (iii), 6, 6-A and 7 — Assessee a firm in Bangalore appointed as sole agent for Ceylon by a tile manufacturing Company of Feroke in taxable territory — Agreement with purchaser at Colombo entered into in Bangalore — Lading bills obtained at Beypore (in taxable territory) and handed over to a Bank in Bangalore — Payments made to assessee by that Bank — Held, since profits were received in Part B State, it could not be said that entire profit accrued or arose within meaning of S. 4 (1) (a) in taxable territories other than Part B State — Business operations were carried out at three different places i.e., Bangalore, Feroke and Ceylon — Assessee was entitled to concession under Order (1950) for profits attributed towards business operations conducted in Bangalore and Ceylon — Apportionment of profits of business was called for pursuant to assessee's trading profit.

The assessee, a firm carrying on business in Bangalore in Mysore State was appointed as the sole selling agent for Ceylon for the purpose of marketing, selling or distributing tiles manufactured by a Company of Feroke. According to an agreement between the parties all prices quoted by the manufacturer were to be F. O. B., Beypore Port and for loading into country crafts; the right to charter or engage vessels was to be with agents. Beypore was in the taxable territory as also Feroke where the tiles manufacturers carried on their business. One of the employees of the assessee stayed at Calicut during the season to supervise the operation of delivery of articles. The bills of lading were obtained by the assessee's representative at Beypore and sent to Bangalore where the hundies together

* (I. T. R. C. Nos. 6 of 1959 and 3 of 1960, D/- 17-12-1963 — Mys.).

with the invoices and shipping documents were handed over by the assessee to the Indian Overseas Bank Ltd., Bangalore. Pursuant to the letter of credit opened by the purchaser at Colombo, payments were made by the aforesaid bank to the assessee. The assessee claimed that since its registered office was in Bangalore and as the agency agreement with the purchaser at Colombo was entered into in Bangalore, the entire income should be treated as income accruing or arising in Part B State and concessions regarding rates and allowances as provided in Part B States (Taxation Concessions) Order, 1950 should be allowed. On a reference under S. 66 (1) of the Act High Court was of the view that since the profits were received in Part B State, namely, Bangalore, it could not be said that the entire profit accrued or arose within the meaning of S. 4 (1) (a) of the Act in the taxable territories other than Part B State and after considering the provisions of S. 42 (3) it answered the questions as follows: —

(1) The profits of the assessee in respect of sales effected by it to the purchaser at Colombo did not entirely arise in Bangalore (then a Part B State) but it arose in Bangalore, Feroke and Ceylon.

(2) The assessee was entitled to the concession under the Part B State (Taxation Concessions) Order (1950) in respect of profits that could be attributed towards business operations conducted in Bangalore and Ceylon.

(3) Apportionment of profits of business was called for pursuant to the assessee's trading profits.

Held that the making of contracts pursuant to which all subsequent activity in respect of the execution of those contracts took place resulting in profits to the assessee, was an integral part of the entire selling operations and therefore there could be no escape from the conclusion at which the High Court arrived. I. T. R. C. Nos. 6 of 1959 and 3 of 1960, D/- 17-12-1963 (Mys. H. C.), Affirmed.

(Paras 4, 7)

Mr. C. K. Daphtary, Attorney General for India and Dr. V. A. Seyid Muhammad, Senior Advocate, (M/s R. N. Sachthy and B. D. Sharma, Advocates, with them) for Appellant (In all the Appeals); Mr. S. T. Desai, Senior Advocate, (Miss Bhuvnesh Kumari, Advocate, and Mr. Ravinder Narain, Advocate of M/s. J. B. Dadachanji and Co., with him), for Respondent (In all the Appeals).

The following Judgment of the Court was delivered by

GROVER, J.: These appeals are by certificate from the common judgment of the Mysore High Court on the following questions of law which were referred by the Income-tax Appellate Tribunal under S. 66 (1) of the Income-tax Act, 1922, hereinafter called the Act.

"(1) Whether, on the facts and circumstances of the case, the income of the assessee did not arise in Bangalore (Mysore State) in respect of sales effected by the assessee to the Burma Teak Trading Co. Ltd., Colombo?"

(2) If the answer to the above question is in favour of the assessee, then whether, on the facts and circumstances of the case, the assessee is entitled to the concession under Part B States (Taxation Concessions) Order, 1950? and

(3) Whether, on the facts and circumstances of the case, the apportionment of profits of business is called for pursuant to assessee's trading activities in Bangalore (Mysore State)?"

2. The assessee is a firm carrying on business in Bangalore in Mysore State. It was appointed as the sole selling agent for Ceylon except Jaffna Peninsula and the town of Trincomalee for the purpose of marketing, selling or distributing Lotus Brand tiles and ridges manufactured by M/s. Modern Tile and Clay Works of Feroke.

3. According to an agreement dated August 10, 1949 between the parties all prices quoted by the manufacturer were to be F. O. B. Beypore Port and for loading into country crafts; the right to charter or engage vessels was to be with the agents. Beypore is in the taxable territory as also Feroke where the tiles manufacturers carried on their business. One of the employees of the assessee stayed at Calicut during the season to supervise the operation of delivery of articles and to engage vessels. The bills of lading were obtained by the assessee's representative at Beypore and sent to Bangalore where the hundis together with the invoices and shipping documents were handed over by the assessee to the Indian Overseas Bank Ltd., Bangalore Pursuant to the letter of credit opened by the Burma Teak Trading Co., Ltd., Colombo, which was the purchaser, payments were made by the aforesaid bank to the assessee. It is unnecessary to state the details about the profits which the assessee made during the relevant assessment years

1951-52, 1952-53 and 1953-54. The assessee claimed that since its registered office was in Bangalore and as the agency agreement with the purchaser at Colombo was entered into in Bangalore the entire income should be treated as income accruing or arising in Part B State and concession regarding rates and allowances as provided in Part B States (Taxation Concessions) Order, 1950, hereinafter called the "Order", should be allowed to it. The income-tax authorities as also the Appellate Tribunal decided against the assessee. It was held that hardly any activity took place at Bangalore in the matter of earning the profits from the transactions in question.

4. The High Court was of the view that since the profits were received in Part B State, namely, Bangalore, it could not be said that the entire profit accrued or arose within the meaning of Cl. (a) of sub-s. (1) of S. 4 of the Act in the taxable territories other than Part B State. After referring to S. 42 (3) of the Act and certain decisions of this court it was observed that the business operations which produced profits were carried out at three different places i.e. Bangalore, Feroke and Ceylon. Therefore the portion of these profits must be held to have accrued in all these places. The only profits which could be deemed to have accrued in the taxable territories other than Part B State were those that could be said to have accrued at Feroke. The profits that could be attributed to the business operations at Bangalore could not be deemed to have accrued in the taxable territories other than the Part B State nor could it be said that the profits that had accrued at Ceylon could be deemed to have accrued in the taxable territories other than Part B State. The answers which were returned to the questions were as follows:—

"(1) The profits of the assessee in respect of sales effected by it to Burma Teak Trading Co., Colombo did not entirely arise in Bangalore (then a Part B State), it arose in Bangalore, Feroke and Ceylon.

(2) The assessee was entitled to the concession under the Order in respect of the profits that could be attributed towards business operations conducted in Bangalore and Ceylon.

(3) Apportionment of profits of business was called for pursuant to the assessee's trading profits."

5. The sole point which has been raised before us by the learned Attorney

General who appears for the appellant is that hardly any activity took place of such a nature as could be said to give rise to accrual of profits in Bangalore. It is pointed out that admittedly the manufacturing concern from where the tiles had to be sent to Colombo was in Feroke in British India and that the goods were also delivered F. O. B., Beypore which was in British India. The assessee's agent resided in British India and supervised all the operations there.

6. Our attention has been invited to the findings of the tribunal which inter alia were that the assessee purchased the goods at places outside Bangalore and the sales were also effected in Ceylon; the assessee continued to retain its title to the goods till they were delivered to the Ceylonese buyers on their accepting the documents and bills of exchange forwarded through the Bank in that country. The sale operations were carried out in Ceylon and the profits attributable to those transactions accrued and arose only in Ceylon which was outside the taxable territories. The essential question, according to the learned Attorney General is, whether any part of income accrued or arose at Bangalore. According to the learned counsel for the respondent it was clear that the profits accrued at Bangalore where the assessee's registered office was situate and where the contracts were entered into by the assessee for the sale and purchase of the goods and where monies were received. At any rate the profit producing operations could not be said to have been confined only to places in the taxable territories because without the contracts no further steps could be taken in carrying out the transactions and the contracts indisputably were entered into at Bangalore. It is urged that the assessee's business activity came within the scope and ambit of paragraph 4 (1) (iii) of the Order and therefore it was entitled to the concessions provided in paragraphs 6, 6-A and 7 of that Order. Section 42 (3) of the Act lays down that when profits accrue or arise from a business all the operations of which are not carried out within taxable territories those profits must be deemed to have accrued or arisen in several places where the business operations were carried out and the total profits earned will have to be apportioned on reasonable basis amongst the several operations and tax should be levied only on that portion of the profits which

are deemed to have accrued or arisen within the taxable territories.

7. If it be held, as indeed it must be held, that the making of contracts pursuant to which all the subsequent activity in respect of the execution of those contracts took place resulting in profits to the assessee, is an integral part of the entire selling operations, there can be no escape from the conclusion at which the High Court arrived. The appeals consequently fail and they are dismissed with costs, (one hearing fee)

LGC/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 302 (V 56 C 59)

(From Orissa AIR 1968 Orissa 84)

J. C SHAH AND V. BHARGAVA. JJ.

Abdul Rahiman Khan, Appellant v. Sadasiva Tripathi, Respondent.

Civil Appeal No. 1723 of 1967, D/- 15-7-1968

(A) Representation of the People Act (1951), S. 9-A, Explanation — Applicability — Contract not fully performed by Contractor — No evidence to show termination of contract by mutual consent — Explanation does not apply.

The explanation to S. 9-A contemplates a case where the contract has been fully performed by the Contractor: but not by the Government. But where the contract has not been wholly performed or completed by the contractor, unless the contractor shows that the contract had been determined by mutual consent, he cannot claim that there was no subsisting contract at the date of the filing of the nomination paper. Such a case does not fall within the explanation to S. 9-A.

(Para 9)

(B) Representation of the People Act (1951), Ss. 9-A and 7(d) — Disqualification for membership to State Legislature — Contract by acceptance of tender by State Government not complying with Art. 299 (1) of Constitution — Contract treated as binding subsisting contract by parties — Person entering into contract incurs disqualification — (Constitution of India (1950), Arts. 191 and 299).

A contract resulting from the acceptance of a tender by the State Government, though not enforceable by a suit against the State Government by reason of its not having been executed in the manner pre-

scribed by Art. 299 (1) of the Constitution must still be regarded as disqualifying the person entering into contract from standing as a candidate for election to the State Legislature under the Representation of the People Act. If the contract is treated by both the parties as binding subsisting contract it will operate as disqualification. AIR 1954 SC 236 & AIR 1966 SC 580, Foll. (Paras 10, 12)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 580 (V 53) =

(1966) 2 SCR 63, Laliteshwar

Prasad Sahi v. Bateshwar Prasad 10

(1954) AIR 1954 SC 236 (V 41) =

1954 SCR 817, Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram 10

Mr. D. Goburdhun, Advocate, for Appellant; Mr. C. B. Agarwala, Senior Advocate, (Miss Uma Mehta, Mr. S. K. Bagga and Mrs. S. Bagga, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.: At the last general elections, the respondent was declared elected to the Legislative Assembly of Orissa from the Nowrangpur General Constituency. The appellant filed an election petition before the High Court of Orissa for an order setting aside the election of the respondent, on the ground that the appellant's nomination paper was improperly rejected and he was illegally deprived of his right to contest the election. The High Court rejected the petition. The appellant has appealed to this Court under S. 116-A of the Representation of the People Act, 1951.

2. It is common ground that the appellant was carrying on the business of a building contractor and that in pursuance of a notification issued by the Government of Orissa he had submitted tenders for construction of buildings of the Rental Housing Scheme at the rates specified therein. Those tenders were accepted and the appellant had carried out a part of the construction work but had thereafter stopped the work because he suffered serious injuries which necessitated his detention in a public hospital. The appellant claimed that at his request the contract was cancelled, and on that account at the date of the filing of his nomination there was, between him and the State of Orissa no subsisting contract for execution of works undertaken by him, and that in any event there was in law

no contract between him and the State relating to the execution of works which disqualified him from standing at the election as a candidate for a seat in the State Legislative Assembly.

3. In January 1965 tenders were invited by the Government of Orissa for construction of buildings under the Rental Housing Scheme. The tenders submitted by the appellant were accepted and on March 30, 1965, the appellant and the Executive Engineer signed an agreement in Form K-2. The principal recitals in the agreements were:

"I do hereby tender to execute the undermentioned description of work by piece work, and in accordance with the conditions noted before in consideration of payment being made for the quantity of work executed at rate specified in the following scheme."

A schedule of items was appended thereto which was followed by the recital:

"Conditions as per F-2 contract which will be finalised."

4. The Executive Engineer then made an endorsement on the tenders. "Accepted by me for item 5 only", and submitted them to the Superintending Engineer for approval of "excess items". Apparently sanction was given by the Superintending Engineer but no formal contracts in Form F-2 were executed. Advance payments were however made to the appellant after execution of the agreements in Form K-2 and the appellant proceeded with the work of construction. On October 13, 1965, the appellant suffered serious injuries which necessitated his admission to a public Hospital and the construction work was stopped. On January 6, 1966, the Sub-Divisional Officer, P. W. D., Nowrangpur, addressed a letter to the appellant calling upon him to resume work on or about the January 12, 1960, failing which, he was informed, his contract will be terminated and "measurements will be recorded". On February 10, 1966, the appellant addressed a letter to the Executive Engineer P. W. D. stating that it was not possible for him to resume the work and to complete it, and he requested that the contract be cancelled without imposition of penalty. On the letter of the appellant there are two endorsements at the foot of the letter which have been marked Ext. 2 (a) and Ext. 2 (b). Exhibit 2 (a) reads:

"Submitted to the Executive Engineer, Koraput Division. The reason for terminating the contract, as mentioned by

Shri A. R. Khan, contractor, is correct. His contract may be terminated without imposing penalty and permission given to take up work through job work soon." Exhibit 2 (b) dated March 18, 1966, bears the initials of the Executive Engineer, and states:

"I know of the unfortunate accident. As the applicant is still in the Vizag Hospital his work may be finally measured and closed without penalty. The balance of the work may be completed through job work."

5. The Sub-Divisional Officer, Nowrangpur, wrote a letter on March 16, 1955, requesting one Harihar Bisoi pursuant to his application dated March 5, 1966, to take up the Rental Housing Schedule building work at Nowrangpur "immediately at current schedule of rates after taking detailed instructions from the Sectional Officer, Nowrangpur". It appears that Harihar Bisoi did some construction work, but no payment was made to him and he also stopped the work.

6. The appellant strongly relies upon the endorsements made on the letter dated February 10, 1966, the letter Ext. 3, and the evidence of Ram Mohan Patnaik — the Executive Engineer. Ram Mohan Patnaik stated that he by his endorsement Ext. 2 (b) on the application dated February 10, 1966, had clearly directed that the work of the contractor (appellant) would be finally measured and his contract would be treated as closed and no penalty would be charged from him; that the question of accounting had nothing to do with the closing of the contract; and that on March 18, 1966, he had passed an order Ext. 2 (b) that the contract was closed. According to the witness closure of the contract was not contingent upon the measurement of the work done by the appellant, and that by his order dated March 18, 1966 Ext. 2 (b) the appellant was excused from liability to complete the work, as the contract was rescinded and by implication Ext. 2 (b) meant that the Sub-Divisional Officer would give intimation to the contractor about the cancellation of his contract. The witness could not say whether the Sub-Divisional Officer did give intimation to the contractor. He asserted that it was not his intention that job work should be entrusted to job workers only after the final bill of the appellant was submitted; his clear intention was that after measurement was taken, the work may be entrusted to job

workers. According to the witness by Ext. 2 (b) he accepted the incomplete work of the appellant "as a complete satisfaction of his contract."

7. This evidence prima facie supports the case of the appellant that it was the intention of the Executive Engineer to terminate the contract. But there is a mass of evidence on the record which shows that no steps were taken to intimate to the appellant about the determination of the contracts and both the parties treated the contract as subsisting. To that evidence we may advert. On April 15, 1966, the appellant wrote a letter in reply to a letter dated April 13, 1966 from the Sub-Divisional Officer that he "had completed upto slab level the construction of Rental Housing Scheme" and that thereafter he was lying injured in a hospital and that as he had no authorised agents to look after further work, early action may be taken to make final measurement upto slab level and for payment of the amount due to him. On December 20, 1966, the appellant wrote a letter to the Superintending Engineer stating that he had recovered and was in a position to leave the Hospital and to attend to his normal avocation and that he had learnt that the Department wanted to cancel his contract and call for new tenders and had taken some action towards that end. He requested the Superintending Engineer to desist from such a course and to favourably consider his request for extension of time to complete the work. He stated that he had advanced large sums of money to the labourers and for the supply of materials, and there were large quantities of building materials belonging to him which had been lying at the site of the work and if his contracts "were to be cancelled he would sustain irreparable loss"; that he had always been a very efficient and good contractor and was executing the works in time and diligently and well; and that he could not complete the work due to the unfortunate accident. He then stated:

"I, therefore, request you to kindly grant me time upto end of March 1967 and I shall resume the work by about 15th January 1967 and will finish it by 31st March, 1967.

The cancellation of my contract at this stage when nearly 75% of the work was already done by me and the roofing alone remains to be completed and the stoppage of the work was due to circumstances

over which I had no control due to more or less vis major will be most inequitable if not unjust. I, therefore, earnestly appeal to you to sympathetically consider this representation of mine and grant me time till end of March 1967 and order withdrawal or cancellation of the fresh tenders that might have been called for by the Executive Engineer Koraput."

At the foot of the letter there is a notation that tenders had been called for the balance of the work "as per instructions of the Executive Engineer Koraput, and that the contract may be rescinded as instructed by the Executive Engineer, Koraput." There is another notation: "It is an old case wherein Executive Engineer has already ordered to close the contract and do by job (illegible) order its without penalty (illegible)." There is one more notation dated January 4, 1967 — "Submitted for favour of orders. What penalty is to be imposed in rescinding the contract." Exhibit 13 is a letter dated January 22, 1967, from the Assistant Engineer P. W. D. Nowrangpur to the Returning Officer which sets out the circumstances in which the work entrusted to the appellant was stopped. The letter states that "the balance work which was suggested to take up on job-work basis would not affect the accounts of Sri A. R. Khan for his work portion. The final bills for his above two works of the aforesaid contractor have been submitted to Division Office, vide this office letter Nos. 120 and 121 dated 18-1-67 and I have been intimated vide Divisional Letter No. 902 dated 20-1-67 that the said contractor has to return 435 bags of cement and 7,954 quintals of rods to the undersigned to finalise his accounts. But no material has been returned by the contractor yet and as such it ensures that his accounts have not yet been finalised." Exhibit 14 is a letter dated January 22, 1967 addressed to the appellant which also indicates that the P. W. D. authorities had not treated the contract as cancelled and had not intimated to him the order made by the Executive Engineer.

8. In February 1966 the appellant requested cancellation of the contract. The Executive Engineer was willing to accept the offer of cancellation and made an endorsement in that behalf, but nothing was done thereafter. Harihar Bisoi was apparently asked to take up the work "at the current schedule of rates", but even thereafter the contract with the appellant was not treated as cancelled.

9. It is true that by virtue of the Explanation to S. 9-A of the Representation of the People Act, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact, that the Government has not performed its part of the contract either wholly or in part. In the present case the contract was not wholly performed by the appellant, and unless he had completed the contract or showed that there was determination by mutual assent of the contract, the appellant cannot claim that there was no subsisting contract at the date of the filing of the nomination paper. By letter written by the appellant on July 22, 1966, Ext. C, the appellant made a request for extension of time by six months to enable him to complete the work and by his letter Ext. D dated December 20, 1966 he requested the Superintending Engineer not to cancel the contract or call for new tenders. This conduct of the appellant clearly suggests that he did not treat the contract as cancelled, nor is there any clear evidence to show that the authorities had treated the contract as cancelled. The High Court was, therefore, right in holding that the case did not fall within the explanation to S. 9-A of the Representation of the People Act and there was no evidence of determination of the contract by mutual agreement.

10. Counsel for the appellant contended that the contract for execution of works was between the State and the appellant and Art. 299 of the Constitution applied thereto, and since the contract was not shown to be executed in the name of the Governor, and by an authority competent to execute the contract on behalf of the Governor, the disqualification under S. 9-A did not apply. By Cl. (1) of Article 299 all contracts made in the exercise of the executive power of the State must be expressed to be made by the Governor of the State, and all such contracts made in the exercise of that power must be executed on behalf of the Governor by such persons and in such manner as he may direct or authorise. It is true that agreements were executed by the Executive Engineer in Form K-2 but no final contracts were executed in Form F-2. The appellant proceeded on the footing that there was a binding contract under which he had undertaken the work of construction for the State, and the State allowed

work and had offered to pay him for the work done at the rates set out in Form K-2. The appellant could not by virtue of Art. 299 sue in a civil court on the agreement in Form K-2 for compensation for breach of contract. But we are unable to hold that the appellant was not disqualified under S. 9-A of the Representation of the People Act merely because the contracts were not enforceable against the State because of Art. 299 (1) of the Constitution. In *Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram*, 1954 SCR 817 = (AIR 1954 SC 236) Bose J., in dealing with a case of disqualification under the Representation of the People Act 1951, resulting from a contract with the State which is not executed in the form and manner prescribed by Art. 299, observed:

"It may be that Government will not be bound by the contract in that case, but that is a very different thing from saying that the contracts as such are void and of no effect. It only means that the principal cannot be sued; but we take it there would be nothing to prevent ratification, especially if that was for the benefit of Government. * * * We accordingly hold that the contracts in question here are not void simply because the Union Government could not have been sued on them by reason of Article 299 (1)."

Undoubtedly for breach of the terms of a contract not executed in the manner prescribed by Article 299 (1) a suit for relief in a civil court will not lie, but on that account it cannot be said that a contract for execution of works undertaken by a person though not executed in manner prescribed by Article 299, but which is treated by both the parties thereto as binding will not operate as a disqualification. In a recent judgment of this Court in *Laliteshwar Prasad Sahi v. Bateshwar Prasad*, (1966) 2 SCR 63 = (AIR 1966 SC 580), this Court held that where an agreement for execution of work had been entered into between the State Government and a private person by correspondence and the State Government has ratified the agreement and has treated the relation between the parties as contractual and has accepted liability arising under the terms of the agreement as if it were a pending contract, a disqualification under the relevant provisions of the Representation of the People Act results.

11. As already pointed out, the appellant had commenced execution of the work but had not completed it. Payment for the work done was not made to the appellant. The contract was not determined by mutual agreement nor was it abandoned.

12. The contract resulting from the acceptance of his tender though not enforceable by suit against the State Government, because it did not comply with Article 299, must still be regarded as disqualifying the appellant under the Representation of the People Act from standing as a candidate for election to the State Legislature.

13. The appeal therefore fails and is dismissed with costs.

KSB

Appeal dismissed.

AIR 1969 SUPREME COURT 308
(V 56 C 60)

(From: Industrial Tribunal, Bihar)*

**J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.**

**Indian Oxygen Ltd., Appellant v.
Their Workmen, Respondents.**

Civil Appeal No. 560 of 1966, D/-
5-8-1968.

(A) Industrial Disputes Act (1947), Section 10 (2) — Trade Unions Act (1926), Sections 6 (g), 28 (3), 29 and 30 (3) — Central Trade Union Regulations (1939), Regulation 9 — Dispute regarding workmen of one factory of Company represented by their Union, and the Company referred to Tribunal — Workmen represented by their registered Union whose membership was confined to workmen of that particular factory — Constitution of Union alleged to have been amended and name changed, before reference — Amendment making workmen of all the establishments in Bihar of the Company eligible for its membership — Amendment not effected according to provisions of Trade Unions Act — Effect of award does not extend to workmen of other factories. Ref. No. 32 of 1963, D/- 28-9-1964 (Ind. Tri. Bihar), Reversed.

The notification referring the dispute to the Industrial Tribunal stated that "an industrial dispute exists or is apprehended between the management of

*Reference No 32 of 1963, D/- 28-9-1964—Ind. Tri., Bihar.)

Indian Oxygen Ltd, Jamshedpur-7, and their workmen represented by Indoxco Labour Union, Jamshedpur, regarding the matters specified in their joint application" according to which the dispute concerned the 352 workmen employed in the Company's factory at Jamshedpur, who were represented by Indoxco Labour Union. Reference was made in October 1963. But before this date the Constitution of Indoxco Labour Union was amended as from January 6, 1963, changing the name of the Union to Indian Oxygen Workers Union and making the workmen of all the establishments of the Company in Bihar eligible for its membership. The tribunal took the view that since the amendment was made before the reference the mention in it of the dispute as a dispute between the company and Indoxco Labour Union did not materially affect the position that the dispute raised by the union was in respect of the employees of the company wherever they might be stationed. Accordingly it held that the effect of the award could not be restricted to the workmen at Jamshedpur:

Held that the Tribunal was in error in so holding and that in making the award operative to workmen at Company's establishments at places other than Jamshedpur, the Tribunal acted without jurisdiction. Even assuming that the Indoxco Labour Union validly amended its constitution so as to extend its membership to the company's other workmen in its other establishments, inasmuch as the disputes referred to the Tribunal were only those set out in the said agreement and the said statement, any award made by the Tribunal in respect of those disputes must necessarily be confined to the disputes referred to it, the parties to those disputes and the parties who had agreed to refer those disputes for adjudication. There was nothing to show in the notification that other workmen of the company had raised similar demands or that there were any disputes existing or apprehended which were included in that reference. (Paras 6, 7, 8)

Held further that the combined effect of Ss. 6 (g), 28 (3), 29 and 30 (3), Trade Unions Act and Regulation 9 of Central Trade Unions Regulation, 1939, is that registered union can alter its rules only in the manner provided in these provisions, that is, it has to send the amended rules to the Registrar within 15 days

from the amendment and until the Registrar is satisfied that the amendments are in accordance with the rules of the union and on such satisfaction registers them in a register kept for that purpose and notifies that fact to the union's secretary, the amendments do not become effective. The union did not produce any evidence to show that the amendments purported to have been carried out by the said resolution dated January 6, 1963 were sent to the Registrar as provided in the aforesaid provisions, nor did it produce any communication of the Registrar notifying the fact of his having registered the said amendments. The Tribunal's conclusion, therefore, that the union's constitution was duly amended on either January 6, or 21, 1963 or that, therefore, the Indian Oxygen Workers Union represented the workmen of the company's factory at Jamshedpur and that consequently it made no difference that the name of Indoxco Labour Union as representing the workmen concerned was mentioned in the said agreement and the said statements of the parties and not that of the Indian Oxygen Workers Union, was erroneous and could not be sustained. AIR 1960 SC 777 and AIR 1960 SC 1012, Distinguished.; Ref. No. 32 of 1963, D/- 28-9-1964 (Ind. Tri. Bihar), Reversed.

(Para 11)

(B) Industrial Disputes Act (1947), Section 2 (rr), Sch. 3, Item 1 — Factory declared an establishment under Bihar Shops and Establishments Act — Overtime payment to workmen — Bihar Shops and Establishments Act has no relevance in deciding the question of payment of overtime wages — Factories Act (1948), Section 59 — Minimum Wages Act (1948), Section 14 — Bihar Shops and Establishments Act (8 of 1954), Sections 9, 21.

Where under the conditions of service of the Company the total hours of work, in their factory are 39 hours, any workman asked to work beyond these hours would obviously be working overtime and the company in fairness would be expected to pay him compensation for such overtime work. The Bihar Shops and Establishments Act under which the factory is declared as an establishment, has no relevance to this question as that Act fixes the maximum number of hours of work allowable thereunder, i. e., 48 hours a week, and provides for double the rate of ordinary wages for work done

over and above 48 hours. It is not, therefore, as if the provisions of that Act govern overtime payment payable by an employer where maximum hours of work are governed by the conditions of service prevailing in the establishment. Therefore, no reliance can be placed on the provisions of that Act for the company's contention that it cannot be called upon to pay for overtime work anything more than its ordinary rate of wages if the workmen do work beyond 39 hours but not exceeding 48 hours a week. It is obvious that if the company were asked to pay at the rate equivalent to the ordinary rate of wages for work done beyond 39 hours but not exceeding 48 hours work a week, it would be paying no extra compensation at all for the work done beyond the agreed hours of work. The company would in that case be indirectly increasing the hours of work and consequently altering its conditions of service. (Para 13)

If after taking into consideration the fact of the comparatively higher scale of wages prevailing in the company, the Tribunal fixed the rate for overtime work at $1\frac{1}{4}$ times the ordinary rate of wages, when in other concerns overtime payment is at $1\frac{1}{2}$ times the ordinary wages, it was impossible to say that the Tribunal erred in doing so or acted unjustly. Ref. No. 32 of 1963, D/- 28-9-1964 (Ind. Tri.—Bihar), Affirmed.

(Para 14)

(C) Industrial Disputes Act (1947), Sch. 3, Item 4 — Trade Unions Act (1926) (as amended by Act 45 of 1947), S. 28-K — Special leave with pay to workmen who are union's representative to attend meeting of executive body of Union and federation of I. N. T. U. C. — Demand held not justified. Ref. No. 32 of 1963, D/- 28-9-1964 (Ind. Tri. Bihar), Reversed.

Where the Company has been allowing those of its workmen who are the Union's representatives to attend without loss of pay proceedings before Conciliation Officers and Industrial tribunals and the types of leave enjoyed by the workmen are not only fair but also liberal, the demand of the workmen to special leave with pay to attend the meetings of the executive committee of the union, the meetings of the federation and the conventions of the I. N. T. U. C. over and above the various types of leave available to them is unjustified, considering that such a demand would have adverse effect on the Company's production. A healthy growth of trade

union movement undoubtedly would lead to industrial peace and harmony and consequently to higher efficiency. But a demand of the type has to be considered from all aspects and its implications and results have to be properly examined. In considering such a demand, the first question which strikes one is as to why the meetings of the executive committee of the union cannot be held outside the hours of work. The meetings of the federation and the annual conventions of the I. N. T. U. C. too can be attended by the union's delegates by availing themselves of their earned leave. Industrial adjudication, cannot and should not ignore the claims of social justice, a concept based on socio-economic equality, and which endeavours to resolve conflicting claims of employers and employees by finding not a one-sided but a fair and just solution. A demand for special leave has, however, nothing to do with any disparities or inequalities, social or economic. On the other hand, too much absenteeism harms both the employers and the employees inasmuch as it saps industrial economy. Ref. No. 32 of 1963, D/- 28-9-1964 (I. T.—Bihar), Reversed.

(Paras 15, 18)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 737 (V 51) =
(1964) 3 SCR 724, J. K. Cotton
Spinning and Weaving Mills v.
Badri Mali 18

(1960) AIR 1960 SC 777 (V 47) =
(1960) 3 SCR 157, Associated
Cement Companies Ltd. v. Their
Workmen 11

(1960) AIR 1960 SC 1012 (V 47) =
(1960) 3 SCR 963 = 1960 Cri
LJ 1384, Ramnagar Cane and
Sugar Co. Ltd. v. Jatin Chakravorty 11

Mr. A. C. Mitra, Senior Advocate, (Mr.
D. N. Gupta, Advocate, with him), for
Appellant; M/s. O. P. Sharma and V. C.
Parashar, Advocates, for Respondents.

The following Judgment of the Court
was delivered by

SHELAT, J.: This appeal, by special
leave, is against the award dated September 23, 1964 of the Industrial Tribunal,
Patna.

2. The appellant company is an all
India complex having establishments in
different parts of the country. In Bihar
alone, it has two factories, one at Jamshedpur and the other at Ranchi, and has
depots at Patna and other towns. The

factory at Jamshedpur is an establishment under the Bihar Shops and Establishments Act.

3. Certain disputes having arisen between the appellant company and its workmen employed in the factory at Jamshedpur, the company and the said workmen represented by their union called the Indoxco Labour Union, Jamshedpur, made a joint application dated September 7, 1963 to the Government of Bihar for a reference under Sec. 10 (2) of the Industrial Disputes Act, 1947. By a notification dated October 23, 1963, the Government referred five disputes to the Tribunal for adjudication. We are concerned in this appeal with only two disputes arising from demands Nos. 3 and 5. These demands were,

No. 3.—“The payment of overtime to office staff should be 1½ times the ordinary rate beyond their normal duty hours.”

No. 5.—“Union representatives should be allowed special leave to attend to law courts for matters connected with the workers and the management, to attend to annual conventions of their federation, to attend to Executive Committee meeting of the union-federation and convention of central organisation i. e. INTUC.” As required by Rule 3 of the Industrial Disputes (Bihar) Rules, 1961, the statement accompanying the said application signed by the District Manager on behalf of the company and the General Secretary of the said union representing the said workmen contained inter alia the following information, namely,

(c) Number of workmen employed in the undertaking affected—352

(d) Estimated number of workmen affected or likely to be affected by the dispute—352.”

It is quite clear from the said application and the statement signed by the parties, (1) that the said disputes concerned the 352 workmen employed in the company's factory at Jamshedpur and (2) that these 352 workmen were represented by the Indoxco Labour Union.

4. The said notification also stated “Whereas the Governor of Bihar is of opinion that an industrial dispute exists or is apprehended between the management of Indian Oxygen Limited, Jamshedpur-7 and their workmen represented by Indoxco Labour Union, Jamshedpur, regarding the matters specified in their joint applications dated 7-9-1963 annexed hereto.....Now, therefore, in

exercise of powers conferred by sub-section (2) of Section 10 of the Industrial Disputes Act, 1947 (XIV of 1947), the Governor of Bihar is pleased to refer the said dispute....." The notification thus makes it clear that the disputes referred to the Tribunal were disputes set out in the said agreement and statement and were between the management of the appellant company's factory at Jamshedpur and their workmen represented by the Indoxco Labour Union.

5. It appears, however, that the union at its general meeting held on January 6, 1963, purported to amend its constitution by a resolution passed thereat by changing the name of the union to Indian Oxygen Workers Union and making the workmen of all the establishments of the appellant company in Bihar eligible for its membership. Exhibit C is the copy of a letter dated January 21, 1963 by which the Secretary of the said union informed the District Manager of the appellant company at Jamshedpur of the said purported amendment. The Tribunal appears to be of the view that the constitution of the said Indoxco Labour Union came to be amended as from Jan. 6, 1963 and that as the said reference was made in October 1963, i. e., after the said purported amendment, "the mention in it of the dispute as a dispute between the company and Indoxco Labour Union does not materially affect the position that the dispute raised by the union is in respect of the employees of the company wherever they may be stationed. Consequently, the award in this case shall be effective in respect of all of them and cannot be restricted to the workmen working at Jamshedpur". So far as the workmen's demands Nos. 3 and 5 were concerned, the Tribunal after observing that the company's wage scales were satisfactory, compared the rates of overtime paid by other industrial concerns in Jamshedpur and awarded 1½ times the ordinary wages for overtime work exceeding 39 hours but not exceeding 48 hours per week. If the overtime exceeded 48 hours per week, 48 hours of work being the maximum provided by the Bihar Shops and Establishments Act, the company would be liable to pay at double the ordinary rate of wages as provided in that Act. Regarding demand No. 5 the union produced three letters addressed to its Secretary, (1) a letter by the General Secretary of the Tata Workers Union, (Ext. I) dated November 30,

1963, wherein it was stated that the officials of that union were granted special leave to attend the union's executive committee meetings, the meetings of their federation and the meetings of the I.N.T.U.C. if held at Jamshedpur; (2) a letter dated January 25, 1964 by the General Secretary of Golmuri Tinplate Workers Union, Jamshedpur, to the effect that members of the executive committee of that union were relieved from duty with pay to attend meetings of the executive committee or any other meetings called by the union except mass meetings and the union's delegates were also allowed special leave with pay to attend I. N. T. U. C. sessions; and (3) a letter dated December 7, 1963 by the secretary of Telco Workers Union, Jamshedpur, to the effect that members of the executive committee of that union and office bearers were allowed to attend union's meetings without loss of pay. The Tribunal noted that the appellant company had been allowing without loss of pay the representatives of the workmen to attend proceedings before conciliation officers and Industrial Tribunals. This concession, it considered, was sufficient and, therefore, rejected the demand for special leave with pay to attend the law courts. But it awarded that the union's representatives should be given special leave to attend (1) meetings of its executive committee, (2) meetings of the federation of the union, (3) the annual convention of that federation when held at Jamshedpur and (4) the convention of the I.N.T.U.C.

6. The first contention urged on behalf of the appellant company was that the Tribunal was in error in making its award operative not only to the said workmen at its Jamshedpur factory but also to workmen at its other establishments and that in doing so it acted beyond jurisdiction. In our view, this contention must be upheld.

7. In the first place, the agreement by which the parties agreed to refer the said disputes for adjudication was clearly between the management of the appellant company's factory at Jamshedpur and the workmen employed in that factory and represented by their said union, the Indoxco Labour Union. The statement accompanying that agreement clearly stated that the disputes agreed to be referred to were between the workmen of that factory and the management

of that factory. The notification referring those disputes to the Tribunal also made it clear that the disputes referred to were those set out in the said agreement and the statement and no other disputes and further that they were the disputes between the parties to that agreement. There was no evidence before the Tribunal that similar demands were raised by workmen engaged in the appellant company's other establishments. Even assuming that the Indoxco Labour Union validly amended its constitution so as to extend its membership to the company's other workmen in its other establishments, inasmuch as the disputes referred to the Tribunal were only those set out in the said agreement and the said statement, any award made by the Tribunal in respect of those disputes must necessarily be confined to the disputes referred to it, the parties to those disputes and the parties who had agreed to refer those disputes for adjudication.

8. Next, as to the claim of the Union that it had amended its constitution on January 6, 1963, and, therefore, as the workmen of the factory at Jamshedpur came henceforth to be represented by the Indian Oxygen Workers' Union which represented also workmen employed in the appellant company's other establishments, the reference extended to them also and the Tribunal's award would cover them also. We fail to see any connection between the purported amendment of the union's constitution and the reference made by the government on the basis of the said agreement and the said statement. These, as aforesaid, related to the disputes between the management and the workmen of the appellant company's factory at Jamshedpur who alone had made the aforesaid demands and disputes arising from those demands only were agreed to be referred to and were actually referred to the Tribunal by the said notification. There is nothing to show in that notification that other workmen of the company had raised similar demands or that there were any disputes existing or apprehended which were included in that reference.

9. The question next is whether the union's constitution was duly amended on January 6, 1963 as claimed by the union and held by the Tribunal. The constitution of the union prior to its purported amendment contained amongst other Articles, Articles 1 and 3. These Articles read as follows:

"Article No. 1. Name and Address:

1. This Union is a Trade Union Organization of wage earners of the Indian Oxygen and Acetylene Co. Ltd., Jamshedpur and shall be called Indoxco Labour Union.....

3. The situation of the Registered Office shall not be changed except by resolution of the General Body Meeting specially held for the purpose. Any change of the address of the Registered Office of the Union will be communicated to the Registrar of the Trade Unions within 14 days of such change."

Article XII of the said constitution deals with alteration of rules and Clause (c) thereof provides that copies of all new rules and amendments or revisions of rules shall be submitted to the Registrar within the prescribed period as required by Section 28 (3) of the Trade Unions Act, 1926. This rule had to be incorporated in the constitution in view of the express terms of that section.

10. Section 6 of the Trade Unions Act provides that a trade union would not be entitled to registration under the Act unless the executive thereof is constituted in accordance with the provisions of this Act, and the rules thereof provide amongst other things for its name and the manner in which the rules shall be amended, varied or rescinded. Section 28 (3) provides that a copy of every alteration made in the rules of a registered trade union shall be sent to the Registrar within fifteen days of the making of the alteration. Section 29 contains the power of the appropriate government to make regulations and sub-section 2 (a) provides that without prejudice to the generality of the power in sub-section (1) such regulations may provide inter alia for the manner in which trade unions and their rules shall be registered. Section 30 (3) lays down that regulations so made shall be published in the official gazette and on such publication shall have effect as if enacted in this Act. In pursuance of the power to make regulations the Central Government framed Central Trade Unions Regulations, 1938, regulation 9 whereof provided that on receiving a copy of an alteration made in the rules of a trade union under Section 28 (3), the Registrar shall register the alteration in the register maintained for this purpose and shall notify the fact that he has

done so to the secretary of the trade union.

11. The combined effect of Ss. 6 (g), 28 (3), 29 and 30 (3) and regulation 9 is that registered union can alter its rules only in the manner provided in these provisions, that is, it has to send the amended rules to the Registrar within 15 days from the amendment and until the Registrar is satisfied that the amendments are in accordance with the rules of the union and on such satisfaction registers them in a register kept for that purpose and notifies that fact to the union's secretary, the amendments do not become effective. The union did not produce any evidence to show that the amendments purported to have been carried out by the said resolution dated January 6, 1963 were sent to the Registrar as provided in the aforesaid provisions, nor did it produce any communication of the Registrar notifying the fact of his having registered the said amendments. The only evidence it produced was its letter dated May 21, 1964 to the appellant company which indicated that the Registrar notified to the union of his having registered the said amendments on May 13, 1964. The Tribunal's conclusion, therefore, that the union's constitution was duly amended on either January 6 or 21, 1963 or that, therefore, the Indian Oxygen Workers Union represented the workmen of the company's factory at Jamshedpur and that consequently it made no difference that the name of Indoxco Labour Union as representing the workmen concerned was mentioned in the said agreement and the said statement and not that of the Indian Oxygen Workers Union is erroneous and cannot be sustained. Any award, therefore, made by the Tribunal in these circumstances can operate only in respect of the workmen of the appellant company's factory at Jamshedpur and the Tribunal's extension of that award to workmen in the company's other establishments was clearly without jurisdiction. The decisions in *Associated Cement Companies Ltd. v. Their Workmen*, (1960) 3 SCR 157 = (AIR 1960 SC 777) and *Ramnagar Cane and Sugar Co. Ltd. v. Jatin Chakravorty*, (1960) 3 SCR 968 = (AIR 1960 SC 1012) on the effect and interpretation of Section 18 of the Industrial Disputes Act, relied on by counsel for the union are beside the point and do not assist him.

12. As regards the Tribunal's finding on demand No. 3, counsel for the company raised two contentions; (i) that the company's factory at Jamshedpur having been declared an establishment under the Bihar Shops and Establishments Act, it could be made liable to pay for overtime work at the rate provided in that Act, viz. at double the ordinary rate when a workman was asked to work beyond 48 hours per week as provided therein. Therefore, the argument ran, the appellant company could not be asked to pay more than its ordinary rate of wages payable to workmen if they were asked to work beyond 39 hours but not exceeding 48 hours. And (2) that the comparative statement (Ext. M) of overtime rates paid by other concerns in Jamshedpur before the Tribunal showed that if the company were made to pay 1¼ times its ordinary rate of wages it would, in the light of its higher scale of wages, be paying more than the other concerns.

13. In our judgment, both these contentions are unsustainable. Under the conditions of service of the company, the total hours of work per week are 39 hours. Any workman asked to work beyond these hours would obviously be working overtime and the company in fairness would be expected to pay him compensation for such overtime work. The Bihar Shops and Establishments Act has no relevance to this question as that Act fixes the maximum number of hours of work allowable thereunder, i.e. 48 hours a week, and provides for double the rate of ordinary wages for work done over and above 48 hours. It is not, therefore, as if the provisions of that Act govern overtime payment payable by an employer where maximum hours of work are governed by the conditions of service prevailing in his establishment. Therefore, no reliance can be placed on the provisions of that Act for the company's contention that it cannot be called upon to pay for overtime work anything more than its ordinary rate of wages if the workmen do work beyond 39 hours but not exceeding 48 hours a week. It is obvious that if the company were asked to pay at the rate equivalent to the ordinary rate of wages for work done beyond 39 hours but not exceeding 48 hours work a week, it would be paying no extra compensation at all for the work done beyond the agreed hours of work. The company would in that case be indirectly increasing the hours of work

and consequently altering its conditions of service.

14. Ext. M relied on by counsel, gives the overtime rate paid by six industrial concerns situate in Jamshedpur. Out of these six concerns, four pay overtime compensation at $1\frac{1}{2}$ times the ordinary wages and dearness allowance payable by them. If after taking into consideration the fact of the comparatively higher scale of wages prevailing in the appellant company, the Tribunal fixed the rate for overtime work at $1\frac{1}{4}$ times the ordinary rate of wages, it is impossible to say that the Tribunal erred in doing so or acted unjustly. The company's contention, therefore, as regards this demand must be rejected.

15. As regards demand No. 5, counsel for the company very seriously challenged that part of the award as unjustified and contended that an obligation to grant special leave to attend the meetings of the executive committee of the union, the meetings of the federation and the conventions of the I. N. T. U. C. over and above the various types of leave available to the company's workmen was tantamount to the company having practically to finance the administration and management of the union. He argued that imposing such an obligation on the company cannot be justified on the ground of social justice or promotion of trade unionism. Counsel for the union, on the other hand, sought to support this part of the award on the ground that such a demand was justified, as the Tribunal has observed, in the interest of a proper growth of trade union movement and the promotion of harmony in industrial relations inasmuch as if facilities are given to the workmen to conduct the administration of the union themselves, there would be less possibility of outside elements establishing their hold on the union.

16. We apprehend the argument does not take into consideration certain important aspects of the demand. As aforesaid, the appellant company has been allowing those of its workmen who are the union's representatives to attend without loss of pay proceedings before conciliation officers and industrial tribunals. This is fair because conciliation proceedings are likely to get thwarted if the workmen's representatives are not there to discuss the disputes and put forward their point of view before conciliation officers

and wherever possible to arrive at a settlement or compromise. Over and above this facility, the workmen get various types of paid leave. As the figures of such leave are not correctly stated in the award, we collected them from counsel on both sides. The following table shows the types of leave enjoyed by the workmen:

Factory Staff:	
Earned leave	21
Festival leave	10
Casual leave	7
Medical leave	15
	<hr/>
	53
Office Staff:	
Earned leave	21
Festival leave	17
Casual leave	7
Medical leave	15
	<hr/>
	60
General Staff:	
Earned leave	15
Festival leave	17
Casual leave	7
Medical leave	15
	<hr/>
	54

17. It is impossible to say that the leave granted by the company with full pay is not fair or even liberal. In conceding the demand of the union the Tribunal does not appear to have considered the adverse effect on the company's production if further absenteeism were to be allowed especially when the crying need of the country's economy is more and more production and employers are exhorted to streamline their management to achieve this objective and to bring down their cost in line with international cost. In awarding this demand the Tribunal also did not specify on how many occasions the executive committee meetings of the union and other meetings would be held when the company would be obliged to give special leave with pay to the union's representatives. Similarly, there is no knowing how many delegates the union would send to attend the conventions of the federation and the I. N. T. U. C. The Tribunal could not in the very nature of things specify or limit the number of such meetings for such an attempt would amount to interference in the administration of the union and its autonomy. Its order must of necessity,

therefore, have to be indefinite with the result that the appellant company would not know before hand on how many occasions and to how many of its workmen it would be called upon to grant special leave. Further, in case there are more than one union in the company's establishment, the representatives of all such unions would also have to be given such leave to attend the aforesaid meetings.

18. A healthy growth of trade union movement undoubtedly would lead to industrial peace and harmony and consequently to higher efficiency. But a demand of the type we have before us has to be considered from all aspects and its implications and results have to be properly examined. In considering such a demand, the first question which strikes one is as to why the meetings of the executive committee of the union cannot be held outside the hours of work. It was said that it may not be possible always to do so if an emergency arises. But emergencies are not of regular occurrence and if there be one, the representatives can certainly sacrifice one of their earned leave. There can obviously be no difficulty in so doing. The meetings of the federation and the annual conventions of the I.N.T.U.C. too can be attended by the union's delegates by availing themselves of their earned leave. Industrial adjudication, as observed in *J. K. Cotton and Spinning and Weaving Mills v. Badri Mali*, (1964) 3 SCR 724 = (AIR 1964 SC 737) cannot and should not ignore the claims of social justice, a concept based on socio-economic equality, and which endeavours to resolve conflicting claims of employers and employees by finding not a one-sided but a fair and just solution. A demand for special leave has, however, nothing to do with any disparities or inequalities, social or economic. On the other hand, too much absenteeism harms both the employers and the employees inasmuch as it saps industrial economy. In our view, the Tribunal, on the considerations aforesaid, was not justified in obliging the appellant company to grant special leave demanded by the union.

19. The result is that except for the overtime rate allowed by the Tribunal which we confirm, the rest of the appeal has to be allowed and the Tribunal's award set aside. We hold that the award is operative in respect of the workmen of the appellant company's factory at Jamshedpur and not the workmen of its other

establishments. The demand for special leave comprised in demand No. 5 is disallowed. There will be no order as to costs.

R.G.D.

Appeal partly allowed.

AIR 1969 SUPREME COURT 313 (V 56 C 61)

(From: AIR 1963 Madh. Pra. 132)
S. M. SIKRI, R. S. BACHAWAT,
K. S. HEGDE, JJ.

Bharat Nidhi Ltd., Appellant v. Takhatmal (dead) by his legal representatives and another, Respondents.

Civil Appeal No. 133 of 1965, D/- 7-8-1968.

Transfer of Property Act (1882), Ss. 130, 6 (e) — Bank holding power of attorney to collect bills due to executant towards Bank advances — Order for payment to bank endorsed on bill sent for collection — Held, it was an equitable assignment of specific fund and not a pay order and could not be attached under S. 60 C. P. C. — Civil P. C. (1908), S. 60. AIR 1963 Madh Pra 132, Reversed.

A Contractor to the military and other authorities entered into an arrangement with a Bank whereby it agreed to finance the contracts and to advance monies to the Contractor against his bills for supplies under the contracts. For the purpose of carrying out this arrangement the Contractor executed an irrevocable power of attorney in favour of the Bank authorising it to receive payments of the bills from the authorities. The contractor made out a bill on the military authorities for a sum and handed over the same to the Bank for collection with an endorsement that it should be paid to the Bank. The Bank sent the bill for payment but before it received the payment, the amount due under the bill was attached by a creditor of the Contractor in execution of a money decree obtained by him against the Contractor.

Held, that the attachment by the creditor under S. 60, C. P. C. was not valid. The power of attorney coupled with the endorsement on the bill was a clear engagement by the Contractor to pay the Bank out of the monies receivable under the bill and amounted to an equitable assignment of the fund by way of security. 1926 AC 703 and (1885) ILR 9 Bom 311 and AIR 1969 SC 73, Rel. on; AIR 1963 Madh Pra 132, Reversed. (Para 2)

BM/BM/D620/68

Although the document did not amount to a transfer within S. 130 it would operate as an equitable assignment of the actionable claim. (Para 4)

The bill was also not a pay order. There is an essential distinction between a pay order and an assignment. A pay order is a revocable mandate. It gives the payee no interest in the fund. An assignment creates an interest in the fund and is not revocable. (Para 6)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 73 (V 56) =

C A. No. 644 of 1966, D/-

25-4-1968, Loonkaran Sethiva v.

State Bank of Jaipur

(1926) 1926 AC 703 = 185 LT 237,

Palmer v. Carey

(1888) 13 AC 523 = 58 LJ QB 75,

Tailby v. Official Receiver

(1885) ILR 9 Bom 311, Jagabhai

Lallubhai v. Rustamji Nauser-

wanji

(1852) 1 De G. M. and G. 763 = 42

ER 749 (LC), Rodick v. Gandell

Mr. S. N. Anand, Advocate, for Appellant; Mr. S. S. Shukla, Advocate for legal representatives of Respondent No. 1; Mr. B. C. Misra, Senior Advocate, (Mr. M. V. Goswami, Advocate, with him), for Respondent No. 2.

The following judgment of the Court was delivered by

BACHAWAT, J.: M. R. Malhotra was working as a contractor to the military and other authorities. He needed funds for the execution of his contracts. The appellant Bank formerly known as the Bharat Bank Ltd., agreed to finance the contracts and to advance monies to Malhotra against his bills for supplies under the contracts. For the purpose of carrying out this arrangement Malhotra executed an irrevocable power of attorney in favour of the appellant on July 13, 1946. The power of attorney recited:

"Whereas we are working as contractors to the Government in its various departments and have entered into certain contracts and will in future enter into other contracts and whereas an agreement dated 13th July 1946 has been made between us and the Bharat Bank Ltd., in pursuance of which the attorneys have agreed to finance contracts and to advance us sums of money, against supply bills for payments to be received by us under the contracts issued by the Government in various departments on conditions mentioned therein; and whereas we, for the

purpose of carrying out the terms of the said agreement more effectively and to secure the interest of the attorneys are desirous of appointing the Bharat Bank Ltd., as our lawful attorneys in all matters relating to the receipt of all payments under the contracts made or to be made hereafter."

The document appointed the appellant to be the attorneys of Malhotra

"to present and submit supply bills regarding our contracts to the proper officers and/or authority of the Government Departments concerned; to obtain cheques for sums payable to us under the contracts directly in their own name or in our names in payment of such bills or other amounts and to cash and to receive the amount thereof and appropriate such receipts towards and in repayment of the advances made or to be made hereafter and all other monies due from us to the attorneys in any account whatsoever."

The appellant was also authorised to sue for, recover and receive the monies due in connection with the contracts with the approval of Malhotra, to conduct and defend proceedings in consultation with him and to take steps in his name and on his behalf. Malhotra promised and declared that "all powers hereby granted are and shall be irrevocable as long as any claims of the attorneys against us whether for principal, interest, costs, charges or otherwise remain outstanding and unpaid." Intimation of the power of attorney was given by the appellant to the military authorities. On July 19, 1948 Malhotra made out a bill on the military authorities for Rs. 49,633/8/7 then due to him in respect of his supplies under the contracts during 1945-46 and handed over the bill to the appellant for collection. On the bill Malhotra made the following endorsement: "Please pay to Bharat Bank Ltd. Jabalpur." The appellant sent the bill to the military authorities for payment. Before the appellant received the payment, the amount due under the bill was attached by Takhatmal in execution of a money decree obtained by him against Malhotra. The appellant filed objections in the execution proceedings. On September 11, 1952 the objections were dismissed. On December 12, 1952 the appellant filed a suit in the court of the 1st Additional District Judge, Jabalpur, against Malhotra and Takhatmal asking for a declaration that the appellant was an assignee of the bill and that Takhatmal had no right to attach it. The Trial

Court held that the appellant was the assignee of the bill and decreed the suit. Takhatmal filed an appeal against the decree. The High Court of Madhya Pradesh allowed the appeal and dismissed the suit. The present appeal has been filed by the plaintiff after obtaining a certificate from the High Court.

2. The sole question in this appeal is whether the power of attorney dated July 13, 1946 coupled with the endorsement on the bill dated July 19, 1948 amounts to an equitable assignment of the monies due under the bill in favour of the appellant. There are many decisions on the question as to what constitutes an equitable assignment. The law on the subject admits of no doubt. In *Palmer v. Carey*, 1926 AC 703 at p. 706 Lord Wrenbury said:

"The law as to equitable assignment, as stated in *Rodick v. Gandell*, (1852) 1 De G. M. and G. 763, (777, 778) is this: The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

In construing the power of attorney it is necessary to bear in mind that the relationship of the two parties, Malhotra and the Bank was that of borrower and lender and that the document was brought into existence in connection with a proposed transaction of financing of Malhotra's contracts. The loans were to be advanced by the Bank against Malhotra's bills for supplies under the contracts. The obvious intention of the parties was to provide protection for the lender and to secure repayment of the loans. With that object in view the lender was authorised to receive payment of the bills and to appropriate the receipts towards repayment of the loans. As the lender had an interest in the funds the power of attorney was expressed to be irrevocable. On a proper construction of the document the conclusion is irresistible that there was an agreement between the lender and the borrower that the debt owing to the lender would be paid out of a specific fund of the borrower in the

hands of the Government authorities. The power of attorney coupled with the endorsement on the bill dated July 19, 1948 was a clear engagement by Malhotra to pay the appellant Bank out of the monies receivable under the bill and amounted to an equitable assignment of the fund by way of security.

3. The question whether a document amounts to an equitable assignment or not is primarily one of construction but we may mention a few decisions which throw light on the matter. In *Jagabhai Lallubhai v. Rustamji Nauserwanji*, (1885) ILR 9 Bom 311 the Bombay High Court held that an agreement to finance the borrower and a power of attorney of even date to receive the monies due to the borrower under certain contracts had the effect of an equitable assignment of the funds. In *Loonkaran Sethiva v. State Bank of Jaipur*, C. A. No. 644 of 1966, D/- 25-4-1968 = (AIR 1969 SC 73) this Court held that a power of attorney authorising a lender to execute a decree then passed in favour of the borrower or which might be passed in his favour in a pending appeal and to credit to the borrower's account the monies realised in execution of the decree amounted to an equitable assignment of the funds.

4. In the last case the Court held that there was no transfer of the decree, or of the claim which was the subject-matter of the pending appeal as the borrower continued to be the owner and the lender was merely authorised to act as his agent. Nevertheless the Court held that the power of attorney amounted to a binding equitable assignment. An actionable claim may be transferred under S. 130 of the Transfer of Property Act. Where a document does not amount to a transfer within S. 130 it may apart from and independently of the section operate as an equitable assignment of the actionable claim.

5. In the present case the power of attorney authorised the appellant to receive all monies due or to become due to Malhotra in respect of pending of future contracts with the government authorities. Counsel argued that there was no engagement to pay out of specific fund and therefore can be valid equitable assignment of future debts, see *Tailby v. Official Receiver*, (1888) 13 A. C. 523. As and when the debt comes into existence it passes to the assignee.

6. As a matter of fact when the debt due to Malhotra came into existence, he speci-

after obtaining special leave from this Court.

2. The crucial question in this appeal is whether the respondent (appellant?) is bound by the decree passed in the previous suit against the heirs of his benamidar. In *Gur Narayan v. Sheo Lal Singh*, 46 Ind App 1 = (AIR 1918 PC 140) the Judicial Committee held:

"The benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him....The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In a contest between an alleged benamidar, and an alleged real owner, other considerations arise with which their Lordships are not concerned in the present case."

3. In view of this decision, it is now well settled that in any litigation with a third party, the benamidar can sufficiently represent the real owner. The decision in any proceeding brought by or against the benamidar will bind the real owner though he is not joined as a party unless it is shown that the benamidar could not or did not in fact represent the interest of the real owner in that proceeding.

4. Let us examine the facts of the present case. In the courts below it was not disputed that Lakhan Lal fully represented the appellant in the agreement of reference to arbitration and in the arbitration proceedings. It was not disputed before us that the award given by the arbitrator was as much binding upon the appellant as if the reference to arbitration was made by the appellant himself. The award was filed in court and the notice of the filing of the award was given to the appellant (respondent?) and Lakhan Lal, the two parties to the arbitration agreement. Upon service of the notice, the proceeding for enforcement of the award under Section 14 of the Indian Arbitration Act commenced. The appellant was not a necessary party in

the proceeding. As the attorney of Lakhan Lal, the appellant filed an application for setting aside the award within the time prescribed by Art. 158 of the Indian Limitation Act, 1908 and thereafter actively conducted the proceedings. There can be no doubt that while Lakhan Lal was alive, he fully represented the appellant. On his death his heirs were brought on the record. They adopted his written statement and stated that the appellant was the real owner and a necessary party. At this stage the appellant filed an application for being added as a party. The Munsif dismissed the application observing that the appellant would not be bound by the decree in the proceedings. Now the question whether the respondent (appellant?) would be bound by the decree was not in issue before the Munsif and the expression of opinion on that question cannot operate as *res judicata*. The non-joinder of the appellant as a party did not cause him any prejudice. All the contentions which could be advanced on his behalf against the validity of the award were put forward by Lakhan Lal's heirs and vigorously pressed. Like Lakhan Lal, his heirs continued to represent the appellant in the proceedings. In somewhat similar circumstances the Calcutta High Court held in *Prokash Chandra v. Mahima Ranjan*, ILR (1947) 2 Cal 185 = (AIR 1947 Cal 320) that the decree against the heirs of the benamidar bound the real owner. There, a mortgagee brought a suit on his mortgage against the sons of a benamidar a mortgagor and the application of the real owners to be added as a party in the mortgage suit was rejected with the remark that

"By the petitioners not being made parties, they will not be prejudiced in any way in this suit beyond the fact that, if their case be true, they will be driven to another litigation to fight out their own case."

After the rejection of the application the heirs of the benamidar contested the suit on behalf of the real owners. On these facts the court held that the real owners in possession of the property were bound by the decree passed in the mortgage suit and the sale in execution of the decree.

5. The appellant relied on the decision in *Mata Prasad v. Ram Charan Sahu*, ILR 36 All 446 = (AIR 1914 All 173). In that case, a suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property. The

defendant pleaded that she was the benamidar for his three sons and that the real owners should be brought on the record as defendants. But no steps were taken for adding them as parties. In a subsequent suit for possession of the property brought by her sons, the Court held that the decree in the earlier suit did not operate as *res judicata*. The reason was that some defences open to her sons were not open to her and the decree against her was based on the finding that she was not the benamidar for her sons and did not represent them. Some observations in this decision lend support to the contention that the benamidar ceases to represent the real owner as soon as he discloses his benami status and pleads that the real owner should be added as a party to the suit. In our opinion the contention is unsound, and we are unable to agree with those broad observations.

6. It follows that the appellant is bound by the decree passed in the earlier suit. The decree can be executed against him under O. 21, R. 35 C. P. C. and he is bound to vacate the property.

7. The appellant submitted that the High Court had no power to set aside the Munsif's order under S. 115 of the Code of Civil Procedure. This point was not taken in the High Court. If we allow the appellant to raise this contention there will be grave miscarriage of justice. The award was made in 1951. The decree in accordance with the award was passed in 1958. For over 16 years the respondent has been deprived of the property awarded to him. Had the High Court dismissed the revision petition on the ground that it had no jurisdiction to interfere with the Munsif's order, the respondent would have immediately filed a suit under O. 21, R. 23 C. P. C. to establish his right to the property. To that suit the appellant would have had no defence. He is bound by the decree in the earlier suit and is liable to be ejected. The ends of justice require that the appellant ought not to be permitted to raise this new contention now. It is therefore not necessary to decide whether this contention has any merit. The appeal is dismissed with costs.

GMJ/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 319

(V 56 C 63)

(From Bombay: (1963) 49 ITR 866)

J. C. SHAH, V. RAMASWAMI AND

A. N. GROVER, JJ.

H. L. Sud, Income-tax Officer, Companies Circle 1 (1), Bombay (In both the Appeals), Appellant v. Tata Engineering and Locomotive Co. Ltd. (In both the Appeals), Respondent.

Civil Appeals Nos. 688 and 689 of 1968.

Income-tax Act (1922), Ss. 43, 18-A — Non-resident firm — Liability of agent appointed under S. 43 — Extent of — 'For all purposes' — Meaning of — Not liable to pay advance tax under S. 18-A — (Words and Phrases — For all purposes).

The liability imposed upon a person by his appointment as a statutory agent for a non-resident firm under S. 43 of the Act is only in respect of the liability for the assessment year for which the appointment is made. Thus the respondent as an agent for the assessment year 1961-62 is in respect of the liability of the non-resident firms for the income of the previous year for the said assessment year 1961-62. Having regard to the scheme of the Act, the assessment for each year is self-contained and the vicarious liability imposed by an appointment under S. 43 only extends to the liability for the assessment of the year for which the appointment is made and cannot extend to the liability for any other assessment.

(Para 3)

The expression "for all purposes", used in S. 43 only indicates that when an appointment is made for a particular assessment year it is good for all purposes as far as that assessment is concerned i. e., for all purposes for imposing tax liability, determining the quantum of the liability and for recovering it. The expression does not extend the liability to any other assessment excepting the liability for the assessment year for which the appointment is made.

(Para 3)

The liability sought to be imposed under S. 18-A of the Act is not in respect of the income-tax for the assessment year for which the appointment is made but for a subsequent assessment year. For the recovery of income-tax of the said subsequent year unless there is a fresh appointment of the respondent under S. 43 as a statutory agent, no such liability can be imposed on the respondent by the

Income-tax authorities. It follows therefore that the respondent could not be treated as an agent of the non-resident firms for the assessment year 1962-63 and advance tax could not be demanded under S. 18-A of the Act for that assessment year treating the respondent as such statutory agent. (1963) 49 ITR 866 (Bom), Affirmed. (Para 3)

Mr. Sukumar Mitra, Senior Advocate (M/s. S. K. Aiyar, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Appellant (In both the Appeals); Mr. M. C. Chagla, Senior Advocate, (Mr. B. Datta, and Mr. P. C. Bhartari, Advocate for M/s. J. B. Dadachanji and Co., with him), for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: The respondent is a limited company incorporated under the Indian Companies Act, 1913 and carries on business of manufacturing and selling diesel trucks and bus chassis, locomotives and other heavy engineering products. The respondent manufactures diesel trucks and bus chassis in collaboration with the German firm "Daimler Bens A. G." The business of manufacturing locomotives is carried on by the respondent in collaboration with the German firm "Kruss Maffei A. G." For each of the assessment years from 1955-56 to 1961-62, the Income-tax Officer issued a notice to the respondent under S. 43 of the Indian Income-tax Act, 1922 (hereinafter called the 'Act') intimating that he intended treating the respondent as the Agents of the two German firms. In pursuance of the notices the Income-tax Officer actually passed orders under S. 43 of the Act treating the respondent as agent of the said two German firms. For the assessment year 1962-63 no notice under S. 43 of the Act had been issued or served upon the respondent by the Income-tax Officer and no order under that section had been passed treating the respondent as the agent of the two German firms. On September 8, 1961, the respondent received from the Income-tax Officer notices of demand under S. 29 of the Act together with an order under S. 18-A (i) calling upon the respondent to make advance payment of the tax for the assessment year 1962-63 as agent of the said two German firms. The tax demanded was Rs. 90,833.29 in the case of Krauss A. G. and Rs. 6,32,629.62 in the case of Daimler A. G. By its reply dated September 22, 1961, the respondent denied its liability to make advance payment

of tax. The respondent also made a representation to the Commissioner of Income-tax but on April 16, 1962, the respondent received a communication from the Commissioner rejecting its representation. The respondent thereupon filed two petitions in the Bombay High Court challenging the action of the Income-tax Officer demanding advance tax and asking for the grant of a writ in the nature of certiorari to quash the notices of demand under S. 29 of the Act. By its judgment dated April 17/18, 1963, the High Court allowed the petitions and granted a writ quashing the notices of demand issued to the respondent and restraining the Income-tax Officer from taking any further steps or proceedings in the enforcement of the said notices. These appeals are brought by special leave to this Court on behalf of the Income-tax Officer, Companies Circle, Bombay, hereinafter called the 'appellant.'

2. Sections 18-A, 42 and 43 of the Act, as they stood at the material time, are to the following effect:

"18-A. (1) (a) In the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, the Income-tax officer may, on or after the 1st day of April in any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one-quarter of the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed, if that total income exceeded the maximum amount not chargeable to tax in his case by two thousand five hundred rupees. Such income-tax and super-tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his total income or in cases where under the provisions of sub-section (1) of Section 17 both income-tax and super-tax or super-tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said

previous year had it been his total income the same proportion as the amount of such inclusion bears to his total world income:

Provided that, where the previous year of the assessee in respect of any source of income ends after the 31st day of December and before the 30th day of April, the order in writing issued by the Income-tax Officer requiring the payment of income-tax and super-tax on that source of income shall substitute for the four quarterly payments hereinbefore specified, three payments of equal amount to be made on the 15th day of September, the 15th day of December and the 15th day of March, respectively.

.....

(b) If the notice of demand issued under Section 29 in pursuance of the order under clause (a) of this sub-section is served after any of the dates on which the instalments specified therein are payable, the tax shall be payable in equal instalments on each of such of those dates as fall after the date of the service of the notice of demand, or in one sum on the 15th day of March if the notice is served after the 15th day of December.

(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period, and shall pay such amount as accords with his estimate in equal instalments on such of the dates specified in sub-section (1) (a) as have not expired or in one sum if only the last of such dates has not expired:

.....

(3) Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed the maximum amount not chargeable to tax in his case by two thousand five hundred rupees, send to the

Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount, on such of the dates specified in that sub-section as have not expired by instalments which may be revised according to the proviso to sub-section (2).

.....”

“42. (1) All income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in the taxable territories, or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind or through or from the sale, exchange or transfer of a capital asset in the taxable territories shall be deemed to be income accruing or arising within the taxable territories, and where the person entitled to the income, profits or gains is not resident in the taxable territories, shall be chargeable to income-tax either in his name or in the name of his agent, and in the latter case such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax:

Provided that where the person entitled to the income, profits or gains is not resident in the taxable territories, the income-tax so chargeable may be recovered by deduction under any of the provisions of Section 18 and that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within the taxable territories:

Provided further that any such agent, or any person who apprehends that he may be assessed as such an agent, may retain out of any money payable by him to such non-resident person a sum equal to his estimated liability under this sub-section, and in the event of any disagreement between the non-resident person and such agent or person as to the amount to be so retained, such agent or person may secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount:

.....”

*48. Any person employed by or on behalf of a person residing out of the taxable territories, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent:

Provided that where transactions are carried on in the ordinary course of business through a broker in the taxable territories in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal, such first-mentioned broker shall not be deemed to be an agent under this section in respect of such transactions:

Provided further that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

Explanation:— A person, whether residing in or out of the taxable territories, who acquires, after the 28th day of February, 1947, whether by sale, exchange or transfer, a capital asset in the taxable territories from a person residing out of the taxable territories shall, for the purposes of charging to tax the capital gain arising from such sale, exchange or transfer, be deemed to have a business connection, within the meaning of this section, with such person residing out of the taxable territories."

3. On behalf of the appellant Mr. Sukumar Mitra addressed the argument that an appointment made under S. 43 of the Act was good for all purposes of the Act and therefore also for the purpose of S. 18-A of the Act. It was said that under S. 18-A, advance payment of tax is liable to be made in the current financial year that the assessment year 1961-62 is the same as the financial year 1961-62 and that for the said financial year in which the advance payment of tax was called to be made by the respondent, there was already an appointment of the respondent as the statutory agents of the non-resident firms, the advance payment of tax was rightly demanded from the respondent. The appointment of the respondent under

S. 43 of the Act was made on October 21, 1961 and the notices of demand in the present case were issued on November 2/3, 1961 and therefore subsequent to the said appointment. It was therefore contended that the advance payment of tax was properly demanded from the respondent and the respondent could not challenge the notices issued to it. In our opinion, there is no warrant or justification for the argument advanced on behalf of the appellant. The liability imposed upon a person by his appointment as a statutory agent under S. 43 of the Act is only in respect of the liability for the assessment year for which the appointment is made. The appointment of the respondent for the assessment year 1961-62 was in respect of the liability of the non-resident firms for the income of the previous year for the said assessment year 1961-62. Having regard to the scheme of the Act, the assessment for each year is self-contained and the vicarious liability imposed by an appointment under S. 43 of the Act only extends to the liability for the assessment of the year for which the appointment is made and cannot extend to the liability for any other assessment. Nor can the expression "for all purposes" used in S. 43 of the Act extend the liability to any other assessment excepting the liability for the assessment year for which the appointment is made. The expression "for all purposes", in our opinion, only indicates that when an appointment is made for a particular assessment year it is good for all purposes as far as that assessment is concerned i.e., for all purposes for imposing tax liability, determining the quantum of the liability and for recovering it. The liability sought to be imposed under S. 18-A of the Act is not in respect of the income-tax for the assessment year for which the appointment is made but for a subsequent assessment year. For the recovery of income-tax of the said subsequent year unless there is a fresh appointment of the respondent under S. 43 of the Act as a statutory agent, no such liability can be imposed on the respondent by the Income-tax authorities. It is true, as Mr. Sukumar Mitra contends, that advance tax which is required to be paid under S. 18-A is charged during the financial year. But it must be remembered that it is charged not in respect of the previous year for which the financial year is the proper assessment year but it is charged for the tax liability of the subsequent year. In the present case, it is admitted that there

was no appointment of the respondent under S. 43 of the Act as statutory agent of the two German firms for the assessment year 1962-63. No notice was served upon the respondent under S. 43 of the Act intimating to the respondent that the appellant intended to treat it as the agent of the non-resident German firms for the assessment year 1962-63. No opportunity was given to the respondent to be heard in the matter, nor was any formal order passed under S. 43 of the Act by the appellant treating the respondent as the agent of the non-resident German firms for the assessment year 1962-63. Although a person may fail in a particular year to resist the claim that he is an agent, circumstances may alter in the next year and he may be able to resist the claim then. Hence notice shall have to be given by the Income-tax Officer for each assessment year to appoint a person as agent. It follows therefore that the respondent could not be treated as an agent of the two German firms for the assessment year 1962-63 and advance tax could not be demanded under S. 18-A of the Act for that assessment year treating the respondent as such statutory agent. We are accordingly of the opinion that the notices of demand issued by the appellant to the respondent dated September 5, 1961 were illegal and ultra vires and rightly quashed by the High Court by the grant of a writ in the nature of certiorari under Article 226 of the Constitution.

4. For the reasons expressed we hold that these appeals fail and are accordingly dismissed with costs — there will be one set of hearing fee.

D.R.R.

Appeals dismissed.

AIR 1969 SUPREME COURT 323
(V 56 C 64)

M. HIDAYATULLAH, C. J.; J. M. SHELAT, V. BHARGAVA, G. K. MITTER AND C. A. VAIDIALINGAM, JJ.

Bidya Deb Barma Etc., Petitioners v. District Magistrate, Tripura, Agartala (In all the Petitions), Respondent.

Writ Petns Nos. 89 to 92 and 94 of 1963, D/- 6-8-1963.

(A) Public Safety — Preventive Detention Act (1950), Section 3 (3) — 'Forthwith', meaning of — Statute requiring particular thing to be done

'forthwith' — It should be understood as allowing reasonable time for doing it — Report to State Government made four days after passing of detention order and two days after arrest and commencement of detention — Held that even if the strict meaning given to expression 'forthwith' in AIR 1957 SC 28 is applied delay of four days was explained sufficiently by the District Magistrate and there was sufficient compliance with S. 3 (3).

(Paras 4, 6)

(B) Public Safety — Preventive Detention Act (1950), Section 3 (3) — Approval of State Government to detention not communicated to detenu — Detention not rendered illegal on that ground.

A detention under the Preventive Detention Act is not illegal merely because the approval of the State Government to the detention is not communicated to the detenu. Section 3 (3) of the Preventive Detention Act does not specify that the order of approval is anything more than an administrative approval by the State Government. Hence, the necessity of communication of the approval does not arise with that strictness as does the decision under Rule 30A (8) of the Defence of India Rules. The scheme of the Preventive Detention Act is merely to approve the original detention by the District Magistrate and the continued detention after 12 days is not under any fresh order but the same old order with the added approval and what the detenu can question, if he be so minded, is the original detention and not the approval thereof. AIR 1961 SC 1500 and AIR 1963 SC 395 and AIR 1965 SC 596, Dist.

(Paras 9, 10)

(C) Public Safety — Preventive Detention Act (1950), Section 3 (4) — Report to Central Government 'as soon as may be' — Time under Section 3 (4) can only be calculated from moment matter reached State Government — State Government after receipt of report of detention taking a week for giving its approval and communicating matter to Central Government three days thereafter — State Government cannot be held guilty of unreasonable delay in reporting to Central Government so as to render detention illegal. AIR 1957 SC 28, Ref. to.

(Para 11)

(D) Public Safety — Preventive Detention Act (1950), Section 7 — Order of detention and grounds of detention supplied to detenu in English though he

knew only Bengali and Tripuri — No request by detenu at earlier stage and no objection as to language of grounds raised by detenu in his original petition under Article 32 in English — Objection raised at stage of rejoinder held could not be entertained especially when detenu was not handicapped thereby. AIR 1962 SC 911, Ref. (Para 21)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1803 (V 55) =

1968 Cri LJ 1490, Criminal Appeal No. 183 of 1967, D/- 1-12-1967, Rameshwar Lal Patwari v. State of Bihar

(1968) AIR 1968 SC 1509 (V 55) = 1969 Cri LJ 33 = Criminal Appeal No. 34 of 1968, D/- 27-3-1968, Motilal Jain v. State of Bihar

(1965) AIR 1965 SC 596 (V 52) = 1964-8 SCR 295, Biren Dutta v. Chief Commr., Tripura

(1963) AIR 1963 SC 395 (V 50) = (1962) Supp 3 SCR 713, Bachhittar Singh v. State of Punjab

(1962) AIR 1962 SC 911 (V 49) = (1962) 1 Cri LJ 797 = 1962 (2) Supp SCR 918, Harikisan v. State of Maharashtra

(1961) AIR 1961 SC 1500 (V 48) = 1962-1 SCR 676, Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer

(1957) AIR 1957 SC 28 (V 44) = 1956 SCR 653 = 1957 Cri LJ 10, Keshav Nilkanth Joglekar v. Commr. of Police, Greater Bombay

(1957) AIR 1957 SC 173 (V 44) = 1957 SCR 63 = 1957 Cri LJ 320, Mohammad Afzal Khan v. State of Jammu and Kashmir

Mr. M. K. Ramamurthi, Advocate, amicus curiae; Petitioners were also present in person; Mr. Niren De, Solicitor-General of India (Mr. R. N. Sachthey, Advocate with him), for the Respondent (In all the Petitions).

The following Judgment of the Court was delivered by

HIDAYATULLAH C. J.: These are five writ petitions under Article 32 of the Constitution of India by persons detained under the Preventive Detention Act (4 of 1950) by virtue of orders passed by the District Magistrate Tripura on February 2, 1968. These detenues (and another since released) were arrested on February 11, 1968. State Government was informed of the fact of detention on

February 13, and the grounds of detention were communicated to the detenus on February 15. State Government gave the approval on February 19 and telegraphically communicated to the Central Government the fact of the detention on February 22 under Section 3 (4). On March 11, the Advisory Board considered the cases. The present petitions were filed on March 12, 1968. The Advisory Board made its report to the State Government under Section 10 of the Act on April 17, 1968. On April 26, 1968, the State Government made the order detaining the petitioners for a period of one year. This detention is challenged before us.

2. The petitions were argued by Mr. Ramamurthy together. The law points raised by him in these cases were common and will be dealt with together. Part of the facts were also common although some special features were pointed out in some cases. We propose to deal with the common points of law and facts together and then to consider the special facts separately.

3. The points of law were (1) that the detention was illegal as the report of the District Magistrate was not submitted forthwith as required by section 3 (3) of the Act, (2) that the detention was again illegal as the order of the approval of State Government under Section 3 (3) was not communicated to the petitioners, (3) that the detention was illegal as the State Government had not reported the fact to the Central Government as soon as possible and without avoidable delay. The common points of fact are that the grounds were vague and the detention was for a collateral purpose and mala fide.

4. The order of detention in each case was made on the 9th February. The arrest and detention commenced from the 11th. The communication was on February 13. Section 3 (3) of the Act lays down:

"3. (1) The Central Government or the State Government may

(a)

(3) When any order is made under this Section [by an officer mentioned in subsection (2)] he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion [have a bearing on the matter, and no such order made after the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall remain in force for more than twelve days after

making thereof unless in the meantime it has been approved by State Government].”

The question is whether the detention became illegal because 4 days were allowed to pass from the order of detention and 2 days from the date of arrest. The third sub-section quoted above uses the word ‘forthwith’. Explaining this word Maxwell in Interpretation of Statutes (Eleventh Edn.) at p. 341 observes as follows:

“When a statute requires that something shall be done ‘forthwith’ or ‘immediately’ or even ‘instantly’, it should probably be understood as allowing a reasonable time for doing it.”

The word ‘forthwith’ in Section 3 (3) and the phrase ‘as soon as may be’ used in the fourth sub-section were considered in Keshav Nilkanth Joglekar v. Commissioner of Police, Greater Bombay, 1956 SCR 653 at pp. 658-660 = (AIR 1957 SC 28 at p. 32). In that case the delay was of 8 days. Giving proper meaning to the expression it was observed:

“We agree that ‘forthwith’ in Sec. 3 (3) cannot mean the same thing as ‘as soon as may be’ in Section 7, and that the former is more peremptory than the latter. The difference between the two expressions lies, in our opinion, in this that while under Section 7 the time that is allowed to the authority to send the communication to the detenu is what is reasonably convenient, under Section 3 (3) what is allowed is only the period during which he could not, without any fault of his own, send the report.”

The delay of 8 days was held explained thus:

“What happened on the 16th and the following days are now matters of history. The great city of Bombay was convulsed in disorders, which are among the worst that this country has witnessed. The Bombay police had a most difficult task to perform in securing life and property and the authorities must have been working at high pressure in maintaining law and order. It is obvious that the Commissioner was not sleeping over the orders which he had passed or lounging supinely over them. The delay such as it is, is due to causes not of his making, but to causes to which the activities of the petitioners very largely contributed. We have no hesitation in accepting the affidavit, and we hold that the delay in sending the report could not have been avoided by the Commissioner and that when they were sent by him, they were sent ‘forth-

with’ within the meaning of Section 3 (3) of the Act.”

5. In the present case the delay is much shorter. The 10th and 11th of February were closed holidays. The communication was on the 13th. Thus there was only delay because the report was not made on the 12th. Explaining the delay the District Magistrate in his affidavit says:

“I say that 10th February, 1968 was a holiday, being the second Saturday of the month and 11th February, 1968 was Sunday. I say that serious reports about the activities of the Mizo National Front and Sangkrak Party, which are tribal groups of hostiles who had set up an independent Government and were indulging in subversive acts against the Local Government and were committing dacoities, murder, arson etc. particularly aimed at non-tribals, were received at that time which kept me extremely busy during those days. Besides this, I also say that I was in the midst of paddy procurements and there was very heavy rush of work in my office in those days. I say that 10th and 11th February, 1968, being holidays and order being communicated on the 13th to the State Government, was communicated ‘forthwith’ as required by law.”

6. In our judgment even if the meaning from the ruling is applied with strictness the delay was explained sufficiently. The District Magistrate was hard put to for time and the surrounding circumstances explain the very short delay. A much larger delay was held in this Court not to militate against Section 3 (3) and we think there is less room for interference in this case than existed in the former case. We accordingly reject the first of the law points.

7. The second point has no force. There is no provision in the Act that such an approval must be communicated to the detenu. The argument is that this must be implied from the object of the Act. The detaining authority is answerable to the State Government. Sub-section (3) gives validity to the order for a period of 12 days even without approval. The approval was done within the time and began to operate as soon as made. It was contended that the approval ought to have been communicated to the detenu and without this communication the detention could not be legal.

8. Reliance was placed upon certain cases to show that persons affected by an order must be communicated that order

if it is to be effective. In *Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Officer*, 1962-1 SCR 676 = (AIR 1961 SC 1500) (a case under the Land Acquisition Act, 1894) it was held that the award of the Collector must be communicated, and that this was an essential requirement of fair-play and natural justice. The Court was considering a question of limitation which ran 'from the date of the Collector's award' in the proviso to Section 18 and was not prepared to construe those words in a literal or mechanical way. The reasons which prevailed for making a distinction between an order passed and an order communicated do not obtain here.

9. In *Bachhittar Singh v. State of Punjab*, (1962) Supp 3 SCR 718 = (AIR 1963 SC 395) an order of dismissal of a public servant passed by the Minister on the file was not communicated and it was held that it was only provisional till communicated. This case is not in point. The next case, *Biren Dutta v. Chief Commissioner of Tripura*, 1964-8 SCR 295 = (AIR 1965 SC 596) deals with detention under the Defence of India Rules 1962 Rr. 30 (1) (b) and 30A (8). The reason of R. 30A (8) was stated by this Court to be that it is in the nature of an independent decision and further detention can be justified only if the decision is recorded as required by the rule, and it must be in writing clearly and unambiguously to indicate the decision. It was further observed that the decision must be communicated. This case is really no authority in the context of the present case. Section 3 (8) of the Preventive Detention Act does not specify that the order of approval is anything more than an administrative approval by the State Government. If this be so the necessity of communication of the approval does not arise with that strictness as does the decision under Rule 30A (8) of the Defence of India Rules. The Solicitor-General on that occasion conceded this position. The dispute then narrowed to the question whether Art. 166 applied. The point was not decided by this Court but basing itself on the admission that the decision to continue the detention must be in writing, this Court considered whether there was substantial compliance with this requirement. A brief memorandum was produced which merely recorded that a decision was reached. This Court held that the memorandum could not reasonably be said to include a decision that the detention of the detenus was thought necessary beyond six months. Such orders

were held not to contain a written record of the decision with appropriate reasons.

10. In our opinion the provisions of the Preventive Detention Act cannot be equated to those of the Defence of India Act and the Rules. While we are of opinion that even in detention under the Preventive Detention Act it would be fair to inform the detenu of all the stages through which his detention passes and a provision to that effect should be included in it, we are not satisfied that in view of the state of the existing law we can import the strict rule here. The scheme of the Preventive Detention Act is merely to approve the original detention by the District Magistrate and the continued detention after 12 days is not under any fresh order but the same old order with the added approval and what the detenu can question, if he be so minded, is the original detention and not the approval thereof. (See in this connection also *Mohammed Afzal Khan v. State of Jammu and Kashmir*, 1957 SCR 63 = (AIR 1957 SC 173)). We accordingly consider the ruling inapplicable.

11. It is next contended that the State Government was also guilty of undue and unreasonable delay in reporting to the Central Government. The State Government communicated the decision on February 22. State Government received the communication from the District Magistrate on February 13, and approved the action on February 19. The communication to the Central Government on February 22 was not so much delayed that it is not covered by the expression 'as early as may be' explained by this Court in *Keshav Nilkanth Joglekar v. Commissioner of Police, Greater Bombay's case*, 1956 SCR 653 = (AIR 1957 SC 28). Mr. Ramamurthy desired us to calculate the time from Feb. 9 but we do not think that is possible. Time can only be calculated from the moment the matter reached the State Government. The State Government took a week to consider these cases and it is reasonable to think that there might be a few more cases which are not before us. Having reached the decision on the February 19 the action of the State Government in communicating the matter to the Central Government on February 22 cannot be said to be so delayed as to render the detention illegal. Various things have to be done before the report to the Central Government can be made and a gap of 3 days is understandable. We see no force in this point.

12. This brings us to the merits of the detention. Here the charge is that the grounds furnished to the detenus were vague and the detention itself mala fide. The grounds are practically the same except for very minor changes to which attention will be drawn when we deal with individual cases. We may set down the grounds of detention from petition No. 89 of 1968 as sample.

"You are being detained in pursuance of the Detention order made under sub-clauses (ii) and (iii) of Clause (a) of sub-section (1) of Section 3 Preventive Detention Act, 1950 as you have been acting in manner prejudicial to the maintenance of public order and supplies essential to the community as evidenced by the particulars given below:—

1. That you have been instigating the loyal villagers particularly the tribals living in and around the Forest Reserve areas to damage the forest plantation and to do Jhuming in Reserve Forest areas in violation of forest laws. Towards the end you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the Forest Department and to destroy the forest plantation. That you have by your activities created resentment against the forest departments and the Forest Laws under Teliamura P. S. thereby endangering the maintenance of public order.

2. That you have been instigating the loyal cultivators from delivering the paddy to the Government which has been requisitioned under the Tripura Foodgrains Requisition Order for the maintenance of supplies of foodgrains to the people in lean months. You have been instigating and inciting the people to offer organised and violent resistance against the paddy procurement staff. Towards this end, you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the procurement of paddy. You have been directly inciting the people in a number of mass meetings also. That you have by your speeches and activities induced the people of certain areas to offer violent resistance to paddy procurement thereby preventing the Government from maintaining supplies essential to the community during times of need.

The above reports are evident from the facts that on 12th November 1967 you attended a mass meeting at Kalyanpur, a secret meeting on 13th November 1967

at Asha rambari, again mass meetings at Teliamura on 28th November, 1967, at Moharchhara Bazar on 16th December 1967, on 6th January 1968 at Teliamura and on 21st January 1968 at Stable ground Agartala.

Because of your activities and incitement, on 2nd February 1968 the procurement staff were offered a strong and violent resistance by an unruly mob at Chalitabari P. S. Teliamura."

13. It is submitted that the grounds do not give any details since no particulars of time, place and circumstances have been mentioned, and relevant and irrelevant matters have been included. Reference is made to two cases decided recently by this Court in which the grounds were found insufficient. They are: Rameshwar Lal Patwari v. State of Bihar, Criminal Appeal No. 183 of 1967, D/- 1-12-1967 = (AIR 1968 SC 1303) and Motilal Jain v. State of Bihar, Criminal Appeal No. 34 of 1968, D/- 27-3-1968 = (AIR 1968 SC 1509). We find no such vagueness in the grounds as was found established in the two cases. The grounds begin by stating generally what the activities were. They consisted of instigation of tribal people to practise jhuming and preventing the authorities from delivering paddy to Government under the procurement schemes. This instigation it is said was through mass and secret meetings and resulted in violent resistance to Government. Having said this the grounds then specify the places where and the dates on which the meetings were held and the date on which and place at which the resistance took place. In our judgment more detailed information was not necessary to give the detenus an opportunity to make their representations. The grounds here are specific and very unlike those in the cases relied upon. We reject the contention.

14. As regards mala fides and collateral purposes alleged to be the real reason, the averment is that the detention was ordered to prevent the detenus from actively campaigning for the Panchayat elections that were to take place on the 19th and 20th February, 1968. This has been denied and looking to the circumstances of this area which are notorious there is no doubt in our minds that the affidavit of the District Magistrate is reliable. This ends the submissions which are common to these five cases. We now proceed to discuss individual objections.

15. Writ Petition 89 of 1968.—There is no special objection in Writ Petition

89 of 1968 beyond what has been discussed above and it is accordingly dismissed.

16. Writ Petition 90 of 1968.— Here too there is no special ground urged before us and the petition is accordingly dismissed.

17. Writ Petition 91 of 1968.— The first objection is that there is a mistake of identity. The petitioner claims to be Dasrath s/o Krishna Deb whereas in the order of detention and other papers is described as Dasrath s/o the Late Krishna Chandra Deb Barma. It is also submitted that Krishna Chandra Deb is alive and, therefore, the order of detention concerned some other person. It is denied by the District Magistrate that the order was not passed against the present detenu himself. The addition of Barma is explained by the District Magistrate as a popular suffix to the name. The District Magistrate has further said that in Tripura it is usual to have Barma in addition to Deb in the surname and that this ground of identity has been raised for the first time in this Court. The address of the petitioner is accurate and the father's name is also correct. Nothing much turns on the fact that the father was described as dead. The petitioner has not objected till he reached this Court and the authorities would hardly be expressed to hold a wrong man and let the real man go free. We reject this contention

18. The next contention concerns the discrepancy in the dates of meetings and what happened as a result of his activities and incitement. The two sets of dates may be put side by side:

Meetings	Result
25-11-67	18-6-67
16-12-67	21-6-67
26-12-67	24-6-67
27-12-67	25-6-67
30-12-67	23-12-67
3-1-68	21-1-68

19. It is argued that the results in all but two dates could not follow activities which were later. The explanation is simple. The results were said to be because of the activities of the petitioner. The mention of dates of meetings is merely some evidence to show the kind of activity. We are concerned with preventive detention. Ordinarily what we have to satisfy ourselves about is the satisfaction of the authority and the absence of malafides and whether all the opportunities of making representation were given. There were enough instances cited of the conduct on which detention was ordered for

the petitioner to make an effective representation. The situation in this area was already bad and the later activities would not make it any better. We do not think that the detention suffers from any defect. The petition will be dismissed.

Writ Petition 92 of 1968.

20. The objection here is of the same character as in Writ Petition 89/91. An additional complaint here is that he is supposed to have instigated people to go on strike and prevented the motor drivers and rickshaw pullers from plying their vehicles on the roads and government employees from going to office and threatened individual shop-keepers to keep their shops closed, but no details are supplied. It is submitted that this brings the case within the rulings of this Court. We think this case is distinguishable from the case of a black marketer who is charged with having sold contraband articles or at higher prices or hoarded goods. General allegations there without concrete instances would be difficult to represent against. Here the matter is different. It is an integrated conduct of instigation against law and order which is being charged. Several aspects of it are mentioned. They range from jhumming in forests and resistance to procurement to arranging for strikes. Instances of mass and secret meetings are furnished and the ramifications of conduct in other directions are mentioned. In these circumstances the petitioner is expected to represent against the instances and if he convinces that he took no part in the agitation, the other aspects of his activity will be sufficiently answered. A case of this type stands on slightly different footing from the cases of black marketing earlier decided by this Court. In our judgment no successful ground has been made out and the petition must fail. It will be dismissed.

Writ Petition 94/68.

21. The petitioner in this case has complained that the order of detention and the grounds supplied to him were in English and he knows only Bengali and Tripuri. He refers to *Harikisan v. State of Maharashtra*, 1962 (2) Supp SCR 918 = (AIR 1962 SC 911). In that case the detenu had asked for a Hindi translation and had been denied that facility. We find that this objection was taken here but no request was made at any earlier time. The original petition did not contain any such objection. It was raised for the first time in the rejoinder.

The petitioner does not seem to have suffered at all. He has filed the petition in English and questioned the implications of the language of the order and the grounds. Of course, he had the assistance of the other detenus who know English. If there had been the slightest feeling that he was handicapped, we would have seriously considered the matter but in his case it appears that this point was presented not to start with but after everything was over. We cannot entertain such a belated complaint. The petition will be dismissed.

22. In conclusion all the petitions fail and will be dismissed.

KSB

Petitions dismissed.

AIR 1969 SUPREME COURT 329
(V 56 C 65)

(From: Bombay at Nagpur)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Maharashtra State Road Transport Corporation (In all the appeals), Appellant v. Balwant Regular Motor Service, Amravati and others, Respondents.

Civil Appeals Nos. 825 to 851 of 1968, D/- 22-8-1968.

(A) Motor Vehicles Act (1939), Ss. 46, 48, 58 (1) (a) — Substantive permit not mentioning period for which it was granted, is not invalid — Bombay Motor Vehicles Rules (1940), R. 80—Spl. Civil Appln. Nos. 575 to 596, 634, 540 and 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed.

There is no statutory requirement that the R. T. A. is required to expressly mention in its order for what period the substantive permit was to be granted. It is true that S. 58 (1) (a) provides that the duration of the permit should be not less than three years and not more than five years as the R. T. A. may specify in the permit. But there is nothing in S. 48 (1) of the Act which states that the R. T. A. is required to specify expressly in the order of the grant of the permit as to for what period the permit is to be effective. Where no period is mentioned the period of validity of the permit

should be deemed to be for the period asked for in the application for permit, because the order of the R. T. A. should be construed as an order of grant of a stage carriage permit "in accordance with the application" under S. 48 (1). Reference may be made in this connection to Rule 80 of the Bombay Motor Vehicles Rules which provides for the forms of application for permits and to Form P. St. S. A. prescribed under that Rule which requires the application to mention for what period the stage carriage permit is to be granted. Consequently the order of the R. T. A. cannot be held to be illegal merely because the period of validity of the permit has not been expressly mentioned therein. Spl. C. A. Nos. 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed.

(Paras 7, 8)

(B) Motor Vehicles Act (1939), S. 48 — Substantive permit not mentioning date of commencement is not illegal. Spl. C. A. Nos. 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed.

There is nothing in the Act or in the Bombay Rules to suggest that the R. T. A. is under an obligation to mention in the order granting permit the actual date from which the permit was to be effective. S. 48 (3) (i) is merely permissive and it does not apply to the order of grant of permit which is dealt within S. 48 (1) of the Act. In the absence of any express statutory provision it must be taken that the date of the commencement of the period of the permit would be the date from which the permit is actually issued. (1960) 62 Bom LR 958, Approved; Spl. C. A. Nos. 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed.

(Para 8)

(C) Motor Vehicles Act (1939), S. 48 — Order granting permit not giving date of commencement — Later order giving such date, is not an order of review — Civil P. C. (1908), O. 47, R. 1.

It is not correct to say that the later order of the R. T. A. is an order of review of the previous order, because the later order of the R. T. A. fixed the date of commencement of the service which was not given in the previous order. The later order is only supplemental and filled up an omission in the previous order which was left intact. AIR 1966 SC 641 and AIR 1965 SC 1457, Dist.

(Para 9)

(D) Motor Vehicles Act (1939), S. 48 — Writ Petitions by private operators against

* (Spl. Civil Appln. Nos. 575 to 596, 634, 540 and 570 to 572 of 1967, D/- 20-10-1967 — Bom. at Nagpur).

order of R. T. A. granting permit to State Road Transport Corporation — Enforcement of order of R. T. A. stayed pending Writ Petition and R. T. A. directed to maintain status quo pending writ petitions — Subsequent compromise between private operators and Road Transport Corporation — Orders formerly passed by R. T. A. but kept pending till writ petitions were withdrawn — Order held conditional and not in violation of High Court order — Order of R. T. O. held not invalid — Contempt of Courts Act (1952), S. 1 — Civil P. C. (1908), O. 39, R. 9. Spl. C. A. Nos. 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed. (Para 10)

(E) Constitution of India, Art. 226 — Writ petition against R. T. A.'s order — R. T. A. directed to maintain status quo during pendency of writ — Compromise between parties — Orders of R. T. A. in terms of compromise — Acquiescence in the Order of R. T. A. — Writ will not be granted against orders of R. T. A. — Writ of certiorari will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. Principle is to a great extent, similar to though not identical with, the exercise of discretion in the Court of Chancery — (1874) 5 P. C. 221, Applied — Evidence Act (1872), S. 115. (Para 11)

(F) Motor Vehicles Act (1939), S. 57 — Bombay Motor Vehicles Rules (1940), Rr. 67 and 68 — Orders of R. T. A. in form of resolution at meeting at which parties were present — Resolution communicated to parties — Reasons for order given in the communication — The procedure did not contravene any provision of law or rule — There is no provision either in the Act or the Rules which requires the R. T. A. to give a written decision with regard to the grant of a stage carriage permit — Nor is there anything in the Act or the Rules which by necessary implication throws a duty upon the R. T. A. to give a written judgment in each case and to give reasons thereof along with the written decision. It is true that S. 57 (7) requires the R. T. A. to give in writing the reason if it refuses an application for a permit of any kind. But in the case of grant of permit, statute does not impose any such duty. In the absence of any statutory provision there is nothing wrong in principle if an administrative

tribunal gives a decision orally and subsequently reduces to writing the reason thereof and communicates it to the parties. — (English practice of interfering by issuing certiorari in respect of orders indicated — Para 14) — Spl. C. A. Nos. 575 to 596, 634, 540, 570 to 572 of 1967, D/- 20-10-1967 (Bom), Reversed; AIR 1967 SC 1606 and C. A. No. 657 of 1967, D/- 17-8-1967 (SC), Dist.

(Paras 12, 13, 15)

- Cases Referred: Chronological Paras
 (1967) AIR 1967 SC 1450 (V 54) =
 (1968) 1 SCJ 364, Moon Mills Ltd.
 v. M. R. Mehar, President Industrial Court Bombay 12
 (1967) AIR 1967 SC 1606 (V 54) =
 (1967) 3 SCR 302, Bhagat Raja
 v. Union of India 13
 (1967) Civil App. No. 657 of 1967,
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 (1966) AIR 1966 SC 641 (V 53) =
 (1966) 1 SCR 817, Harbhajan
 Singh v. Karam Singh 9
 (1965) AIR 1965 SC 1457 (V 52) =
 (1965) 2 SCR 328, Chunibhai v.
 Narayanrao 9
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 (1874) 5 PC 221 = 22 WR 492,
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 and John Kemp 11
 (1855) 4 WR 55 = 19 J. P. Jo 756,
 R. v. Trafford 14
 (1845) 8 QB 75 = 115 ER 802, R.
 v. Coles 14
 (1843) 4 QB 893 = 114 ER 1133,
 R. v. Lichfield 14
 (1700) 1 Salk 146 = 91 ER 4, R. v.
 Levermore 14

Mr. C. K. Daphtary, Attorney General for India (Mr. Santosh Chatterjee, Advocate and Mr. D. P. Singh, Advocate of M/s. Ramamurthi and Co. with him), for the Appellant (In all the Appeals); M/s. M. N. Phadke, C. G. Madholkar and A.G. Ratnaparkhi, Advocates, for Respondent No. 1 (In C. As. Nos. 832, 840, 842, 844, and 847 to 851 of 1963); M/s. M. N. Phadke, M. W. Puranik and Naunit Lal, Advocates, for Respondent No. 1 (In C. As. Nos. 825 to 831 and 833 to 838 of 1963); Mr. R. V. S. Mani, Advocate, for Respondent No. 1 (In C. A. No. 845 of 1963).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals are brought by certificate from the judgment of the Bombay High Court dated October 20, 1967 in Special Civil Applications Nos 540, 570 to 572, 575 to 596 and 634 of 1967 filed under Arts. 226 and 227 of the Constitution of India.

2. The appellant is the State Road Transport Corporation of the State of Maharashtra constituted under the Road Transport Corporation Act (64 of 1950), Respondent No. 1 who is a private stage carriage operator, along with other such private operators, had applied for renewal of stage carriage permits which they were holding and which permits were to expire on March 31, 1961. The Provincial Transport Services (the predecessor of the appellant) had been also operating the stage carriage service in the adjoining and nearby areas and had made applications sometime in January, 1961 for grant of substantive permits for the same routes. The Provincial Transport Services had published a scheme under S. 68-D of the Motor Vehicles Act, 1939 (hereinafter called the 'Act') under which it proposed to take over several routes in the region including the routes in respect of which renewal applications were made by the appellant and the private operators. The scheme was approved by the Chief Minister of the then Bombay State. The approval was, however, challenged by private operators in Special Civil Application No. 86 of 1962 in the High Court. By its order dated 29th/30th August, 1963 passed in that case, the High Court quashed the scheme with the direction that the matter should be reconsidered by the approving authority. The scheme was thereafter not pursued.

3. By a notification dated June 10, 1961 under S. 47-A of the Road Transport Corporation Act of 1950 the Central Government provided for the amalgamation of the Bombay Road Transport Corporation with the Commercial Undertaking of the State Government, namely, the Provincial Transport Services. It was also provided in the notification that any application for permit made by the Provincial Transport Services would be deemed to be an application made by the Bombay Road Transport Corporation. In other words, the Provincial Transport Services was substituted by the State Road Transport Corporation which is now known as

Maharashtra State Road Transport Corporation (hereinafter referred to as the 'appellant').

4. The applications for renewal of permits and applications for substantive permits were considered by the Regional Transport Authority, Nagpur (hereinafter called the 'R. T. A.') on October 9 and 10, 1964 and the R. T. A. passed a common order by which all the applications for renewal made by private operators were rejected and the permits were granted to the appellant. This order of the R. T. A. was challenged by the private operators in Special Civil Application No. 603 of 1964. One of the grounds on which the order was challenged was that the R. T. A. was not validly constituted. By its order dated January 14, 1965, the High Court quashed the order passed by the R. T. A., holding that it was not properly constituted on October 13, 1964 when it passed the common order. Thereafter the applications for renewal of permits and for fresh grant of permits were again considered by the R. T. A. at its meeting held on May 10, 1965. By its order on the same date, the R. T. A. dismissed all the applications for renewal made by the private operators and directed that substantive permits for these routes should be granted to the appellant. The order of the R. T. A. dated May 10, 1965 was challenged by the private operators in different Civil Applications. One of the applications was Special Civil Application No 488 of 1965. In this application, one of the prayer was to the effect that pending the decision of the application the R. T. A. should be directed to maintain status quo. Clause 3 of the prayer was to the following effect:

"That pending the decision of this application the R. T. A. Nagpur be directed to maintain status quo viz., to grant temporary permit to the petitioner as it has been done upto now on the routes Chikhli — Buldana and Chikhli — Deulgaonraja on which the petitioner is operating his vehicles."

On June 4, 1965 Paranjpe, J. ordered as follows:

"Rule. Expedite hearing at Nagpur on 21st June, 1965. In the meantime R. T. A. Nagpur to maintain status quo in terms of Clause 3."

The interim order was subsequently confirmed by the High Court and all the petitions were directed to be heard together.

5. During the pendency of the Special Civil Applications in the High Court an

application was made by the R. T. A. jointly on behalf of the appellant and the private operators. A copy of that application is included as document No. 17 in Special Civil Application No. 575 of 1967. The joint application stated that the appellant and the private operators, with a view to end all litigation, had agreed to settle the matter on certain terms. One of the terms was that the Special Civil applications filed were to be withdrawn. The application for compromise was considered by the R. T. A. at its meeting held on September 10 and 11, 1966. The private operators including respondent No. 1 assured the R. T. A. that they would withdraw the petitions pending in the High Court. Upon such assurance the R. T. A. considered the matter at the meeting and after hearing the parties decided that the appellant who was granted substantial permits by its order dated May 10, 1965, would commence operation on the routes described in Sch. 'A' from November 1, 1965. In regard to the routes mentioned in Sch. 'B' for which also the appellant had been granted substantive permits by the order of the R. T. A. dated May 10, 1965, the appellant was to be permitted to commence operation from July 1, 1965 and the private operators including respondent No. 1 were to be allowed to operate on these routes on temporary permits uptill June 30, 1967. This interval of time was given to the private operators apparently to help them to wind up their business without having to incur any loss and to assure certainty of better transport to the public. With regard to the third category of routes covered by Sch. 'C' of the order of the R. T. A., the private operators were operating on substantive permits which they agreed to surrender in favour of the appellant. The appellant, however, had not made any application till then for these routes. The R. T. A. decided that it had to consider these routes on merits by inviting applications as provided under the Act since the private operators holding substantive permits in respect of these routes were voluntarily surrendering them. Subsequently, the Secretary, R. T. A. on applications made by the parties, granted temporary permits to the appellant in respect of 20 of these routes and to the private operators in respect of 22 other routes. The decisions were actually reached by the R. T. A. in presence of all the parties and subject to the condition that the private operators would withdraw their petitions pending in the High Court. It appears

that on October 8, 1967 the private operators including respondent No. 1 withdrew the petitions from the High Court and informed the R. T. A. of such withdrawal. The R. T. A. thereupon on October 15, 1965, announced its decisions which it had taken on September 10/11, 1965. Thereafter the R. T. A. invited applications in respect of Sch. 'C' routes but the private operators including respondent No. 1 made applications not only in respect of Sch. 'C' routes including those which were being operated by the appellant, but in respect of Sch. 'B' routes as well. These applications were made during the month of February, 1967. The appellant had also made applications in respect of Sch. 'C' routes in January, 1967 in response to a notification of the R. T. A. On April 5, 1967, the Secretary, R. T. A. issued permits to the appellant for a period of five years, commencing from July 1, 1967 in respect of Sch. 'B' routes, acting upon the order of R. T. A. dated May 10, 1965 granting permits to the appellant and the subsequent order of the R. T. A. dated September 10/11, 1965 allowing the appellant to commence operations from July 1, 1967.

6. The applications of the parties for substantive permits in respect of Sch. 'C' routes and the applications made by the private operators in respect of Sch. 'B' routes, were considered by the R. T. A. in its meeting held on June 28/29, 1967. After considering each case on merits, the R. T. A. granted substantive permits in respect of Sch. 'C' routes to the appellant and rejected the applications of the private operators for the same. With regard to the applications of the private operators in respect of Sch. 'B' routes and in respect of some routes of Sch. 'C' for which they had applied after expiry of the date prescribed for making of such applications, the R. T. A. expressed the view that such applications could not be maintained in respect of Sch. 'B' routes since substantive permits for those routes had already been granted by the R. T. A. in favour of the appellant on May 10, 1965. As regards Sch. 'C' routes, the applications of the private operators were held to be not maintainable as they were filed late. Thereafter the private operators including respondent No. 1 voluntarily converted their applications into applications for additional timings or trips on those routes. The R. T. A. thereupon decided to postpone consideration of these applications for additional timings in order to enquire and satisfy itself about the existence of

the additional need. This order of the R. T. A. dated June 28/29, 1967 was challenged by the private operators including respondent No. 1 in Special Civil Applications which are the subject-matter of these appeals. By its judgment dated October 20, 1967, the Bombay High Court allowed the Special Civil Applications and granted a writ in the nature of certiorari quashing the order of the R. T. A. dated September 10/11, 1965 and June 28/29, 1967 and the permits issued by the Secretary, R. T. A. to appellant on April 5, 1967. With regard to the order of the R. T. A. dated May 10, 1965 granting substantive permits to the appellant in respect of Sch. 'A' and Sch. 'B' routes, the High Court held that the said order had become "unworkable" in respect of Sch. 'B' routes and hence to that extent quashed that order.

7. The first question arising in this case is whether the High Court was right in taking the view that the order of the R. T. A. dated May 10, 1965 granting substantive permits to the appellant was invalid merely because: (1) the period of validity of the permit was not expressly mentioned, and (2) the order does not mention the commencement of the period of the permit. As regards the first ground, there is no statutory requirement that the R. T. A. is required to expressly mention in its order for what period the permit was to be granted. In this connection reference may be made to Ss. 46, 48 and 58 (1) (a) of the Act which state:

"46. An application for a permit in respect of a service of stage carriages or to use a particular motor vehicle as a stage carriage (in this Chapter referred to as a stage carriage permit) shall, as far as may be, contain the following particulars, namely:—

(a) the route or routes or the area or areas to which the application relates;

(b) the number of vehicles it is proposed to operate in relation to each route or area and the type and seating capacity of each such vehicle;

(c) the minimum and maximum number of daily services proposed to be provided in relation to each route or area and the time-table of the normal services;

(d) the number of vehicles intended to be kept in reserve to maintain the service and to provide for special occasions;

(e) the arrangement intended to be made for the housing and repair of the vehicles, for the comfort and convenience

of passengers and for the storage and safe custody of luggage;

(f) such other matters as may be prescribed."

"48. (1) Subject to the provisions of S. 47, a Regional Transport Authority may, on an application made to it under section 46, grant a stage carriage permit in accordance with the application or with such modifications as it deems fit or refuse to grant such a permit:

Provided that no such permit shall be granted in respect of any route or area not specified in the application.

(2) Every stage carriage permit shall be expressed to be valid only for a specified route or routes or for a specified area.

(3) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for a service of stage carriages of a specified description or for one or more particular stage carriages, and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:—

(i) that the service or any specified part thereof shall be commenced with effect from a specified date;

* * * * *

"58. (1) (a) A stage carriage permit or a contract carriage permit other than a temporary permit issued under Section 62 shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may specify in the permit."

8. It is true that S. 58 (1) (a) provides that the duration of the permit should be not less than three years and not more than five years as the R. T. A. may specify in the permit. But there is nothing in S. 48 (1) of the Act which states that the R. T. A. is required to specify expressly in the order of the grant of the permit as to for what period the permit is to be effective. It is manifest, however, in the present case that the period of validity of the permit should be deemed to be five years because the order of the R. T. A. should be construed as an order of grant of a stage carriage permit "in accordance with the application under S. 48 (1) of the Act. In other words, the order of the R. T. A. dated May 10, 1965 should be construed in the context of the language of S. 48 (1) of the Act which empowers the R. T. A. to grant a stage carriage permit "in accordance with the

application" or "with such modifications as it deems fit or to refuse to grant such a permit." In the present case, the R. T. A. did not make any modification and it must therefore be deemed that the grant of the permit was made in accordance with the application of the appellant which expressly declares the period of validity of the permit applied for to be of five years (See the application of the appellant printed at page 205 of Vol. II of the Paper Book). Reference may be made in this connection to Rule 80 of the Bombay Motor Vehicles Rules which provides for the forms of application for permits and to Form P. St. S. A. prescribed under that Rule which requires the application to mention for what period the stage carriage permit is to be granted. We are accordingly of the opinion that the order of the R. T. A. dated May 10, 1965 cannot be held to be illegal merely because the period of validity of the permit has not been expressly mentioned therein. It was, however, argued by Mr. Phadke on behalf of respondent No. 1 that the period of commencement of the permit should have been mentioned by the R. T. A. in its order of May 10, 1965 and the omission of the R. T. A. to do so invalidated the order. It was pointed out by Mr. Phadke that the order of the grant of permit was made on May 10, 1965 by the R. T. A. but the permits were actually issued to the appellant on April 5, 1967 to be effective for five years from that date. There is, however, nothing in the Act or in the Rules to suggest that the R. T. A. is under an obligation to mention in the order of grant of permit the actual date from which the permit was to be effective. Mr. Phadke, referred to S. 48 (3) (i) of the Act which states that the R. T. A., if it decides to grant a permit, may grant the permit for a service of stage carriage of a specified description and may subject to any rules that may be made under the Act, attach to the permit a condition that the service or any specified part thereof shall be commenced with effect from a specified date. It is manifest that this statutory provision is merely permissive and it does not apply to the order of grant of a permit which is dealt with in S. 48 (1) of the Act. In the absence of any express statutory provision it must be taken that the date of the commencement of the period of the permit would be the date from which the permit is actually issued which is April 5, 1967 in the present case. The

view that we have expressed is borne out by the decision of the Bombay High Court in *Shree Laxmi Bus Transport Co. v. R. T. A., Rajkot*, (1960) 62 Bom LR 958 in which it was said that when an application for renewal of a stage carriage permit is granted under S. 58 of the Act, subsequent to the date on which the period of the permit expires, the period specified in the renewal cannot be made to commence retrospectively from the date of the expiry of the permit sought to be renewed but will commence from the date on which it is actually renewed. Hence it is not possible to accept the argument of Mr. Phadke that the order of the R.T.A. dated May 10, 1965 is illegal merely because the date of commencement of the operation of the permit is not specified therein. In our opinion, the High Court was in error in holding that the order of the R. T. A. dated May 10, 1965 was legally invalid either because the period of validity of the permit or the date of commencement was not mentioned therein.

9. The next contention put forward by Mr. Phadke is that the order of the R.T.A. dated September 10/11, 1965 fixing the date of the commencement of the service was an order which was tantamount to a review of the previous order of the R. T. A. dated May, 10, 1965 and as no express power of review is conferred on the R. T. A. by any provision of the Act, the order of September 10/11, 1965 was illegal and ultra vires. In this connection Mr. Phadke referred to the decisions of this Court in *Harbhajan Singh v. Karam Singh*, AIR 1966 SC 641 and *Chunibhai v. Narayanrao*, AIR 1965 SC 1457, and contended that a tribunal of limited jurisdiction has no inherent power to review its own orders except in the matter of clerical error. We consider that there is no substance in the argument put forward on behalf of respondent No. 1. It is not correct to say that the order of the R. T. A. dated September 10/11, 1965 is an order of review of the previous order dated May 10, 1965, because the later order of the R. T. A. fixing the date of commencement of the service is only supplemental and filled up an omission in the previous order of May 10, 1965 which was left intact.

10. We pass on to consider the next question arising in this case, namely, whether the order of the R. T. A. dated September 10/11, 1965 was invalid because it was passed during the sub-

sistence of the stay order of the High Court dated June 4, 1965 in Special Civil Application No. 488 of 1965. The High Court has taken the view that the order of the R. T. A. dated September 10/11, 1965 was invalid because it was made on a compromise reached by the parties during the operation of the stay order of the High Court in Civil Application No. 488 of 1965. In our opinion, the High Court was not right in taking the view that the R. T. A. had violated the stay order. The parties had themselves approached the R. T. A. on the basis of the compromise which was meant to put an end to a long protracted litigation and which allowed time to the private operators to wind up their business. On a perusal of the order of the R. T. A. dated September 10/11, 1965 it is manifest that the R. T. A. was careful to say that the compromise will come into effect only after the withdrawal of the writ petitions by the private operators. To put it differently, the order made by the R. T. A. on September 10/11, 1965 was a conditional order, namely, an order which was intended to come into effect only after the writ petitions in the High Court were withdrawn by the private operators. It is not disputed that the order of the R. T. A., though dated September 10/11, 1965 was formally announced on October 16, 1965 after the private operators had withdrawn the writ petitions on October 8, 1965. In these circumstances we hold that there is no violation of the stay order of the High Court and the order of the R. T. A. dated September 10/11, 1965 which was formally announced on October 16, 1965 is not in any way invalid.

11. In any event, we are satisfied that it is not open to the private operators including respondent No. 1 to apply for a writ in the nature of certiorari for quashing the order of the R. T. A. dated September 10/11, 1965 in view of their conduct. It is not disputed that the private operators including respondent No. 1 were present in the meeting of the R. T. A. held on September 10/11, 1965 either personally or through duly appointed Counsel. Respondent No. 1 and the other private operators assured the R. T. A. at the hearing that they would withdraw the writ petitions pending in the High Court. On such assurances and subject to the actual withdrawal of the writ petitions in terms of the assurance, the R. T. A. considered the matter in the said meet-

ing and after hearing the parties, made an order giving effect to the compromise. It is obvious that the private operators including respondent No. 1 were parties to the order dated September 10/11, 1965, had accepted that order, acted upon it and derived benefits and advantages from it for nearly one year and 9 months. But for the said order which suspended the operation of the permit of the appellant till July 1, 1967 the private operators including respondent No. 1 could not have got temporary permits to operate on the same routes as no stage carriage permits could be issued under Section 62 of the Act during the subsistence of substantive permits. In these circumstances we consider that there was such acquiescence in the R. T. A.'s order dated September 10/11, 1965 on the part of respondent No. 1 and other private operators as to disentitle them to a grant of a writ under Article 226 of the Constitution. It is well established that the writ of certiorari will not be granted in a case where there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, similar to though not identical with, the exercise of discretion in the Court of Chancery. The principle has been clearly stated by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp*, (1874) 5 PC 221 at p. 239 as follows:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which

might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

This passage was cited with approval by this Court in a recent case—*The Moon Mills Ltd. v. M. R. Mehar*, President Industrial Court, Bombay, AIR 1967 SC 1450. In our opinion, the principle of this decision applies to the present case and since respondent No. 1 and the other private operators had not even pleaded any circumstances justifying the delay or their conduct, the High Court was in error in granting a writ of certiorari in their favour.

12. We next proceed to consider the question regarding the validity of the order of the R. T. A. dated June 29, 1967. The High Court has taken the view that this order is invalid for two reasons: (1) the order of the R. T. A. is oral and not in writing, and (2) no reasons were immediately given by the R. T. A. for the order. In the present case, what actually happened was that the orders of the R. T. A. were made at its meeting held on June 28/29, 1967. Respondent No. 1 was admittedly present at this meeting and knew of the orders of the R. T. A. It is also not disputed that the orders made on June 28/29, 1967 were in the form of resolutions and the minutes of the meeting were formally recorded on July 20, 1967 and communicated to respondent No. 1 and the other private operators on the same date. The letter of July 20, 1967 communicating the resolution dated June 28/29, 1967 is Annexure 'N' to the Writ Petition No. 634 of 1967. In this letter detailed reasons are given by the R. T. A. in support of its order granting stage carriage permits to the appellant for the routes in question. In our opinion, the procedure adopted by the R. T. A. does not contravene any provision of the Act or Rules made thereunder and no legal principle has been violated. Reference may be made in this connection to Section 57 of the Act and Rules 67 and 68 of the Rules which are to the following effect:

"S. 57. (1) An application for a contract carriage permit or a private carrier's permit may be made at any time

(2) An application for a stage carriage permit or a public carrier's permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or, if the Regional Transport Authority appoints dates

for the receipt of such applications, on such dates.

(3) On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received will be considered:

Provided that, if the grant of any permit in accordance with the application or with modifications would have the effect of increasing the numbers of vehicles operating in the region, or in any area or on any route within the region, under the class of permits to which the application relates, beyond the limit fixed in that behalf under sub-section (3) of Section 47 or sub-section (2) of Section 55, as the case may be, the Regional Transport Authority may summarily refuse the application without following the procedure laid down in sub-section.

(4) No representation in connection with an application referred to in sub-section (3) shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation.

(5) When any representation such as is referred to in sub-section (3) is made, the Regional Transport Authority shall dispose of the application at a public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative.

(6) When any representation has been made by the persons or authorities referred to in Section 50 to the effect that the number of contract carriages for which permits have already been granted in any region or any area within a region is sufficient for or in excess of the needs of the region or of such area, whether such representation is made in connection with a particular application for the grant of a contract carriage permit or otherwise, the Regional Transport Authority may take any such steps as it con-

Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal;

.....
Admittedly and clearly section 351 mentioned in section 13 of the Act is section 351 of the Code of Civil Procedure 1859 which was in force in 1870 when the Act was passed and enforced. That provision was in the following terms:—

"If the lower Court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point shall be reversed by the decree in appeal, the Appellate Court may, if it thinks right, remand the case, together with a copy of the decree in appeal to the Lower Court, with directions to restore the suit to its original number in the Register and proceed to investigate the merits of the case, and pass a decree therein."

Section 352 of the Code of 1859 provided:—

"It shall not be competent to the Appellate Court to remand a case for a second decision by the Lower Court, except as provided in the last preceding section."

6. The Code of 1859 was repealed and was replaced by the one of 1877 (Act X of 1877). In the Code of 1877 the counter part of section 351 of the 1859 Code was section 562. This provision ran:—

"If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of fact which appears to the appellate Court essential to the determination of the rights of the parties and the decree upon such preliminary point is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits

The appellate Court may, if it thinks fit, direct what issue or issues shall be tried in any case so remanded"

Section 564 of the 1877 Code provided: "The appellate Court shall not remand a case for a second decision, except as provided in Section 562"

7-8. The Code of 1877 was repealed and was replaced by the one of 1882 (Act No XIV of 1882). In this Code the provisions of Sections 562 and 564 were brought forward from the Code of 1877 verbatim.

9. The Code of 1882 was also repealed and was replaced by the present Code,

which was passed in 1908. In the present Code the counter-part of Section 562 of the Code of 1882 is Order XLI, Rule 23, which reads:—

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case,"

This Court amended Order XLI, Rule 23, C. P. C. with effect from June 1, 1957 and that provision now for the purposes of this State reads:—

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court, while reversing or setting aside the decree under appeal, considers it necessary in the interest of justice to remand the case, it may by order remand the case."

Clearly the Allahabad amendment to Order XLI, Rule 23, C. P. C. has widened the scope of the provisions Whereas formerly a remand could be made only in a case where the decree of the lower court disposing of the case had proceeded on a preliminary point, now the position is that a remand order can be passed also in cases where the Court considers it necessary in the interest of justice to do so.

10. In other words now remand can be granted in a case which was disposed of on a preliminary point as also in a case where this Court is of the opinion that the interest of justice requires the remand of the case.

11. G. C Mathur, J. has clearly stated in the referring order that he remanded the case under Order XLI, Rule 23 as amended by this Court on the ground that it was necessary to do so in the interest of justice. In other words as he himself points out his order of remand does not fall under unamended Order XLI, Rule 23, C. P. C.

12. The question requiring consideration is whether in these circumstances the appellant is entitled to the refund of the Court fees.

13. Clearly Section 351 of the Code of 1859 is no longer law now. Therefore, if the provisions of section 13 of the Act are not to become dead letter, some meanings must be given to the words "on any of the grounds mentioned in Section 351." It is contended that for Section 351 we must read Order XLI, Rule 23, C. P. C., which is the counter part in the present Code of that provision. The further submission is that Order XLI, Rule 23, C. P. C. should be read for Section 351 in its amended form. Section 122, C. P. C. confers upon the High Courts the power to make rules

regulating their own procedure and the procedure of the civil courts subject to their superintendence and the power extends to annul, alter or add to all or any of the rules in the First Schedule. There is no dispute that this Court had the power to amend Order XLI, Rule 23, C. P. C. in the form in which it has done. Some other Courts have also amended Order XLI, Rule 23, C. P. C. and the amendments do differ to some extent.

14. If the submission made by the learned counsel for the appellant-applicant were to be accepted, then Section 13 of the Act would have different scope and different meanings in different States depending upon the terms in which Order XLI, Rule 23, C. P. C. has been framed in those States. The Act is an All India Act and the same words in Section 13 cannot have different scope and different meanings in different States of this country. It was held by a Full Bench of this Court in *Municipal Board, Kanpur v. Janki Prasad*, AIR 1963 All 433 (FB), that the same word in a statute cannot have two different meanings in two different local areas governed by the same statute.

15. True, "court fees" payable in a Court other than the Supreme Court is a State subject. (See Entry 3 of List II of II Schedule of the Constitution). The State legislature can, therefore, amend Section 13 for Uttar Pradesh, but only after following the procedure required by the Constitution. Such an amendment in this section cannot be assumed only on the basis of the amendment made by this Court in a provision contained not in this Act, but in another statute, i. e. Order XLI, Rule 23, C. P. C.

16. But apart from this consideration, in my opinion, the language of Section 13 of the Act does not support the submission made on behalf of the appellant-applicant. Properly analysed the provisions of Section 13 of the Act are that court fee would be refundable under the following two circumstances:

(i) If an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or

(ii) if a suit is remanded in appeal on any of the grounds mentioned in Section 351 of the same Code.

Ours is a case where a suit is remanded in appeal and we are concerned with the second clause of Section 13 of the Act. To my mind, all that this clause provides for is that the grounds for remand must be those which are contained in Section 351 of the 1859 Code. The provision does not mean that the grounds must be those which are mentioned in the counter part of Section 351 in the Code contemporaneously applicable. The

legislature has not used the words "on any of the grounds mentioned in Section 351 or in its counter part in the Civil Procedure Code for the time being applicable." In the expression "on any of the grounds mentioned in Section 351 of the same Code" what is of importance is the grounds contained in Section 351 and not Section 351. The words used are not "or if a suit is remanded under Section 351 of the same Code." If those were the words used, there might have been some justification for saying that for Section 351, read its counter part in the existing Code. But the legislature has deliberately not used those words. In my opinion, it has not done so because it did not want to go beyond the grounds already existing in Section 351 of the 1859 Code and did not want to widen the scope of this Section in accordance with the local amendments which may be made in the counter parts of that provision in subsequent Codes.

The reference in Section 13 of the Act is confined to the grounds mentioned in Section 351 and does not extend to Section 351. It is an elementary and a cardinal principle of interpretation of all statutes to find out the natural and grammatical meaning of the words used in them. It is also well settled that when the text is explicit, the text is conclusive. The legislature has deliberately used the words "or if a suit is remanded on any of the grounds mentioned in Section 351 of the same Code" and we cannot read for these words "or if a suit is remanded under section 351 of the same Code". What the legislature intended by using the words "on any of the grounds mentioned in Section 351" was to bodily lift the grounds of Section 351 and to make them a part of this provision. They used these words instead of reproducing the grounds mentioned in Section 351 in Sec. 13 of the Act for legislative convenience because if the language of Section 351 was bodily lifted and placed in Section 13 of the Act, the provision might have become cumbersome and inartistic. The intention of the legislature in using the words "on any of the grounds mentioned in Section 351" was to make Section 13 of the Act read as follows :—

"If an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or in a case where the lower Court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact which shall appear to the appellate court essential to the rights of the parties and the decree of the lower court upon such preliminary points has been reversed by the decree in appeal, and the appellate court has remanded the case it shall grant to the appellant a cer-

tificate authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

But as pointed out earlier, the provision might have become cumbersome and on the ground of convenience instead of bodily lifting the words of Sec. 351 and putting them in Section 13 of the Act, the legislature adopted the convenient expression "on any of the grounds mentioned in S. 351." It could never have the intention of allowing S. 13 of the Act to be automatically amended in accordance not only with the language of the counter parts of Section 351 in the subsequent Codes, but also in accordance with the local amendments. In the Code of 1859 there was no provision analogous to section 122 of the present Code with the result that the Sadar Court (also High Court) did not have any power to annul, alter or amend the provisions of the Code. The only power that the Sadar Court (later on the High Court after passing of the High Courts Act, 1861) had was "to make and issue general rules for regulating and practice and proceedings of the subordinate Civil Courts, and also to frame forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and for keeping all books, entries, and accounts to be kept by the Officers, and from time to time to alter any such rule or form; provided that such rules and forms be not inconsistent with the provisions of this Act (1859 Code) or of any other law in force." Inasmuch as there was no provision permitting local amendments by High Courts in the Code of 1859 which was in force in 1870, when the Act was passed, Section 13 of the Act could not have visualised the existence of the local amendments made, by the various High Courts in exercise of their powers under Section 122, C. P. C. nor could it have comprehended them in its scope and for this reason apart from others it is not possible to take the view that Section 13 of the Act contemplates the application of Order XLI, Rule 23, C. P. C. as amended by this Court and other Courts.

17. The view that I am taking with regard to the interpretation of Section 13 of the Act finds some support from *In re Woods' Estate; Ex Parte Commrs. of Works and Buildings*, (1886) 31 Ch. D. 607 where Lord Esher observed at pages 615 and 616—

"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the latter Act,

you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

I also find support from the following observation of Lord Blackburn in *Mayor, &c. of Portsmouth v. Smith*, (1885) 10 AC 364 occurring at page 371:—

"Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken,"

18. Order XLI, Rule 23, in the form in which it stands in the C. P. C. (unamended by this Court) is analogous to Section 351 of 1859 Code. I am satisfied that by the use of the words "on any of the grounds mentioned in Section 351 of the same Code" occurring in Section 13 of the Act all that is intended to provide is "on the ground that the decree of the lower court disposing of a case on a preliminary point has been reversed by the appellate court." Therefore, in my opinion court fee can be refunded only in a case which falls under Order XLI, Rule 23 in the unamended form.

19. In my opinion, Section 8(1) of the General Clauses Act cannot be of any help in the case. Section 8(1) of the General Clauses Act reads :—

"Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification, any provision of a former enactment, then reference in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

This provision would only enable us to read Order XLI, Rule 23, for Section 562 of the 1882 Code in any statute where that section is referred to, but a reference to Section 351 of 1859 Code in other Acts cannot be read as reference to Order XLI, Rule 23, C. P. C. because the Code of 1908 has not repealed the one of 1859 but that of 1882. Besides, clause 8 of the General Clauses Act talks of a Central Act or Regulation. Sec. 351 of 1859 Code was a provision in the Central Act. So is Order XLI, Rule 23, but clearly Order XLI, Rule 23 as amended by this Court is only a State amendment made by a State authority (the Allahabad High Court). Section 8 of the General Clauses Act will apply to a provision which has been framed by the Central Legislature. I am doubtful if it can apply to the case of a provision framed not by an authority competent to pass a Central Act or Regulation, but by an authority competent only to make a local or State amendment. Again, section 8 only em-

bodies a rule of interpretation. It can be invoked where there is doubt in the interpretation of any statute. In my opinion there is no occasion for any doubt in the construction of Section 13 of the Act. If the words in Section 13 were "If a suit is remanded in appeal under Section 351 of the Code of 1859" there could be no remand order after the repeal of that provision and in that case Section 8 of the General Clauses Act could be utilised to read for Section 351 of 1859 Code its corresponding provisions in the succeeding Code one after the other.

20. Reliance has been placed on Section 158 of the present Code. That provision reads:—

"In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or Section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding part, Order, Section or Rule".

(Underlined by me (herein ' '))

This provision is analogous to the second part of Section 3 of 1882 Code, which read :—

".....
And when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act No. VIII of 1859, Act No. XXIII of 1861, or the "Code of Civil Procedure," or to Act No. X of 1877, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

"....."

Its corresponding provision in 1877 Code was the second part of Section 3 of that Code, which ran—

".....
But when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the 'Code of Civil Procedure,' or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

"....."

The reason why such provisions were made was to maintain the administrability of the Acts in which reference had been made to provisions of Code which was being repealed. Instead of amending the provisions of all the Acts (the task would have been tremendous if not impossible) in which reference was made to the provisions of the Code which was

being repealed by substituting the reference of the repealed Act by the Repealing Act the legislature adopted the convenient device of making a provision like Section 158 C. P. C. (1908). The effect of a provision like this is (to) put in the various Acts the corresponding provision of the Repealing Act in place of the provision of the repealed Act. But what we are entitled to read in place of the provision of the repealed Code is the corresponding provision in the repealing Code. Order XLI, Rule 23, as amended by this Court, provides for much more than was contained in Section 562 of 1882 Code.

It cannot, therefore, be treated to be the corresponding provision of Sec. 562 of 1882 Code. There cannot be two corresponding provisions to Section 562 of the 1882 Code: one Order XLI, Rule 23 (unamended) and the other the amended Order XLI, Rule 23, specially when the contents of the two very materially differ. The words "so far as practicable" occurring in Section 158, C. P. C. (1908), clearly suggest that only within practicable limits the rule contained in Section 158, C. P. C. (1908) would be enforced. It is not practicable to read the amended Order XLI, Rule 23, for Section 562 of the 1882 Code firstly because the contents of the two very materially differ and secondly because the corresponding provision could be the unamended Order XLI, Rule 23, C. P. C. which is *pari materia* with Section 562 of 1882 Code and is the provision passed by the legislature, unlike Order XLI, Rule 23 (amended) which has been framed by a delegatee only for local application.

21. The rule contemplated by Section 158 of the present Code is the rule as framed by the Legislature and not the one as framed or amended by the delegatee, the High Court. This becomes apparent by the use of the words "be taken to be made to this Code or 'its' (underlined by me (herein ' ')) corresponding part, Order, Section or Rule." Note the word "its". "Its" obviously refers to the "Code". Therefore, the words in quotation would read "be taken to be made to this Code or to the corresponding part, Order, Section or Rule of this Code." Order XLI, Rule 23, is of "this Code" but the amended Order XLI, Rule 23, is not of this Code. It is by a legal fiction to be treated of the Code and would have effect as if it was of the Code.

22. It is significant that in Section 158 the word "rule" is preceded by the words "part, order, section or". "Part, Order, Section" clearly refer to the part, order and section of the Code as passed by the legislature. Therefore, "rule" must also refer to rule as passed by the legislature and not to the one framed by the High Court.

22A. Section 127 of the 1908 C. P. C. reads:—

"Rules so made and sanctioned shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them 'as if they' had been contained in the First Schedule."

(Underlined by me (herein ' '))

The power to repeal belongs only to a legislature. The combined effect of Sections 122 and 127, C. P. C. (1908), or any of those provisions separately is not to result in the repeal of Order XLI, Rule 23, as passed by the Central Legislature. The amended rule, therefore, does not obliterate the original rule, but permits its eclipse only for the State where it has been amended. Section 127, C. P. C. only introduces a legal fiction, that is, that the amended rule will be deemed a rule contained in the Code though in fact it is not. This is apparent from the use of the words "as if they had been contained in the first Schedule." Section 158, C. P. C. (1908), does not refer to rules which in fact are not rules, but by legal fiction are treated to be rules. True, the rules framed by the High Court will by virtue of Section 127 of the present Code "have the same force and effect" as the original rules contained in the C. P. C., but they do not for that reason repeal the original rules and themselves become rules, to have a similar effect as another provision is not to make the two provisions the same or one.

23. As Section 127 itself provides the rules amended by the High Courts have only local application, that is, within the jurisdiction of the High Court concerned. Different High Courts can frame different rules for their States and they may materially differ. Those rules may be law within the State, but it is difficult to believe that the rules framed by the State High Courts with their limited application can be comprehended in the expression "rule" occurring in Section 158 of 1908 Code. I am, therefore, unable to agree that Section 158 C. P. C. (1908) in any way supports the claim of the applicant. In my opinion section 158 C. P. C. only helps us to read Order XLI, Rule 23, C. P. C. (unamended) in Section 13 of the Act in place of Section 351.

24. It is true that Section 13 of the Act was framed on equitable considerations. The idea perhaps was to give relief to a person by remitting his court fee in respect of a matter which has not been decided by Courts. The principle being that after the remand order, the matter will be decided again and the aggrieved

party will have to pay court fee again in respect of the same matter.

25. In the first place court fee is a tax and the Court Fee Act is a taxing statute. Taxation and equity do not always go hand in hand and while interpreting a taxing statute, considerations of equity are out of place. Some legal principle apart from equity must be brought in aid in support of a claim for the remission or refund of a tax.

26. Secondly there is a difference even with regard to equity in a case covered by Order XLI, Rule 23, (unamended) and the one covered by the amended provision. Whereas in the former case the suit is decided on a preliminary issue and there has been no adjudication in respect of other pleas, in the latter case there has been a complete adjudication on all the pleas by the lower court and the case is remanded on the ground that the interest of justice requires that the matter should be re-heard. In the former case it may be said that a party did not have a return for the court fee he paid, in the latter he had a full return, all his pleas having been adjudicated upon. There is thus a clear difference in the two cases and it would be wrong to say that it would be unjust and illogical to give relief in the first case but not in the second.

27. Learned counsel for the applicant has placed reliance upon 1964 All LJ 868 (supra) and *Sohan Singh v. Oriental Bank of Commerce*, AIR 1956 Punj 215. The first is a decision by a Division Bench of this Court and the second that of the Punjab High Court. The learned Judges who decided 1964 All LJ 868 (supra) went on the provisions of Section 8 of the General Clauses Act and Section 158, C. P. C. I have already given my reasons for holding that these provisions do not apply in the instant case. In AIR 1956 Punj 215 (supra) the view taken was that in the first place section 13 of the Act would cover a case where a remand has been made on ground of "interest of justice" even though the case may not have been decided by the lower Court on the preliminary point and thus may travel beyond the scope of Order XLI, Rule 23 C. P. C. unamended; secondly, even if Section 13 of the Act did not comprehend a remand on a ground other than contained in Order XLI, Rule 23, C. P. C. unamended, under the inherent powers, a High Court can direct the refund of court fee under Section 13 of the Act. With great respect to the learned Judges, I am unable to agree with them. I have already said earlier that Section 13 of the Act is confined in its operation only to a case where the remand order is made under Order XLI, Rule 23 unamended. I am of

the opinion that inherent powers cannot be invoked in a case which is covered by statute. If Section 13 of the Act did not provide for refund of Court fee in a case where the remand order has been passed on a ground not contained under Order XLI, Rule 23 unamended, the Courts cannot expand its scope or give the relief, which the legislature has not given, in the name of the exercise of its inherent powers.

28. It is well settled that when an Act deals with a particular subject, it is exhaustive on that subject and any relief not given by the Act, cannot be given. (See *Ganga Saran v. Firm Ram Charan Ram Gopal*, AIR 1952 SC 9 — where it was observed "that to the extent that the Contract Act deals with a particular subject it is exhaustive upon the same." and also *Official Receiver, Jhansi v. Jugal Kishore*, AIR 1963 All 459 (FB)).

29. In *Sales Tax Officer v. Kanhaiya Lal Mukund Lal Saraf*, AIR 1959 SC 135 it was observed "in order to ascertain the true meaning and intent of the provisions, we have got to turn to the very terms of the statute itself, divorced from all considerations as to what was the state of the previous law or the law in England or elsewhere at the time when the statute was enacted. To do otherwise would be to make the law, not to interpret it."

30. In *Munna Lal v. Abir Chand*, AIR 1958 All 766 a Full Bench of this Court doubted the existence of the inherent powers to direct refund of court fee. Their Lordships observed:—

"There are cases which have gone to the length of holding that the Court has no inherent powers, at all to order refund of court-fee, and that even if the court fee has been paid inadvertently, the prayer for refund cannot be made in the Civil Court but has to be addressed to the revenue authorities. For instances of such cases reference may be made to *Lalta Prasad v. Sheoraj Singh*, AIR 1920 All 54; *U Po Toke v. U Lu Gyi*, AIR 1936 Rang 352 and *In re Vedaranyaswamy Devasthanam*, AIR 1942 Mad 464. Some observations of Desai, J. in *Tej Bahadur v. Pearey Lal*, AIR 1957 All 734 which are in the nature of obiter dicta also indicate the same view."

31. For the reasons mentioned above I am of the view that the petition of the applicant for the refund of the Court fee should be dismissed. I would direct the parties to bear their own costs.

31A. PATHAK, J. :— This is an application under S 13 of the Court Fees Act, 1870, by the appellant in a second appeal for a certificate authorising him to receive back from the Collector the amount of court fee paid on the memorandum of the second appeal.

32. The appellant filed a suit for money. The suit was decreed by the trial court. The lower appellate court, on appeal, set aside the decree of the trial Court and dismissed the suit. The appellant proceeded in second appeal to this Court and on January 2, 1967 the Court allowed the appeal, set aside the decree of the lower appellate court and remanded the case to that Court with a direction to re-hear the appeal and to dispose it of in accordance with law. The appellant then filed the instant application. The application came up before G. C. Mathur, J., and reliance was placed by the appellant on 1964 All LJ 868 in support of the proposition that where under the amendment introduced by this Court in Order 41 Rule 23 of the Code of Civil Procedure, the Court remanded the case on the ground that it was in the interest of justice to do so the appellant was entitled to a refund of the court-fee on the memorandum of appeal. G. C. Mathur J. came to the view that the law laid down in *Raja Virendra Shah Ju Deo's case*, 1964 All LJ 868 required reconsideration, and accordingly the case has been laid before this Full Bench.

33. It is urged by Mr. C. P. Srivastava, for the appellant, that Section 13 of the Court Fees Act must be read with Order 41, Rule 23 of the Code of Civil Procedure as amended by this Court, and upon that he contends that the appellant is entitled to a refund of the court-fee paid on the memorandum of the second appeal.

34. The submission on behalf of the State of Uttar Pradesh is that Section 13 of the Court Fees Act must be confined to a case where the suit has been disposed of on a preliminary point and the appellate court has set aside the decree and remanded the case. It cannot be extended, it is said, to a case where the suit has been decided on the merits and the appellate court has set aside the decree and remanded the case on the ground that it is in the interest of justice to do so. The latter ground, it is pointed out, was added by this Court and cannot be said to constitute one of the grounds contemplated by section 13 of the Court Fees Act.

35. Section 13 of the Court Fees Act provides:

"If an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal on any of the grounds mentioned in Section 351 of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal;

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorise the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded."

36. We are concerned with the second category of cases contemplated by Section 13. The section speaks of a suit remanded in appeal "on any of the grounds mentioned in Section 351 of the same Code for a second decision by the lower court." The Code referred to here is the Code of Civil Procedure, 1859, because that was the operative Code at the time when the Court Fees Act was enacted in 1870. The dispute between the parties must be resolved by determining whether any of the grounds mentioned in Section 351 of the Code of Civil Procedure, 1859 can include the ground that the case should be remanded in the interest of justice.

37. At the time when the Court Fees Act was framed, section 351 of the Code of Civil Procedure, 1859 read as follows:—

"If the Lower Court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point shall be reversed by the decree in appeal, the Appellate Court may, if it thinks right, remand the case, together with a copy of the decree in appeal, to the Lower Court, with directions to restore the suit to its original number in the Register, and proceed to investigate the merits of the case, and pass a decree therein."

38. The Code of 1859 was repealed and replaced by the Code of Civil Procedure, 1877. Section 562 of the Code of 1877 was in terms almost identical with Section 351 of the earlier Code. The Code of 1877 was in turn repealed and replaced by the Code of Civil Procedure, 1882, and contained a corresponding provision in S. 562. Then the Code of 1882 was repealed and replaced by the present Code of Civil Procedure. Corresponding to Section 562 of the Code of 1882 is Order 41, Rule 23 of the present Code which, when the Code was framed, read as follows:

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case"

39. It will appear that substantially the terms of Order 41, Rule 23 correspond to those contained in Section 351 of the Code of 1859 except that the words "so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties" occurring in section 351 have been omitted. On June 1, 1957 this Court, in pursuance of the powers conferred by Section 122 of the Code of 1908 amended Order 41, Rule 23 and empowered the Court to remand a case in appeal on the ground also that it was necessary in the interest of justice to do so.

40. There is no dispute between the parties that when reading Section 13 of the Court Fees Act the reference therein to Section 351 of the Code of 1859 must be construed as a reference to Order 41, Rule 23 of the Code of 1908. The controversy before us centres round the question whether the amendment effected by this Court in Order 41, Rule 23 of the Code of 1908 can be read when applying Section 13 of the Court Fees Act. It is urged by the appellant that Section 13 of the Court Fees Act contemplates that there can be more than one ground on which a suit is remanded in appeal and, it is contended, that inasmuch as there was only one ground upon which the suit could be remanded under Section 351 of the Code of 1859, the Legislature, when framing Section 13 of the Court Fees Act, must have contemplated additional grounds for remand brought into the Code by amendments introduced by the High Courts. I cannot accept the contention. The argument presupposes that at the time when Section 13 of the Court Fees Act was framed, there was power in the High Courts to amend the provisions of the Code.

I have examined the provisions of the Code of 1859 and I have been unable to discover any such power. That power was vested in the High Courts, it appears, for the first time by Section 122 of the Code of 1908. It was certainly not contained in the Code of 1859, and that was the Code, as I have pointed out, which governed civil procedure when the Court Fees Act was enacted. It is not possible to contemplate that when the Legislature framed section 13 of the Court Fees Act, it could have had in mind that subsequently almost four decades later there would be a Code which would confer such power upon the High Courts. Far less could it have contemplated that still a half century thereafter a High Court would so amend the power to remand a suit in appeal as to add to further ground in which the power of remand may be exercised. It is not possible for me to accept the submission of the appellant that when Section 13 of the Court Fees Act was framed the Legis-

lature had in mind the grounds introduced by the amendment made by this Court in Order 41, R. 23 of the Code of 1908. In my opinion, the grounds which the Legislature can be said to have had in mind are those which must be discovered within the scope of Section 351 of the Code of 1859 alone.

41. The next question which arises upon the submissions before us is whether by the operation of Section 8(1) of the General Clauses Act, 1897, it can be said that Order 41, Rule 23 as amended by this Court must be read, where reference is made to Section 351 of the Code of 1859, in Section 13 of the Court Fees Act. Section 8(1) of the General Clauses Act provides:—

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted."

It appears to me that Section 8(1) of the General Clauses Act, 1897 can be of no assistance in this case. The Code of 1908, it is true, was enacted after the General Clauses Act was brought into operation. But it repealed and enacted in Order 41, Rule 23 the provisions of Section 562 of the Code of 1882. The Code of 1908 did not repeal the Code of 1859. However, in view of the opinion, which I now proceed to set out in respect of the remaining contention of the appellant, it is not necessary for me to express myself finally as to the operation of Sec. 8(1) of the General Clauses Act.

42. The appellant relies upon section 158 of the Code of 1908. Section 158 reads:—

"In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, Section or Rule."

The submissions of the parties have proceeded on the basis that when Section 13 of the Court Fees Act refers to section 351 of the Code of 1859 it must be taken, by reason of Section 158 of the Code of 1908, to refer to Order 41, Rule 23 of the latter Code. The question is whether the reference to Order 41, Rule 23 will also include the amendment in that rule introduced by this Court. The

respondent says that it cannot because an amendment made by the High Court under section 122 of the Code is not a rule contained in the Code. It is urged that it is only by virtue of Section 127 that it is to be deemed by legal fiction to be contained in the First Schedule, and that again solely for the purpose of construing its force and effect. The amendment, it is said, is not part of the Code and our attention has been drawn to Section 128 which provides that the rules made by the High Court "shall be not inconsistent with the provisions in the body of this Code."

43. To appreciate these submissions comprehensively, it will be necessary to digress somewhat and examine the organic structure of the Code of 1908.

44. The Code of Civil Procedure, 1908 is an Act which consists of a number of sections and rules. The first eight sections are grouped together as "Preliminary" and the remaining are arranged into parts. The rules are comprised in five Schedules. We are concerned only with the first Schedule, which indeed is the only one which remains after the repeal of the others. The First Schedule consists of a number of rules arranged into Orders. Apart from the rules contained in the First Schedule, Sections 122 and 125 confer power upon the High Courts to make rules.

45. The word "Code", wherever used in the Act, is defined by Section 2(1) as including rules. Section 2(18) defines "rules" to mean "rules and forms contained in the First Schedule or made under section 122 or section 125." It is clear that wherever the word "Code" is used in the Act of 1908, it includes not only the sections comprised in it but also rules and forms contained in the First Schedule as well as the rules and forms made by the High Courts under Section 122 or Section 125. It will be found that the Act used both expressions "Code" and "body of the Code". The expression "body of the Code" is not defined. But upon an analysis of the several provisions of the Act it will be clear that the expression "body of the Code" is employed only where reference is intended to the sections of the Act. That that is so will appear from a perusal of the provisions of Sections 7, 8, 96, 100, 104, 121 and 128.

46. The sections mentioned above are jurisdictional provisions and having regard to their subject-matter the expression "body of the Code" can refer to the sections only and not to the rules. The conclusion is reinforced if regard is had to section 121 and section 128. Section 121 declares that the rules in the First Schedule shall have effect "as if enacted in the body of this Code". Section 128

provides that the rules made by the High Court "shall be not inconsistent with the provisions in the body of this Code," which rules by section 127 are deemed to have the same force and effect as if they had been contained in the First Schedule. It is clear from Sections 121 and 123 that the rules contained in the First Schedule and the rules framed by the High Courts are in fact outside the "body of the Code". The sections alone therefore comprise the "body of the Code"

47. The word "Code" has been used in different sections of the Act, and it will be apparent from the several provisions wherever the word occurs that reference is intended not merely to the sections of the Act but to the entire Code, which includes the rules in the First Schedule and the rules made by the High Courts. I have examined the several Sections of the Act where the word "Code" has been used. Some of them are Sections 5, 12, 29, 36, 43, 44, 62, 67, 86, 97, 104, 105, 107, 108, 112, 114, 117, 119, 129, 132, 134, 136, 137, 141, 142, 143, 146, 148, 151, 157 and 158. In none of these can it be said that reference is intended merely to the sections of the Act and not to the rules also. In a Full Bench decision of the Madras High Court reported in *Bademian Saheb v. Jankan Saheb*, AIR 1938 Mad 438 Leach, C. J., who spoke for the Court, observed:

"S. 2(1) makes it clear that the Code includes the rules in Sch. I. Therefore O. 21, R. 17 is as much as a part of the Code as the sections forming the body of the Act."

Now, what is of significance is that the sections of the Act, namely the "body of the Code", can be altered by legislation only. Legislation may be effected by Parliament or by a State Legislature. The sections cannot be altered or amended by the High Courts. In that sense the "body of the Code" consists of provisions which are fundamental and less easily amenable to amendment than the rules contained in the First Schedule. The sections enjoy a certain status and a related degree of permanency denied to the rules contained in the First Schedule which can be annulled, altered or added to by rules made by the High Courts under Section 122. The power to annul, modify or add to the rules contained in the First Schedule has been conferred upon the High Court for the purpose of answering local needs and adapting the First Schedule to effectively serve that purpose. It was pointed out by Sir Lawrence Jenkins, C. J. in *Mani Mohan Mandal v. Ramtaran Mandal*, AIR 1917 Cal 657:

"The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with de-

tails and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules."

This Court examined the question in *Karam Singh v. Kunwar Sen*, AIR 1942 All 387 and Allsop, J. said:

"It is manifest that the Civil Procedure Code was framed in its present form, namely in the form of an Act with schedules attached so as to give greater elasticity to the rules of procedure. The main body of the Act sets forth the fundamental principles which are variable only by the Legislature itself. The rules in Sch. I deal with matters of detail which are variable at the instance of the various High Courts with the previous approval of certain other authorities."

To the same effect are the observations in *Trimbak Bhikaji v. Dhonappa Narayanappa*, AIR 1945 Nag 83 at p. 85 where the learned Judges referred to the observations in *Mani Mohan's* case and *Karam Singh's* case. Reference was also made by them to a Full Bench decision of the Calcutta High Court in *Abdul Karim Abu Ahmad Khan v. Allahabad Bank, Ltd.*, AIR 1917 Cal 44. Comparatively recent cases in which similar observations have been made are *Sheshgiridas Shanbhag v. Sunderrao*, AIR 1946 Bom 361, *Laxmikumar Srinivas Das v. Krishnaram Baldeo Bank, Lashkar*, AIR 1954 Madh B. 156 and *Satyanarayana v. Venkata Subbiah*, AIR 1957 Andh Pra 172 (FB).

48. Section 121 declares:

"The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part."

and Section 127 provides:

"Rules (i. e. Rules made by a High Court) so made and approved shall be published in the official Gazette and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule."

It was not necessary to enact these provisions for the purpose of deeming that the rules contained in the First Schedule or made by the High Courts are part of the Code. That purpose was completely achieved by section 2(1) read with Section 2(18) of the Code. The object in enacting sections 121 and 127 was entirely different. By section 122 the

High Courts were empowered to make rules annulling, altering or adding to the rules in the First Schedule, and in order that the rules framed by the High Courts should have the same force and effect as the rules which they removed, amended or supplemented the Legislature enacted Section 127. It provided that the rules framed by the High Courts would have the same force and effect as if they had been contained in the First Schedule. They would have the same force although they were framed by the High Courts and not by the Legislature. In other words, they would have the same status in law as the rules contained in the First Schedule. They would also have the same effect, namely, that as regards legal consequences they would be at parity with the rules contained in the First Schedule. Thus, it might fairly be inferred that in regard to their force and effect the rules framed by the High Courts are assimilated into the First Schedule.

49. Now, by virtue of Section 121 the rules in the First Schedule have effect as if enacted in the body of the Code. Accordingly, the rules contained in the First Schedule as well as the rules framed by the High Courts must be considered in their effect as if they are further provisions in the body of the Code. With Section 128 safeguarding that the rules framed by the High Courts would not be inconsistent with the Section of the Code, the Legislature provided a harmonious balance between the sections, the rules in the First Schedule, and the rules framed by the High Courts. The mutual relationship in which these three classified categories of law have been placed demonstrates the organic unity running through the entire content of the Code.

50. In my opinion when section 158 speaks of the "corresponding rule" of the Code of 1908 it refers to the rule in the First Schedule as amended, supplemented or replaced by the rule framed by the High Court. It is not possible for me to come to a contrary conclusion. There is no ground for limiting the reference in section 13 of the Court Fees Act to those provisions only of Order 41, Rule 23 which were originally enacted in the First Schedule. The terms of section 158 are wide enough to refer to the entire sweep of the rule. There is nothing in the terms of section 158 which limits the reference to the rule to the terms in which it was originally enacted. Then, it must be remembered that under section 122 the High Court has power not merely to add to the rules in the First Schedule but also to alter them as well as to annul them. Consider a case whether Order 41, Rule 23 is altered by the High Court by substituting altogether different grounds for remand in place of the original provision. Can it

be contended that the altered provision of Order 41, Rule 23 cannot now be referred to when applying section 13 of the Court Fees Act? If the contention is that it cannot, it would lead to the unacceptable conclusion that in matters of remand Section 13 cannot operate within the jurisdiction of that Court. If that conclusion is not possible where the grounds originally enacted in Order 41, Rule 23 have been completely substituted by new grounds, there is no reason why there should be any difference in principle when the grounds have been added to by the High Court.

51. There is another consideration upon which I find myself, for the purpose of applying section 13 of the Court Fees Act, unable to limit the reference to Order 41, Rule 23 to its original provisions. The object behind Section 13 appears to be that court fee should be levied only once in the progress of a suit from the lower court to the appellate court even though the case is remanded for re-trial and the movement to the appellate court repeated. It appears to be intended that the litigant should be relieved of the burden of court fee in obtaining the removal of an erroneous decision of the lower court and a retrial of the case. That is also demonstrated by the terms of the proviso to Section 13, which limit the refund of the Court fee to that part of the subject matter in respect of which the suit is remanded. Now, if a refund of the court-fee is available when the case is remanded because the appellate court disagrees with the disposal of the suit by the lower court on the preliminary point, I am unable to discern any reason why the same right should not be recognised in an appellant if the appellate court finds it necessary to remand the case on any other ground. The remand of the case for retrial is, I think, the material event entitling the appellant to a refund of the court fee. It is immaterial that the remand has been ordered for one reason or another.

52. But the respondent says that if Order 41, Rule 23, when referred to in Section 13 of the Court Fees Act, is taken to include an amendment effected by the High Court, the construction will offend against the rule that the words in a Central Act cannot be so construed as to bear a different meaning in different parts of the country. Reference has been made to AIR 1963 All 433 (FB). It seems to me that the rule is not attracted in the instant case. There is no question here of giving a different meaning to section 13 in different parts of the land. Wherever Section 13 is read, no matter in which State of India, the reference to Section 351 of the Code of 1859 must be read as a reference to Order 41, Rule 23 of the Code of 1908. The language of sec-

tion 13 is uniform in its meaning throughout the territories of India. It must be taken as referring to Order 41, Rule 23. Now, the reference to Order 41, Rule 23 does not make that rule an integral part of Section 13 as if it were incorporated in it. All that it means is that when you apply section 13 you must read Order 41, Rule 23 to discover the grounds for remand contemplated by it. The benefit of section 13 will vary from State to State according to the terms of Order 41, Rule 23 in each State. That variance arises not because of any different meaning assigned to the provisions of section 13. It follows from the language of Order 41, Rule 23. The difference turns not on what Section 13 says but on how Order 41, Rule 23 reads.

53. For all these reasons, I am of opinion that an appellant is entitled to a refund of the court fee paid on the memorandum of appeal whenever the appeal is remanded under Order 41, Rule 23 as amended by this Court. In my judgment the statement of the law to this effect in 1964 All LJ 868 accords to the true position in law. The application of the appellant under Section 13 of the Court Fees Act should be allowed with costs.

54. A. K. KIRTY, J. :— I agree with the opinion of my learned brother Pathak J. and his reasonings. I, however, do not consider it necessary to go into question of the applicability of Sec. 8(1) of the General Clauses Act or to give my opinion thereon.

BY THE COURT

55. In view of the opinion of the majority, the appellant is entitled to a refund of the amount of Court fee paid by him on the memorandum of Second Appeal. The application is allowed with costs.

GGM/D.V.C. Petition allowed.

AIR 1969 ALLAHABAD 155 (V 56 C 28)
S. N. KATJU, J.

Phool Chand, Appellant v. Lalit Kishore and others, Respondents.

Second Appeals Nos. 1744 and 1745 of 1961, D/- 22-12-1967, from order of Temporary Civil and S. J., Aligarh, D/- 23-1-1961.

Hindu Law — Debts — Manager — Suit against — Creditor wishing to make joint family liable for manager's debts should make it clear in plaint — Judgment or decree not indicating that debt was incurred in capacity of manager — Decree cannot be executed against entire family property, but can be executed

IL/JL/E113/68

only against judgment-debtor's share. AIR 1935 Lah 1, Diss.

If there is nothing in the judgment or the decree to indicate that the claim of the creditor had proceeded on the footing that the debt had been incurred by the Karta of the family on behalf of the family and for legal necessity, then in such a case the decree obtained by the creditor can only be executed as against the interest of the judgment-debtor in the family properties and not against the entire joint family properties in which the other members of the family have interest. It may be that in certain cases the defendant is not described as the Karta of the family and the other members of the family are not impleaded but if there is sufficient indication in the judgment and the decree that the claim was not only against the defendant in person but in his capacity as the managing member of the family, then in such a case it may be open to a creditor to proceed against the joint family properties leaving it to the members of the family to challenge the action of the creditor decree-holder. AIR 1935 Lah 1, Diss.

(Para 10)

If the creditor intends to make his claim against the entire family, then even if he impleads only the Karta in the suit it should be sufficiently made clear not only in the plaint that the claim is against the entire family and the family properties, but this position should also be made clear in the decree so that the other members of the family may not be taken by surprise. AIR 1943 Mad 1 (FB), Rel. on.

(Para 11)

Cases Referred: Chronological Paras
(1943) AIR 1943 Mad 1 (V 30)=

ILR (1943) Mad 248 (FB), Chippagiri Nagireddi v. Venkatadri Somappa

(1935) AIR 1935 Lah 1 (V 22)=157
Ind Cas 739, Jai Kishen v. Ram Chand

(1912) ILR 34 All 549=9 All LJ
819 (FB), Hori Lal v. Nimman Kumwar

Brij Lal Gupta and Ashok Gupta, for Appellant; Anangpal Gupta (for No. 1) and P. M. Gupta (for No. 2), for Respondents.

JUDGMENT :— These are two connected appeals which arise out of proceedings in execution of a decree passed in favour of Phool Chand in suit No. 242 of 1953 of the court of Munsif Koil, district Aligarh.

2. One Mohan Lal has two sons — Udai Ram and Maya Ram. Udai Ram's son was Ram Prasad who was married to Smt. Sharbati. Their sons are Lalit Kishore and Durga Dutt. Maya Ram's son is Shiam Manohar.

3. Phool Chand who is the appellant in the two appeals before me instituted the aforesaid suit no. 242 of 1953 for recovery of Rs 2535/- together with interest etc. from Durga Dutt. It was alleged that the latter had borrowed money from Phool Chand and hence the claim against Durga Dutt. The aforesaid suit was decreed. The defendant in that suit was described as "Durga Dutt son of Sri Ram Prasad, caste Maithil Brahman, resident of Pala Sahibabad, Pargana and Tahsil Koil, district Aligarh, Proprietor of R. S. Sharma & Company, Aligarh". Suit No. 73 of 1959 was brought by Phool Chand against Lalit Kishore, Smt. Sharbati, Shiam Manohar and Durga Dutt. It was stated therein that after the passing of the aforesaid decree in suit no. 242 of 1953 against Durga Dutt the plaintiff got attached the house and shop in dispute.

Objections under Order 21, Rule 58 C. P. C. were raised by Lalit Kishore, Smt. Sharbati and Shiam Manohar on the ground that they had a 5/6th interest in the said house and the shop and their aforesaid interest could not be attached and sold in execution of the decree in suit no. 242 of 1953. The plaintiff Phool Chand sought a declaration by suit no. 73 of 1959 that the aforesaid house and the shop were liable to be attached and sold in execution of the aforesaid decree in suit no. 242 of 1953 which had been passed in his favour. Suit No. 401 of 1958 was instituted by Lalit Kishore, Smt. Sharbati and Shiam Manohar against Phool Chand and Durga Dutt in which they prayed that their 5/6th interest in the aforesaid house and shop was not liable to be attached and sold in execution of the decree in suit no. 242 of 1953 which had been passed in favour of Phool Chand.

4. The trial court decreed suit no 401 of 1958 and dismissed suit no. 73 of 1959. Aggrieved from the decision in the two suits Phool Chand preferred appeals before the lower appellate court. Both the appeals were dismissed by it. Phool Chand has now preferred second appeal in this Court. When the appeals came before me earlier I remitted the following issue to the court below for its finding thereon.—

"Whether Shiam Manohar, Ram Prasad, Durga Dutt and Lalit Kishore were members of a joint Hindu family and whether Shiam Kishore had an interest in the properties purchased by Ram Prasad and Durga Dutt by the sale deeds of 1940?"

The court below found that Shiam Manohar was not a member of the joint family with Ram Prasad and his sons. It has further found that Shiam Manohar had no interest in the properties pur-

chased in the name of Ram Prasad and Durga Dutt by the sale deeds of 1940.

5. It was the case of Lalit Kishore and Smt. Sharbati that Ram Prasad had purchased the house and the shop in dispute from his own money and the name of Durga Dutt had been entered in the sale deed as benami, and that Shiam Manohar had no interest in the aforesaid house in dispute because Ram Prasad and Shiam Manohar were separate. The aforesaid findings are findings of fact. They cannot be assailed in second appeal.

6. It was strenuously urged by Phool Chand that the shop and the house in dispute were exclusively owned by Durga Dutt. The court below repelled this contention and it must be held that the house and the shop in dispute are jointly owned by the two brothers Lalit Kishore and Durga Dutt and their mother Smt. Sharbati. The question for consideration is whether Phool Chand could execute his decree as against the said house and the shop. It was contended by the learned counsel for Phool Chand that the decree passed in suit no. 242 of 1953 was binding on Lalit Kishore and Smt. Sharbati also because Durga Dutt had taken the loan from Phool Chand for purposes of the family business run in the name of Messrs R. S. Sharma and Durga Dutt as manager of the family was representing the interest of the members of the family and, therefore, the latter were bound by the decree passed against Durga Dutt. As mentioned above, Durga Dutt was described in the suit as the owner of Messrs R. S. Sharma & Company, Aligarh. It was stated in the first paragraph of the plaint of the said suit that the firm R. S. Sharma was the family (khandani) firm of the defendant Durga Dutt for purposes of which he had taken the loan from the plaintiff Phool Chand. Besides the aforesaid averment that the firm R S Sharma was a family firm there was no other allegation in the plaint to show the character of the firm and the members of the family which had interest therein, or the fact that Durga Dutt was the karta of the family and the needs of the business necessitated the taking of the loan. That suit was decreed against Durga Dutt and the decree describes Durga Dutt as proprietor of firm R S Sharma & Co. Thus there is nothing in the decree to indicate that Durga Dutt was the manager of the family which was conducting the family business and money had been taken for purposes of the said business.

7. In suit no 73 of 1959, the case of Phool Chand was that the house and the shop in dispute belonged exclusively to Durga Dutt and they were liable to be

attached and sold in execution of the decree passed against him. In the alternative he contended that even if it was held that Lalit Kishore and Smt. Sharbati had any interest in the said house and the shop, even then the aforesaid properties could be sold in execution of the decree passed in his favour because the loan had been taken by Durga Dutt for purposes of the family business and he being the Karta represented the other members of the family in his dealings with Phool Chand. The case of Lalit Kishore and Smt. Sharbati was that Shiam Manohar was also a member of the family and had an interest in the said house and the shop in dispute and thus Durga Dutt had only a 1/6th share in the said house and the shop in dispute. It has been found that Shiam Manohar is not joint with the branch of Ram Prasad and, therefore, Durga Dutt will have a one-third interest in the said house and the shop in dispute.

8. There can be no doubt that the 1/3rd interest of Durga Dutt in the properties in dispute is liable to be attached and sold in execution of the decree passed against him and in favour of Phool Chand. The question, however, is whether the 2/3rd interest of Lalit Kishore and Sharbati is also liable to be sold in execution of the decree passed in favour of Phool Chand. The decree passed in the earlier suit no. 242 of 1953 was only against Durga Dutt and the court below held that it was not open to the decree-holder in the execution proceedings to contend that it could also be executed against the interest of Lalit Kishore and Smt. Sharbati in the joint properties in dispute. It observed:

"There is nothing in the plaint of that suit to show that Phool Chand had alleged that the debt was borrowed by Durga Dutt as a manager of the joint family concern and for the benefit of the members of the joint family and the same was as such binding on the other members of the family. These points should have been agitated and decided in the original suit (suit no. 242 of 1953).

These points cannot be agitated and decided in the execution department after the decree in suit no. 242 of 1953 had been passed and put in execution.

At this stage Phool Chand cannot be heard saying that the debt was taken by the manager of the joint Hindu family concern in his capacity as such manager and was binding on every member of that joint family."

9. Learned counsel for the appellant relied on a Full Bench decision of the Punjab High Court in *Jai Kishen v. Ram Chand*, AIR 1935 Lah 1. In the aforesaid case one R obtained a money decree against D and in execution of that decree

a house was attached and sold to the decree-holder who obtained possession in due course. J, a minor, who was the nephew of D brought a suit for possession of the house alleging that it was the exclusive property of his father T on whose death it had devolved on him and, therefore, it was not liable to attachment and sale in the execution of the decree obtained against D. D and T were brothers. The suit was resisted by the decree-holder R who contended that T and their sons were members of the joint Hindu family of which D was the Karta and the decree in execution of which the house had been sold had been passed on foot of a debt raised by D in his capacity as Karta of the family and for purposes which were binding on all the coparceners. It was also alleged that the house in question, though nominally purchased in the name of D, really belonged to the joint family and, therefore, it had been properly attached and sold in execution of the decree. The Court posed the question whether in such a case it is obligatory on the plaintiff to implead the junior members of the parties to the suit and where this has not been done and the decree *ex facie* is against the managing member alone, whether the decree-holder can proceed against the entire family property. It observed as follows:

"This question has to be examined in respect of two distinct classes of cases:

(i) where the managing member has mortgaged the family property and the suit has been brought on foot of the mortgage and decreed against him alone, and

(ii) where the loan raised by him was unsecured and a simple money decree has been passed against him to which the junior members were not parties"

A Full Bench decision of this Court in *Hori Lal v. Nimman Kunwar*, (1912) ILR 34 All 549 (FB), was relied on (for?) the support of the proposition that in a suit brought on the foot of a mortgage against the Karta the decree would be binding on the junior members of the family. Banerji, J. observed as follows:—

"I do not think that it is essential that the manager when he brings his suit should state in distinct terms that he is suing as manager, or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or being sued as such in respect of a family debt. If it is denied that the person suing or sued is the manager that fact must be proved."

On the second proposition where a simple money decree is passed for the recovery of an unsecured debt in a suit against the managing member of the family to which the junior members were not parties, Tek Chand, J. made the fol-

lowing observation in *Jai Kishen's case*, AIR 1935 Lah 1 (supra).—

"The consensus of judicial opinion is overwhelmingly in favour of the view that a decree passed against the managing member of an undivided Hindu family in respect of a liability incurred within the scope of his authority is enforceable against the interest of the junior members in the family property, even though they had not been made parties to the suit, but such members are not precluded from contesting the authority of the manager or the nature of the debt, and this they may do either in the course of execution proceedings or in a suit of their own."

Tek Chand, J., however, pushed the above mentioned proposition of law still further when he observed:

"There is, of course, no presumption that a debt contracted by the manager of a Hindu family was contracted for family purposes, and this fact must be proved by evidence. AIR 1934 P. C. 4 But at the same time, the mere circumstances that it had not been disclosed in the course of the proceedings in the original suit against the managing member, that the debt had been raised for family necessity or that the decree does not show on the face of it that the judgment-debtor had been sued in his capacity as manager, is not fatal to the right of the decree-holder to proceed against the entire family property. It is not the frame of the suit or the form of the decree which is conclusive of the matter: the essential point is whether in fact the debt which is the basis of the decree had been raised by the judgment-debtor within the scope of his authority as the manager and for the purposes of the family. This question of fact can be determined finally only after the junior members have had proper opportunity of being heard, either in the execution proceedings, or in a separate suit specially brought for the purposes."

10. I respectfully beg to differ from the above mentioned proposition of law as enunciated by Tek Chand, J. I am not prepared to subscribe to the view that where a creditor institutes a suit against a member of the family, not mentioning in it that the defendant is the Karta of the family and not disclosing in it that the debt had been incurred for family necessity and the judgment and decree on the face of it do not show that the defendant had been sued in his capacity as the Karta of the family and the liability had been incurred on behalf of the family, then in such circumstances it is open to the creditor-decree-holder to execute his decree against the joint family properties and leave it to the members of the family to challenge the

right of the decree-holder to proceed against the family properties. If there is nothing in the judgment or the decree to indicate that the claim of the creditor had proceeded on the footing that the debt had been incurred by the Karta of the family on behalf of the family and for legal necessity, then in such a case the decree obtained by the creditor can only be executed as against the interest of the judgment-debtor in the family properties and not against the entire joint family properties in which the other members of the family have interest. It may be that in certain cases the defendant is not described as the Karta of the family and the other members of the family are not impleaded but if there is sufficient indication in the judgment and the decree that the claim was not only against the defendant in person but in his capacity as the managing member of the family, then in such a case it may be open to a creditor to proceed against the joint family properties leaving it to the members of the family to challenge the action of the creditor decree-holder.

11. In suit no. 242 of 1953 Durga Dutt had been described as proprietor (malik) of R. S. Sharma & Company and in the first paragraph of the plaint it was only stated that the firm R S Sharma was the family (khandani) firm. In the description given in the array of parties Durga Dutt was described as the proprietor. That may mean that he was the sole proprietor of the firm. The mere use of the expression Khandani in the first paragraph of the plaint could not mean that the business was run by the family of which Lalit Kishore and Smt. Sharbati were also members. It might be that Durga Dutt had continued the lock making business of his father. That would not necessarily imply that the business of Durga Dutt was a joint business in which Lalit Kishore and Sharbati were also interested as members of the family. Again, the decree was only against Durga Dutt who was described as the proprietor of the firm R. S. Sharma & Co. The judgment of the learned Munsif in the aforesaid case was not produced by the appellant and there is only the plaint and the decree in suit no. 242 of 1953 to indicate the nature of the suit and the decree. There is thus nothing to show that Durga Dutt had been sued in his capacity as the managing member of the family of which Lalit Kishore and Sharbati were members and that the firm R S Sharma & Company was the joint family firm of the family and the money which had been advanced by Phool Chand to Durga Dutt had been taken by Durga Dutt for the benefit of the family. Under these circumstances I have no hesitation in holding that it is not open to the decree-holder to proceed

against the entire family properties in which Lalit Kishore and Sharbati are also interested. The lower appellate court took the correct view in holding that the aforesaid question should have been agitated and decided in suit no. 242 of 1953 and it could not be raised subsequently in execution proceedings.

If that was not so, a hazardous situation would be created for the members of a joint family. The result would be, with which I disagree, that a creditor could institute a suit against a member of the family and take the other members of the family by surprise by confining his claim only against one of the members and succeed in obtaining a decree against the defendant and once the decree is obtained he would be free to proceed in execution not only against the interest of the defendant in the joint family property but also against the entire family properties leaving it open to the other members of the family to assert their own claims in the joint family. If the creditor intends to make his claims against the entire family, then even if he impleads only the Karta in the suit it should be sufficiently made clear not only in the plaint that the claim is against the entire family and the family properties, but this position should also be made clear in the decree so that the other members of the family may not be taken by surprise. If the position is made clear in the judgment and the decree that the decree was confined not to the defendant alone but it also extended as against the entire family, then only the decree-holder could proceed against the family properties. If such a position is not made clear in the judgment and the decree then the decree-holder has no right to proceed in execution beyond the interest of the defendant-judgment-debtor in the family properties. In Chippagiri Nagireddi v. Venkadar Somappa, AIR 1943 Mad 1 (FB) the case related a claim on the basis of a promissory note. It was observed:

"Each case must depend on its own facts but where the facts are similar to the facts in those cases, as they are in the present case, only the defendant can be called upon to satisfy the decree. A creditor has only himself to blame if he contents himself with the suing on the instrument. He can if he wishes add a claim on the debt and join the other coparceners as defendants, or he can bring a suit against them on the debt."

It is not necessary to refer further to the aforesaid case as it arose out of a claim on the basis of a promissory note.

12. I agree with the view of the court below that "at this stage Phool Chand cannot be heard saying that the debt was taken by the manager of the joint Hindu family concerned in his capacity

as such manager and was binding on every member of that joint family."

13. Even though it was not necessary for me to consider the evidence on the record with regard to the liability of the joint family I have looked into the evidence and find that it is wholly insufficient to establish that the firm R. S. Sharma & Co. was a joint family firm in which Lalit Kishore and Sharbati had interest and the money borrowed by Durga Dutt from Phool Chand was for legal necessity and for the benefit of the family firm.

14. The appeals fail and are dismissed with costs.

MVJ/D.V.C.

Appeals dismissed.

AIR 1969 ALLAHABAD 159 (V 56 C 29) SATISH CHANDRA, J.

Kishori Lal Bihani, Petitioner v. The Addl. Collector and District Magistrate, Kanpur and others, Respondents.

Civil Misc. Writ No. 2999 of 1967, D/- 21-12-1967.

Essential Commodities Act (1955), Ss. 6A and 7 — Forfeiture of goods — Mens rea or bona fides of dealer — Consideration of, is relevant — Ss. 6A and 7 are in pari materia.

The consideration of mens rea or bona fides of a dealer is relevant while passing an order of forfeiture of foodgrains from him under S. 6A. The view that the question of bona fides or mens rea of a dealer may have bearing in criminal proceedings and may be considered there if any prosecution is launched against the dealer and that those considerations are out of place at the stage of the confiscation, is not correct. The contravention attracting the provisions of S 6A has the same legal incidence and consequences and has the same nature and character as the contravention made punishable by S. 7. The two provisions i. e. Ss. 6A and 7 are in pari materia. AIR 1966 SC 43, Ref.

(Paras 2, 3, 4, 6 & 7)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 43 (V 53)=1966

Cri LJ 71, Nathu Lal v. State of Madhya Pradesh

2

J. Swaroop, V. Swaroop and Subodh Markandey, for Petitioner; Standing Counsel, for Respondents.

ORDER :— Section 6-A of the Essential Commodities Act, 1955, authorises the Collector to order the confiscation of foodgrains, edible oilseeds or edible oils in pursuance of an order made under Section 3 of that Act if he is satisfied that there has been a contravention of

such order. For the same contravention the dealer is liable to be punished under Section 7 of the Essential Commodities Act to the punishments mentioned therein. (Sic) Under clause (b) of Sec 7(1) any property in respect of which the order has been contravened or such part thereof as the Court may deem fit shall be forfeited to the Government. Under the proviso the Court can refrain from directing the forfeiture of the seized property if it is of the opinion that it is unnecessary to direct it.

2. The question is whether the contravention spoken of in section 6-A has the same legal incidence and consequences and has the same nature and character as the contravention made punishable by section 7. In *Nathu Lal v. State of Madhya Pradesh*, AIR 1966 SC 43 the Supreme Court held that mens rea was an essential ingredient of an offence under Section 7 of the Essential Commodities Act. An intentional contravention of an order made under Section 3 of that Act has to be established. If it is proved that the breach of an order under Section 3 was under a bona fide belief that the dealer could legally store the foodgrains seized, without infringing any order, there would be no "contravention" under Section 7 of the Act.

3. In my opinion the contravention attracting the provisions of section 6A is of the same character. It is to be seen that the same transaction of seizure of foodgrains on the ground that an order under Section 3 has been violated attracts liability to forfeiture under section 6A as well as punishment under Section 7. Section 6A as well as section 7 expressly use the same word "contravention" on the existence of which the power to take action arises. Under section 6A the Collector has to be satisfied that there has been a contravention of the order. Under Section 7 the Court has to find contravention of the same order. Two provisions are in pari materia. They should bear the same significance and legal incidents. Thus for satisfying himself that the provisions of an order under Section 3 have been contravened, the Collector would be entitled to take into consideration the question whether there was an intentional contravention of the order, or whether the conduct of the dealer was bona fide, under the belief that he was acting legally. These considerations would not be outside the purview of the satisfaction of the Collector that there has been a contravention of the order.

4. This view is strengthened by the scheme of the Act. Under Section 7 after the Court finds that there has been a contravention, the property in relation to which there has been a contravention is to stand forfeited to the Government,

subject to the Court directing to the contrary. The Court can for reasons to be recorded refrain from directing the forfeiture if in its opinion it is not necessary to do so. So, in a case where initially an order of confiscation has been passed under section 6A, and the dealer is subsequently prosecuted, the Court is entitled to look into the whole matter and to see whether there were reasons for not directing so. If it finds that it is not necessary to order forfeiture of the goods, it can direct that the goods need not be forfeited. In that case the initial order of the Collector would stand modified or abrogated.

Thus the orders under section 6A are provisional, that is they are subject to the orders passed by the Court. Section 7 does not require that the contravention for which the dealer was liable to be punished under it, was something different in nature and character than the contravention for which an order of forfeiture is to be passed by the Collector in the first instance u/s. 6A. That shows that the contravention which entails forfeiture is of the same kind as that for which a dealer can be punished. I am, therefore, of the opinion that the question whether there was mens rea was relevant at the stage of passing an order of forfeiture under Section 6A.

5. In this case the U. P. Foodgrains (Restriction on Hoarding) Order, 1966, which came into force on June 30, 1966, provided that a licensed dealer shall not have in his possession at any time, a quantity of any one of the mentioned foodgrains exceeding 1,000 quintals or of all kinds of foodgrains exceeding 2,500 quintals. This order was amended by the U. P. Foodgrains (Restriction on Hoarding) (Amendment) Order, 1967, which came into force on 1st February, 1967. Under this amendment for the words "1000 quintals and 2500 quintals" the words "250 quintals and 1000 quintals" were substituted with the result that a dealer could not keep more than 250 quintals of any particular variety of foodgrain. On 16th March, 1967, the authorities conducted a raid on the petitioner's premises and seized 539.26 quintals of paddy.

Subsequently on 7th July, 1967, a notice was issued to the petitioner to show cause why the seized quantity of paddy be not confiscated. Ultimately on 29th July, 1967 the Additional Collector passed an order confiscating 289.26 quintals of paddy which was found with the petitioner in excess of the permissible maximum of 250 quintals. The Additional Collector held that he was not empowered to take into consideration the bona fides or otherwise of the conduct of the petitioner. He had only to see whether

there was any violation of the provisions of law.

6. The petitioner went up in appeal under Section 6-C to the Commissioner. The Commissioner held that it was true that there was no guilty intention on the part of the petitioner because the amendments introduced on 1st February, 1967, had not come to the notice of the officials as well as the public until much later, but the question of bona fides may have bearing in criminal proceedings and would be liable to be considered there if any criminal prosecution is launched against the petitioner. At this stage of confiscation these considerations are out of place. The Commissioner further found that the petitioner was sending regular reports about his stock to the Marketing Inspector even though they were in excess of the maximum prescribed by the amendment. That shows that he had no intention of committing a breach of the order. On this finding, it could not in my opinion, be said that the petitioner had contravened the order. No liability of confiscation accordingly arose.

7. As explained above the officials below misdirected themselves in law in taking the view that the considerations of mens rea or bona fides were irrelevant while passing an order under Section 6A confiscating the seized goods.

8. The petition, therefore, succeeds and is allowed. The impugned order confiscating the goods seized from the petitioner's premises on 16th March, 1967, is set aside. Under the circumstances, the parties will bear their own costs.

HGP/D.V.C.

Petition allowed.

AIR 1969 ALLAHABAD 161 (V 56 C 30)

S K. VERMA, J.

Ishtiyag Husain Abbas Husain, Appellant v. Zafrul Islam Afzal Husain and others, Respondents.

Second Appeal No. 4234 of 1959, D/- 9-11-1967, from judgment and decree of Civil J., Moradabad, D/- 9-4-1959

Civil P. C. (1908), S. 80 — Suit for declaration of title and possession decreed — State Government impleaded as pro forma defendant, being tenant of property, not putting in appearance — Want of notice under S. 80—Plea as to — Cannot be raised by private individual to assail the decree — State Government by non-appearance must be deemed to have waived the plea, AIR 1958 SC 274 & AIR 1942 Bom 339 & (1905) ILR 32 Cal 1130, Appld.

(Paras 3, 4)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 274 (V 45)= 1958 SCR 781, Dhian Singh Sobha Singh v. Union of India

(1942) AIR 1942 Bom 339 (V 29)= 44 Bom LR 727, Hirachand Himatlal v. Kashinath Thakurji 3
(1905) ILR 32 Cal 1130=1 Cal LJ 542, Raghubans Sahai v. Ful Kumari 8

N. Kumar, for Appellant; M. H. Beg and Majeeduddin, for Respondents.

JUDGMENT :— This is a defendant's second appeal arising out of a suit filed by the plaintiff-respondent for a declaration that the plaintiff is the owner in possession of the house described at the foot of the plaint, situate in village Sahaspur Ali Nagar, Pargana Amrcha, district Moradabad.

2. The plaintiff's case was that he was the owner in possession of the house in suit of which defendant no. 2 was a tenant. One Mukhtar Ahmad Pradhan of the Gaon Samaj instituted proceedings under Rule 115D of the U. P. Zamindari Abolition and Land Reforms Act, claiming that the Gaon Samaj was the owner of the house in dispute. It was alleged, further, that neither defendant no. 2 nor defendant no. 4 was the owner of the house and that the sale-deed alleged to have been executed by Chhidda in favour of defendant no. 4 conferred no title upon him. In the proceedings under rule 115-D of the U. P. Zamindari Abolition and Land Reforms Act the plaintiff was directed to file a regular suit and hence he filed the suit out of which this appeal has arisen. The State Government was made a pro forma defendant and it did not put in appearance. The Gaon Samaj filed a written statement but thereafter took no further interest in the litigation. Defendant no. 2 did not put in appearance. The suit was contested only by the appellant, Ishtiyag Husain. He pleaded that the plaintiff was not the owner of the house and that the answering defendant had purchased the house by a registered sale-deed dated the 3rd of September 1956 from Chhidda who was the real owner of the house. The bar of Section 42 of the Specific Relief Act was also pleaded.

3. The learned Munsif framed three issues:—

(1) Whether the plaintiff is the owner of the house in suit as alleged?

(2) Whether the plaintiff is in possession of the house in suit? If not, its effect?

(3) To what relief, if any, is the plaintiff entitled?

He decided the first two issues in plaintiff's favour, namely that he was the owner in possession of the house in dispute. The suit was, however, dismissed by him on the technical ground that the notice under section 80 of the Code of Civil Procedure had not been proved. Curiously enough, the learned Munsif decided this point under the third issue

which related only to relief. There was no specific issue on this point. The plaintiff filed an appeal which was allowed by the learned Civil Judge of Moradabad and the suit was decreed. The learned counsel for the appellant has tried to impugn the decree of the lower appellate Court on the ground of want of notice as the result of absence of its proof. It appears to me that the plea of want of notice is open only to the Government and the Officers mentioned in section 80 and it is not open to a private individual. In this particular case the State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it. In *Dhian Singh Sobha Singh v. Union of India*, AIR 1958 SC 274 their Lordships observed as follows:—

"It is relevant to note that neither was this point taken by the respondent in the written statement which it filed in answer to the appellants' claim nor was any issue framed in that behalf by the trial Court and this may justify the inference that the objection under S. 80 had been waived."

In *Hirachand Himatlal v. Kashinath Thakurji*, AIR 1942 Bom 339 a Division Bench of the Bombay High Court said thus:—

"It is well settled and is conceded that the party in whose favour the section prescribes notice to be given can waive his right to notice"

In the first place defendant 3 is not the proper party to raise it, and in the second place the receivers in our opinion must be deemed to have waived their right to notice. It is open to the party protected by S. 80 to waive his rights, and his waiver binds the rest of the parties. But only he can waive notice, and if that is so, it is difficult to see any logical basis for the position that a party who has himself no right to notice can challenge a suit on the ground of want of notice to the only party entitled to receive it."

In *Raghubans Sahai v. Ful Kumari*, (1905) ILR 32 Cal 1130 a Division Bench of the Calcutta High Court observed as follows:—

"In the case before me, the Secretary of State was joined as a party; the only objection is that the notice required by S. 424 (present S. 80) of the Civil Procedure Code, was not served upon him two months before the institution of the suit. This objection in my opinion ought not to prevail for two reasons. In the first place, this objection can be taken only by the Secretary of State for whose benefit the notice is intended; but although the objection was taken on his behalf in the court of first instance and was overruled, the objection has not been

pressed by him in this Court; indeed, although the point was decided against the Secretary of State by the first court, no appeal was preferred by him, and though he was a party respondent to this appeal, he has not chosen to enter appearance."

4. In the case before me, as I have said above, the State of Uttar Pradesh did not even put in appearance in the trial court and it must be deemed to have waived any objection with regard to notice. In my opinion, it is not open to the appellant to raise this plea. The decree of the lower appellate court is perfectly correct and it must be upheld. This appeal is, therefore, dismissed with costs throughout.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 ALLAHABAD 162 (V 56 C 31)

K. B. ASTHANA, J.

Raj Kumar, Defendant-Applicant v. Vijaya Kumar and another, Plaintiffs Opposite Parties.

Civil Revn. No. 219 of 1966, D/- 24-10-1967.

(A) Civil P. C. (1908), Preamble — Judicial precedents — Principles as to — Decision without reason can hardly be a precedent — Decision of Division Bench of High Court of Allahabad (old) prior to 1948 — Entitled to great respect and value — But to say that a Judge of the New High Court established under U. P. High Courts Amalgamation Order 1948, Para 14 is bound by it may not be quite correct. (Para 3)

(B) Evidence Act (1872), S. 35 — Certificate of guardianship under S. 7 of Guardians and Wards Act is admissible in evidence — Entries therein as to period of minority are relevant under S. 35, Evidence Act — (Guardians and Wards Act (1890), S. 7). (1896) ILR 18 All 478, Not Foll. (1890) ILR 17 Cal 849, Disting.; AIR 1928 PC 152, Ref.; AIR 1926 Oudh 88 & AIR 1929 Oudh 134, Foll. (Para 4)

(C) Civil P. C. (1908), S. 115 — Powers of Court — Question as to age of minor plaintiff — Defendant not raising any objection in court below to admissibility of certified copy of application filed by minor's mother under Guardians and Wards Act and to certificate of guardianship — He cannot question admissibility of such documents in revision. (Para 5)

Cases Referred: Chronological Paras (1950) AIR 1950 Cal 533 (V 37).

Muktupada Dawn v. Aklama Khatun

(1929) AIR 1929 Oudh 134 (V 16) = 6 Oudh WN 51, Ameer Hasan v. Muhammad Ejaz Husain

IL/JL/E73/68

- (1928) AIR 1928 PC 152 (V 15)=
55 Mad LJ 88, Sadiq Ali Khan
v. Jai Kishori
(1926) AIR 1926 Oudh 88 (V 13)=
12 Oudh LJ 453, Mohan Lal v.
Mohammad Adil
(1896) ILR 18 All 478=1896 All
WN 158, Gunjra Kuer v. Ablakh
Pande
(1890) ILR 17 Cal 849, Satish
Chunder Mukhopadhyaya v. Mohen-
dro Lal Pathuk

Prakash Gupta, for Applicant; J. N.
Verma, for Opposite Parties.

ORDER :— This is an application in revision filed by the defendant in a suit pending in the court of the Munsif of Mathura, which was filed by the plaintiff, opposite party Vijaya Kumar, on 27-7-1964 as minor through his mother Sethani Vimla Devi. The suit was for recovery of arrears of rent and ejectment of the defendants from an accommodation of which the plaintiff was the landlord. After the written statement had been filed on behalf of the defendants, contesting the suit, the proper issues were framed. On 10th of August, 1965, Sethani Vimla Devi was examined as a witness for the plaintiff on commission. At the end of her cross-examination certain questions were put to her on behalf of the defendants regarding her age and that of her son Vijaya Kumar, the plaintiff. One of the questions was as to what her age was when her son Vijaya Kumar, the plaintiff was born. She first answered that she was 19 years of age but again stated that she was 17 years of age when Vijaya Kumar, the plaintiff, was born. In the description of her name her age was mentioned as 40 years by the Commissioner. No question was ever put to her on behalf of the defendants as to what her age was on the date on which she gave the statement. It appears that the defendants relying on her statement in cross-examination and on calculating the age of the plaintiff on that basis, found that the plaintiff was over 21 years of age on the date when he presented the plaint in the court.

Thereupon an application dated 12th October, 1965 was filed on behalf of the defendants praying for an amendment in the written statement by adding a plea that the plaintiff being a major, when he filed the suit, the plaint was not properly presented and verified. Soon after an application was filed by Vijaya Kumar, the plaintiff, on 20th October 1965 under Order 32 Rule 12 C. P. Code for securing an order that he had attained majority and next friend be discharged. The defendants filed an objection to this application of the plaintiff on the ground that the plaintiff being a major on the date of the suit, the application under

Order 32, Rule 12 C. P. Code was incompetent.

4 In support of his application under O.
32, Rule 12 C. P. Code, the plaintiff filed
4 a certified copy of an application given
4 by Sethani Vimla Devi under the Guar-
dians and Wards Act in the court of the
District Judge and the order passed
3 thereon granting a certificate of guar-
dianship under Sec. 7 of the Guardians
and Wards Act appointing Sethani
3 Vimla Devi as guardian during the period
of the minority of her son Vijaya Kumar
viz. till the 20th day in the month of
July, 1965. Thus the certificate which
was granted by the District Judge under
Section 7 of the Guardians and Wards
Act declared that Vijaya Kumar's minor-
ity was to cease after 20th July 1965. On
behalf of the defendants a communica-
tion received from the Municipal Board
of Mathura, was filed showing that in
the year 1944 no child was born to
Seth Bhagwan Das, father of Vijaya
Kumar.

2. The learned Munsif considered the application of the defendants for amendment of the written statement, the application of the plaintiff under Order 32, Rule 12 C. P. Code and the objection of the defendants to the said application together. Relying upon the application under the Guardians and Wards Act and the certificate granted under Section 7 of that Act produced in evidence on behalf of the plaintiff, the learned Munsif held that the plaintiff was a minor on the date when the plaint was presented and that he had attained majority on 21st July 1965. Accordingly the application of the plaintiff under Order 32, Rule 12 C. P. Code was allowed while the objection of the defendants to that application and the application of the defendant for amendment of the written statement were dismissed. The defendant has now come up in revision before this court under section 115 of C. P. Code against the rejection of his application for amendment of the written statement.

3. Sri Prakash Gupta, learned counsel appearing for the applicant, urged that in rejecting the prayer of the defendants for amendment of the written statement the court below acted with material illegality and irregularity in the exercise of its jurisdiction inasmuch as by taking into consideration the evidence which was inadmissible under the law, the learned Munsif erroneously recorded a finding that the plaintiff was a minor on the date of the presentation of the plaint. Learned counsel submitted that neither the application under the Guardians and Wards Act nor the certificate granted under section 7 of that Act would be admissible in evidence on the question of age, the same not being in the nature of an entry in any public or other official book, regis-

ter or record stating a fact in issue or relevant fact, made by a public servant in the discharge of his official duty within the meaning of Section 35 of the Indian Evidence Act. Reliance was placed in this connection on the cases of *Gunjra Kuer v. Ablakh Pande*, (1896) ILR 18 All 478 and *Muktipada Dawn v. Aklema Khatun*, AIR 1950 Cal 533.

No doubt these two cases support the proposition advanced by the learned counsel. Unfortunately the case of *Gunjra Kuer* (supra) decided by the Division Bench of Allahabad High Court does not give any reason but simply follows the decision of the Calcutta High Court in the case of *Satis Chunder Mukhopadhyaya v. Mahendro Lal Pathuk*, (1890) ILR 17 Cal 849. The latter case of Calcutta High Court which has been cited by the learned counsel is a decision of the learned single Judge of that Court and it was held that a certificate granted by the court in the guardianship proceedings cannot be treated as a judgment in rem and thus is inadmissible in evidence. The question whether an order passed by the District Judge under Section 7 of the Guardians and Wards Act or a certificate granted by the court will be relevant was actually not considered in the case. The previous decisions of the Calcutta High Court were considered by the learned Single Judge and it was held that the contents of the application made to the court under the Guardians and Wards Act could be made admissible under section 157 of the Indian Evidence Act for corroborating the evidence as to age in any subsequent legal proceedings. However, the learned counsel submitted that the Division Bench decision of this Court in the case of *Gunjra Kuer*, (1896) ILR 18 All 478 (supra) was a direct authority for the proposition that a certificate of guardianship is no evidence of minority and that I was bound by that decision. I do not agree. Firstly a decision without reason can hardly be a precedent and secondly this court is a new High Court and I am not bound by any Division Bench decision of the then High Court of Judicature at Allahabad. However, a decision of the High Court of Allahabad as it was prior to 1948 would be entitled to great respect and will have great value but to say that I as a Single Judge am bound by it may not be quite correct.

4. Sri G. N. Verma, learned counsel appearing for the plaintiff opposite party drew my attention to the case of *Nawab Sadiq Ali Khan v. Jai Kishori*, AIR 1928 PC 152. In this case decided by the Privy Council a certificate under the Guardians and Wards Act was relied upon as relevant evidence for determining the age. Here I may make a reference to a case of the erstwhile Oudh Chief Court

decided by a Division Bench of that Court: *Mohan Lal v. Mohammad Adil*, AIR 1926 Oudh 88. It was held that a guardianship certificate prepared and signed by the District Judge is a public document under section 35 of the Evidence Act and an entry therein will be relevant. This decision was followed in the case of *Ameer Hasan v. Muhammad Ejaz Husain*, AIR 1929 Oudh 134 where in it was held that the guardianship certificate in Oudh granted by District Judge was admissible under Section 35 of the Evidence Act. I agree with the reasoning of the learned Judges of the Oudh Chief Court which is equally applicable to a guardianship certificate granted by a District Judge subordinate to our High Court as this High Court has also framed rules under the Guardians and Wards Act which enjoin upon the District Judges to grant certificates under Section 7 of the Guardians and Wards Act in a specified form. Those rules are contained in Appendix 17(F) of General Rules Civil, 1957 for Civil Courts, subordinate to the High Court of Judicature at Allahabad, Volume 2. The form of an appointment under Section 7 of the Guardians and Wards Act is mentioned at page 285 of Volume 2 of the General Rules Civil, 1957. One of the requirements of the form is that the period of minority is to be mentioned. A District Judge would be a public servant within the meaning of Section 35 of the Indian Evidence Act or can even be said to be a person who performs a duty specifically enjoined by the law. The date as to when the minority would end would be an entry in a public record. In all the cases decided by Calcutta High Court this aspect of the question was not considered and it is not known whether the Calcutta High Court had made any rules under the Guardians and Wards Act requiring the District Judges to grant a certificate under section 7 of that Act in any particular form. I have no doubt in my mind that a certificate granted by a District Judge under section 7 of the Guardians and Wards Act would be admissible in evidence and any entry therein would be relevant under Section 35 of the Indian Evidence Act. Thus the certificate granted by the District Judge under Section 7 of the Guardians and Wards Act appointing Sethani Vimla Devi as the guardian of her minor son Vijaya Kumar and entering the date 20th July 1955 up to which the minority was to last was rightly relied upon by the learned Munsif as an evidence of age of Vijaya Kumar, the plaintiff.

5. I need not consider the other argument raised by Sri G. N. Verma, learned counsel for the plaintiff, opposite party on the merits when he submitted that the evidence of Sethani Vimla Devi itself

proved the date of birth of the plaintiff according to which he was minor when the suit was filed. However, there does appear some force in the argument of Mr. G. N. Verma, to the effect, that the defendant not having raised any objection in the court below to the admissibility of the certified copy of the application filed by Sethani Vimla Devi under the Guardians and Wards Act and to the certificate of guardianship he cannot now in revision question the admissibility of those documents in evidence.

6. For the reasons given above, I do not find any merits in this application and reject it with costs.

HGP/D.V.C. Application rejected.

AIR 1969 ALLAHABAD 165 (V 56 C 32)
S. D. SINGH, J.

Rahmat Ullah, Applicant v. State, Opposite Party.

Criminal Revn. No. 1482 of 1966, D/- 18-1-1968, from order of Magistrate, Varanasi, D/- 19-4-1966.

(A) Constitution of India, Art. 77(1) — Citizenship Act (1955), S. 9(2) — Citizenship Rules (1956), R. 30 — Order under S. 9(2) and R. 30 — Nature and validity of — Executive order within meaning of Art. 77(1) is valid though passed in name of Central Government and not President. AIR 1959 SC 308 & AIR 1964 SC 643, Rel. on. (Paras 7, 8)

(B) Citizenship Rules (1956), R. 30 — Decision under, by Central Government — When final.

Central Government can be said to have taken decision determining citizenship of a person under R. 30 by the date the Central Government has taken necessary steps to communicate the decision to the person concerned and when the order has gone out of the precincts of the office of Central Government on that date. It cannot thereafter be said that chance of the advice of the Ministers being changed still exists. AIR 1963 SC 395, Rel. on. (Para 15)

(C) Foreigners Act (1946), S. 14 — Citizenship Act (1955), S. 9(2) — Citizenship Rules (1956), R. 30 — Receipt of decision of Central Government under R. 30 by State Govt. — Framing of charge under S. 14 prior to communication of order under R. 30 to accused — Effect — Proceedings are not vitiated.

Where after obtaining the decision of the Central Government under R. 30, a person is prosecuted under S. 14 of the Foreigners Act (1946) by the State Govt. the proceedings do not get vitiated on the

ground that the order communicating decision of the Central Government was served upon him after framing of charge under S. 14 against him. (Para 18)

If such a decision is secured by the State Government by the time it becomes necessary for the Court to give a decision in the case, keeping in view the purpose of S. 9(2) and R. 30 there can be no reasonable ground for disregarding such a decision and deciding the case as if no decision had been given in the case. It is of course to be seen whether in any particular case any prejudice has been caused to an accused person on account of the late securing of the decision of the Central Government; but unless there is some question of prejudice being caused, it should not be open to courts to disregard the decision of the Central Government. AIR 1962 All 383, Explained. (Para 19)

(D) Foreigners Order (1948), Para 7 — Person entering India as Indian citizen — Becoming foreigner thereafter — Cannot be prosecuted for breach of Para 7.

Paragraph 7 of the Foreigners Order cannot be made to cover the case of a person who having entered India as a citizen of India fails to depart from India even though he may have ceased to be a citizen of India. In order that there may be a breach of Paragraph 7 it is necessary that the accused must have entered India as a foreigner and it is immaterial that he was a foreigner at the time he was prosecuted. AIR 1961 All 428, Foll. (Para 22)

(E) Foreigners Act (1946), S. 2(a) — Citizenship Act (1955), S. 9(1) — Acquisition of foreign citizenship by Indian citizen between 26-1-1950 and commencement of Citizenship Act — No loss of Indian citizenship till commencement of Citizenship Act — Person entering India before commencement of Act (1955) cannot be deemed foreigner at time of his entry.

Even if an Indian citizen acquires foreign citizenship between 26-1-1950 and commencement of the Citizenship Act, he also retains Indian citizenship by virtue of S. 9(1) of the Citizenship Act, till the commencement of the Citizenship Act. Therefore, if he returns to India before commencement of the Act, he cannot be called as foreigner, for, foreigner as defined in S. 2(a) of Foreigners Act (1946) is not a person who has acquired foreign citizenship but is a person who is not citizen of India. (Para 21)

On interpretation of S. 9(1) of the Citizenship Act it is clear that it is only in acquisition of foreign citizenship subsequent to commencement of the Act (1955) that the two dates of acquisition of foreign citizenship and loss of Indian citizenship will be the same, not so in

case in which foreign citizenship has been acquired in between 26-1-1950 and the commencement of the Act. There is obviously an anomaly in the law inasmuch as a person who acquired citizenship of a foreign country before the commencement of the Citizenship Act, 1955, will have double citizenship in between 26-1-1950 and the date of the commencement of the Act which is 30th December, 1955. (Para 21)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 648 (V 51)=	
(1964) 5 SCR 294, Jayantilal Amratlal v. F. N. Rana	5
(1963) AIR 1963 SC 395 (V 50)=	
(1962) Supp 3 SCR 713, Bachhittar Singh v. State of Punjab	11, 12, 15
(1962) AIR 1962 All 383 (V 49)=	
1962(2) Cri LJ 166, Khalil Ahmad v. State of U. P.	11, 16
(1961) AIR 1961 SC 493 (V 48)=	
(1961) 2 SCR 371, State of Punjab v. Sodhi Sukhdev Singh	13
(1961) AIR 1961 All 428 (V 48)=	
1960 All LJ 924=1961 (2) Cri LJ 173, State v. Yakub	22
(1959) AIR 1959 SC 308 (V 46)=	
1959 Supp (1) SCR 319, Gullapalli Nageswara Rao v. Andhra Pradesh Road Transport Corporation	5
Bashir Ahmad, for Applicant.	

ORDER :— This application arises out of a case against the applicant under Section 14 of the Foreigners Act (XXXI of 1946).

2. The prosecution allegation was that the applicant is a Pakistani national and came to India on the basis of a Pakistani passport dated 15th March, 1955, and Indian Visa dated 22nd March, 1955, and stayed on in India beyond the period fixed under the visa.

3. The applicant's contention was that he is an Indian and not a Pakistani citizen. He alleged that he was in India on 26th January, 1950, and that he had gone to Pakistan for a temporary visit, though he admits that he came to India after having obtained a Pakistani passport and an Indian visa.

4. The main question which arises for consideration in the case, therefore, was whether the applicant was an Indian citizen and reliance for the purpose was placed on behalf of the State on Section 9 of the Citizenship Act (LVII of 1955). Under sub-section (1) of this section if a citizen of India voluntarily acquired the citizenship of another country after the 26th of January, 1950 and before the commencement of the Act, shall upon such acquisition cease to be a citizen of India. Under sub-section (2) of the same section if any question arises as to whether when or how any person acquired the citizenship of another country, it has to be determined by such authority in

such manner and having regard to such rules of evidence as may be prescribed in this behalf. The provision to that effect is prescribed under Rule 30 of the Citizenship Rules, 1956. Under this rule if any question arises as to whether when or how any person has acquired the citizenship of another country the authority to determine such a question is to be the Central Government. It was thus contended on behalf of the State that the citizenship of the applicant has been determined by the Central Government under the aforesaid Rule 30 and reliance for the purpose was placed upon an order, Ex. Ka. 10, which purports to have been signed by one Sri C. L. Goel, Under Secretary to the Government of India. This order says that the Central Government has, acting under Section 9(2) of the Citizenship Act, 1955, and Rule 30 of the Citizenship Rules, 1956, determined that Sri Rahmatullah, who is the applicant in this revision, had voluntarily acquired the citizenship of Pakistan after 26th January, 1950, and before 15th March, 1955.

5. Learned counsel for the applicant has challenged this order from a number of points of view and it was contended that it could not be relied upon on behalf of the State in proof of the citizenship of the applicant. Under Article 77(1) of the Constitution of India all executive actions of the Government of India shall be expressed to be taken in the name of the President and it was contended that even this order should have been passed by the Central Government in the name of the President and as it was not, it is not a valid order for the determination of the citizenship of the applicant. Clause (1) of Article 77 aforesaid relates to executive action of the Government and it was contended that even a quasi-judicial order such as the one which determines the citizenship of a person is an executive action of the Government within the meaning of clause (1) of Article 77. Reliance for this purpose was placed upon two decisions of the Supreme Court, Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation, AIR 1959 SC 308 and Javanti Lal Amrit Lal v. F. N. Rana, AIR 1964 SC 648.

6. The 1959 case aforesaid was one in respect of the interpretation of the provisions of the Motor Vehicles Act, 1939. On page 326 of this decision, their Lordships observed.—

"The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power."

7. What has thus been held in this decision is that although an act may be quasi-judicial, if it is performed by an executive authority in the discharge of its executive functions, it would be an executive action of that authority. The 1964 case brings out the point more specifically. Their Lordships pointed out on page 655 of this decision that functions which do not fall strictly within the fields, legislative or judicial, fall under residuary class and must be regarded as executive. Proceeding further their Lordships pointed out:

"In the performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character."

This is a clear authority for the proposition that even the quasi-judicial function of the executive Government would be an executive function and it would in that case fall within the four corners of clause (1) of Article 77 of the Constitution.

8. The General Clauses Act, X of 1897, also defines "Central Government" as meaning in relation to anything done or to be done after the commencement of the Constitution, the President. Even according to this provision the authority given to the Central Government under Rule 30 of the Citizenship Rules, 1956, is to be exercised by the President and when this authority is so exercised by him or by any other authority permitted to do so under the rules of business, the action in any case must purport to have been taken in the name of the President. In view of what "Central Government" is defined to mean under Section 3(8) of the General Clauses Act, X of 1897, viz., "the President" the order in question will be deemed to have been made in the name of the President.

9. Another contention on behalf of the applicant was that the order, Ex. ka. 10, which has been relied upon by the State was passed by an Under Secretary of the Government of India and could not, therefore, be regarded as an order of the Central Government. The order itself shows that it was not the Under Secretary who passed the order, though he has signed it, but the Central Government as is specifically mentioned in the order itself that "the Central Government . . . hereby determines that the said Sri Rahmat Ullah has voluntarily acquired the citizenship of Pakistan." In signing the order, therefore, Sri G. L. Goyal was referring to a decision which had been taken by the Central Government and what Sri Goyal did by signing the order was only to communicate the aforesaid decision of the Central Govern-

ment to those who were likely to be affected by it.

10. The next point which was urged on behalf of the applicant was that even if a decision was taken by the Central Government within the meaning of Rule 30 of the Citizenship Rules, that decision could be deemed to have been taken only when it was communicated to the applicant and that the prosecution in this case was premature if it originated prior to the communication of the aforesaid order to him.

11. What appears to have happened in this case is that the charge sheet against the applicant was submitted in February, 1965, as according to the order sheet in the Magistrate's file, the first order passed in the case was dated 8th February, 1965. The order, Ex. ka. 10, may be deemed to have been passed sometime in November, 1964, though nothing is brought out in that respect clearly in the evidence. But it was communicated to the State Government under the Central Government letter dated 28th December, 1964, and served on the applicant on 29th March, 1965. The charge sheet against the applicant was framed earlier on 6th March, 1965, and the order convicting him under Section 14 of the Foreigners Act was passed on 19th April, 1966. What was urged on behalf of the applicant was that the order not having been communicated to him before the 29th of March, 1965, it will be deemed to have been passed against him on that date and the entire proceedings taken against him prior to it being premature, invalidated even the subsequent proceedings against him. Reliance for this purpose was placed upon two decisions — one of the Supreme Court in *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395 and another of a Division Bench of this Court in *Khalil Ahmad v. State of U. P.*, AIR 1962 All 383.

12. The Supreme Court decision in AIR 1963 SC 395 relates to an order which was passed by the State Government. Reliance in that case had been placed upon Article 166 of the Constitution which, however, uses exactly the same language which is employed in clause (1) of Article 77 of the Constitution. It has been held in that case that an order passed under clause (1) of Article 166 has to be expressed in the name of the Governor and that merely writing something on the file does not amount to an order. Their Lordships pointed out:

"The Constitution, therefore, requires and so did the Rules of Business framed by the Raj Pramukh of Pepsu provide that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be re-

garded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State."

Proceeding further their Lordships pointed out:

"Indeed it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the 'order' of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned."

13. Their Lordships then referred to an earlier decision, *State of Punjab v. Sodhi Sukhdev Singh*, AIR 1961 SC 493 in which a similar view was taken and in which it was observed.—

"Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and come to a contrary conclusion later on until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent."

14. Then their Lordships finally expressed their opinion that until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till then the communication of the order cannot be regarded as more than anything provisional in character. According to this view, therefore, the mere passing of the order in the file is not enough to show that a decision had been taken. The decision must be taken and after the approval to that decision is given by the authority whose approval is required under the Rules of Business, it must be communicated to the person concerned.

15. A question may arise in this connection whether the order will be deemed to have been passed within the meaning of what their Lordships of the Supreme Court have expressed in this decision, on the date on which it was actually served upon the person affected by the order or even on the date on

which necessary steps may have been taken by the Central Government to communicate the aforesaid order or decision to the person concerned. In this case the evidence indicates that the Central Government had written to the State Government on 28th December, 1964, that the order may be communicated to the present applicant. The possibility of the Central Government changing its decision within the meaning of what has been observed by their Lordships of the Supreme Court in *Bachhittar Singh's case*, AIR 1963 SC 395 ceased on the date this letter dated 28th December, 1964, Ex. Ka. 11, was sent to the State Government. Thereafter could it not be said that the chance of the advice of the Ministers being changed still existed? Since it had gone out of the precincts of the office of the Central Government on that date, it could be said in respect of it that the decision had in any case been taken by them.

16. The view taken by the Allahabad High Court in AIR 1962 All 383 is that a person cannot be prosecuted under Section 14 of the Foreigners Act without first obtaining the decision of the Central Government under Section 9(2) of the Citizenship Act. One of the questions which was referred to a Division Bench in that case was: "Whether the question of citizenship can be decided by the Central Government or by the law Courts?"

17. In answering this question the Division Bench observed:

"Our answer to question no. 1 therefore is that the question of citizenship can only be decided by the Central Government in accordance with Section 9(2) of the Citizenship Act. We further hold that there being no decision of the Central Government in the present case that the applicant was not a citizen of India he could not be prosecuted and convicted under Section 14 of the Foreigners Act."

Earlier in the judgment it is pointed out at page 387:

"It was next contended that under section 9(2) read with Rule 30 of the Citizenship Rules the proper authority to determine the question as to nationality of the petitioner was the Central Government and that the applicant could not have been prosecuted without first obtaining the decision of the Central Government under Section 9(2) of the Citizenship Act. In our opinion the objection raised by the applicant is sound."

18. It was contended on the basis of this decision that unless the decision of the Central Government is obtained, a person cannot even be prosecuted under Section 14 of the Foreigners Act. It appears difficult, however, to accept this interpretation of the decision of the Division Bench. In this case the decision of

the Central Government was not obtained at all and it was consequently held that without such decision the applicant could not be prosecuted or convicted under Section 14 of the Foreigners Act. This decision, in my opinion, cannot be interpreted to mean that even if the decision is given after a person has been prosecuted as aforesaid, that decision can be of no avail during the hearing of that case and the prosecution must fail merely on the ground that the decision of the Central Government was given after the applicant had been prosecuted.

19. The purpose behind Section 9 of the Citizenship Act and Rule 30 of the Citizenship Rules is that it is the Central Government and the Central Government alone which can decide the citizenship of a person who is supposed to adopt the citizenship of another country, and if such a decision is given by the State Government by the time it becomes necessary for the court to give a decision in the case, there does not appear to be any reasonable ground for disregarding such a decision and deciding the case as if no decision had been given in the case. It will of course have to be seen whether in any particular case any prejudice has been caused to an accused person on account of the late securing of the decision of the Central Government; but unless there is some question of prejudice being caused, it should not be open to courts to disregard the decision of the Central Government.

20. The main question which was put on behalf of the applicant, however, was that even if he had acquired citizenship of Pakistan and the decision of the Central Government on that question is final under sub-section (2) of Section 9 of the Citizenship Act 57 of 1955 read with Rule 30 of the Citizenship Rules, 1956, all that the Central Government could decide was that the applicant had acquired citizenship of Pakistan with effect from the date determined by the Central Government and that the acquisition of the citizenship of a foreign country did not automatically make the applicant a foreigner for purposes of Section 14 of the Foreigners Act XXXI of 1946. Section 14 aforesaid makes a person liable to be punished if he contravenes the provisions of the Act or of any order made thereunder. In this particular case, the applicant is alleged to have contravened the provisions of paragraph 7 of the Foreigners Order, 1948 under which provision every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 shall depart from India before the expiry of the period during which he is allowed to stay in India. The contention was that even though the applicant may have acquired foreign citizenship as a necessary

consequence of the order of the Central Government passed under Section 9(2) of the Citizenship Act, he did not cease to be a citizen of India automatically on his acquiring foreign citizenship and that since he continued to be a citizen of India he would not, for purposes of section 14 of the Foreigners Act, be deemed to be a foreigner as defined in clause (a) of Section 2 of that Act. This clause (a) of section 2 of the Foreigners Act defines 'foreigner' as a person who is not a citizen of India. In order therefore that a person must be a foreigner he must not be a citizen of India and if the applicant Rahmat Ullah had not lost his citizenship of India even though he had acquired Pakistani citizenship, he may not have committed a breach of paragraph 7 of the Foreigners Order, 1948.

21. As to whether or not Rahmatullah ceased to be a citizen of India on his having acquired Pakistani citizenship we will have to look back again to the provisions of section 9, sub-section (1) of the Citizenship Act, 1955. This sub-section (1) reads :—

"Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India."

This sub-section refers to a citizen of India acquiring citizenship of another country within two periods of time, one subsequent to the commencement of the Act and the other between 26th January, 1950 and the commencement of the Act. Normally this would cover the entire period since January 26, 1950 but the consequences of acquiring foreign citizenship within these two periods of time are a little different. Towards the end of sub-section (1) it provides:—

"Shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India."

This part of sub-section (1) of Section 9 thus provides that in one case the loss of citizenship of India will be with effect from the date of acquisition of a foreign citizenship and in the other with effect from the commencement of the Act. That portion of sub-section (1) which connects the loss of citizenship of India to the date of acquisition of foreign citizenship refers to the acquisition of foreign citizenship subsequent to the commencement of the Act, while the loss of citizenship of India with effect from the date of the commencement of the Act relates to the acquisition of foreign citizenship between 26th January, 1950 and the commencement of the Act. The Cen-

tral Government may determine the date of the acquisition of foreign citizenship somewhere between the 26th January, 1950 and the commencement of the Citizenship Act, but that would not be the date of loss of citizenship of India, as sub-section (1) clearly provides that in all such cases in which the date of acquisition of foreign citizenship is between the 26th January, 1950 and the commencement of the Citizenship Act, 1955 that date will be the date of the commencement of the Act. It is only in subsequent acquisition of foreign citizenship that the two dates will be the same, not so in case in which foreign citizenship has been acquired prior to the commencement of this Act. There is obviously an anomaly in the law inasmuch as a person who acquired citizenship of a foreign country before the commencement of the Citizenship Act, 1955, will have double citizenship in between the aforesaid date and the date of the commencement of this Act which is 30th December, 1955. A 'foreigner' in clause (a) of Section 2 of the Citizenship Act, 1955 is defined not as a person who has acquired foreign citizenship, it is only that person who is not a citizen of India who can be treated as a foreigner and not a citizen of India. Rahmatullah was a citizen of India upto the time of the commencement of the Citizenship Act, 1955, and did not lose this citizenship, even though he had acquired the citizenship of Pakistan. He was not, therefore, a 'foreigner' under the Foreigners Act on the date he entered India and consequently could not be prosecuted for an offence of breach of paragraph 7 of the Foreigners Order, 1948 under section 14 of the Foreigners Act.

22. It is certainly true that on the date Rahmatullah was prosecuted under Section 14 of the Foreigners Act he was a foreigner, but he did not enter India as a foreigner and paragraph 7 of the Foreigners Order cannot be made to cover the case of a person who having entered India as a citizen of India fails to depart from India even though he may have ceased to be a citizen of India. In order that there may be a breach of paragraph 7 it is necessary that the accused must have entered India as a foreigner. If he entered India as a citizen of India, this paragraph could not apply and this is also the view taken by a Division Bench of this Court in *State v. Yakub*, 1960 All LJ 924 = (AIR 1961 All 428).

23. The applicant could not, therefore, be convicted under Section 14 of the Foreigners Act. This application in revision is, accordingly, allowed. The conviction of the applicant under Section 14 of the Foreigners Act and the sentence of 18 months R. I. and a fine of Rs. 200/-

thereunder are set aside. He is on bail. He need not surrender to his bail bonds which shall stand cancelled.
DVT/D.V.C. Revision allowed.

AIR 1969 ALLAHABAD 170 (V 56 C 33) FULL BENCH

JAGDISH SAHAI, R. S. PATHAK AND
S. N. SINGH, JJ.

Harinath, Appellant v. Ram Pratap Singh and another, Respondents.

Second Appeal No 3555 of 1958, D/- 4-1-1968, against judgment of Addl. Civil J., Mirzapur, D/- 31-7-1958

(A) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 20(b), Explanation I thereto and 232 — Person recorded as occupant within meaning of S. 20(b) — His eviction from land in execution of compromise decree passed under S. 180 of U. P. Act 17 of 1939, thereafter — He is entitled to regain possession under S. 232.

An adhvasi who is recorded as an occupant of certain land within the meaning of S. 20(b) is entitled under S. 232 to regain possession of the same if he is dispossessed after 30th June 1948, notwithstanding that his dispossession was in execution of the compromise decree passed under S. 180 of the U. P. Tenancy Act (17 of 1939). 1957 All LJ 593. Approved. (Paras 22 and 36)

Per Jagdish Sahai & R. S. Pathak JJ. —

It is true that a compromise decree is an agreement between the parties to which the command of the court is super-added, but that does not mean that the decree passed under Section 180 of the U. P. Tenancy Act (17 of 1939) for the ejectment, is not a decree or is not one for ejectment or eviction. The compromise stands merged in the decree and cannot have a separate existence or identity from the decree itself. Consequently once a decree for ejectment is passed, though in terms of a compromise and not after contest, it is nonetheless a decree and does not remain a mere compromise. The law does not recognise any distinction between a consent or compromise decree and one passed after contest as regards effectiveness or the force behind it. It is well settled that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case (Case law discussed). (Paras 8, 9, 10)

The compromise decree passed under Section 180 of the U. P. Tenancy Act (17 of 1939) is an adjudication. It has like all other decrees behind it, the authority of the judicial power of the State.

It is a command of the court, sealed and signed. Consequently, the element of compulsion is clearly involved in the execution of the decree and in the dis-possession of the occupant. In execution of that decree the compulsive aspect may be latent and not visible yet its existence cannot be doubted or denied.

(Para 15)

It is true that the word "eviction" is generally used in the sense of compulsive dispossession. And where a person against whom a suit is filed under S. 180 of U. P. Act 17 of 1939 comes to a compromise under the pressure of the suit, it cannot be said that there is no element of compulsion and that the surrender of certain portion of land under the compromise is willing or spontaneous. The compromise is in the nature of adjustment in the suit. Moreover, the question whether a person entered into a compromise willingly is immaterial when the compromise is followed by a decree, and is put in execution and the person is dispossessed through the process of law under the compulsive force of the decree.

(Paras 14, 22)

Per S. N. Singh, J. :— For maintaining an application under section 232, it is immaterial whether the plaintiff has lost his possession by forcible dispossession or by voluntarily giving up of possession before the date of vesting. The plaintiff need only prove that he was a recorded occupant and that he was not in possession at the date of the filing of the application and further that the application was within time Explanation I to section 20 of the Act does not lay down any additional condition which an adhvasi who is covered by section 20(b) should comply with, in order to get relief under section 232 of the Act. The explanation does not control the section. It simply explains it by saying that even if an adhvasi is evicted from the land after June 30, 1948, he shall notwithstanding the decree, be deemed to be entitled to regain possession of the land. The explanation cannot be interpreted to mean that a person claiming relief under section 232 of the Act has to prove further that there was forcible dispossession.

(Paras 36, 37, 43)

(B) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (I of 1951), S. 20(b)(i) — Entries relating to occupant in khasra and khatauni of 1356F. at variance — Khatauni entry showing certain person as occupant while khasra entry showing him as sub-tenant — Entry in Khatauni is in sufficient compliance with S. 20(b)(i). (Para 24)

(C) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (I of 1951), S. 20(b) Explanations I, II, III — Compromise decree for eviction of occupant under S. 180 of U. P. Act 17 of 1939

passed on 8-12-1948 — No mention in compromise or decree for correction of records — Entries in favour of occupant cannot be deemed to have been corrected — Explanation I excludes operation of Explanations II and III. (Para 25)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 54 (V 52)=

(1964) 7 SCR 800, Amba Prasad v. Mohaboob Ali Shah 27

(1965) AIR 1965 All 253 (V 52)=

1964 All LJ 273, Jhaman Lal v. Deputy Custodian General 42

(1963) 1963 R. D. 151 (All), Sakur Sai v. Ram Charittar Singh 16, 40

(1958) Civil Misc. Writ No. 2023 of 1958 D/- 22-7-1958 (All), Jian v. Board of Revenue 16, 35, 38, 40, 41

(1958) Civil Misc. Writ No. 2502 of 1958 (All) 41

(1957) 1957 All LJ 593=1957 All WR (HC) 630, Dwarika Prasad v. Board of Revenue 26, 35, 36, 38, 39, 40, 41, 42

(1956) AIR 1956 SC 346 (V 43)=

1956 SCR 72, Sailendra Narayan Bhanja Deo v. State of Orissa 10

(1947) AIR 1947 Lah 296 (V 34), Ram Labhaya v. Dani Ram 19

(1933) AIR 1933 All 252 (V 20)=

ILR 55 All 334 (FB), Mohiuddin v. Mt. Kashmiro Bibi 21

(1878) 1878-8 Ch. D. 39 = 47 LJ Ch. 617, Newby v. Sharpe 13

(1866) 1 C. P. 570=35 LJCP 351, Lievesley v. Gilmore 20

(1858) 140 ER 1149=4 C. B. N. S. 423, In re, Emery and Barnett 13

(1855) 104 R. R. 562=25 L. J. C. P. 44, Upton v. Townend 13

Behariji Dass, for Appellant.

JAGDISH SAHAI, J. :— This second appeal, which is directed against the decree passed by Sri B. K. Sharma, Addl. Civil Judge, Mirzapur, dated 3-7-1958, has come to us on a reference made to a Full Bench by a Division Bench of this Court.

2. Suit No. 1 of 1954, which has given rise to this second appeal, was filed by the appellant, Harinath, under Section 232 of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the U. P. Z. A. & L. R. Act) against the respondents, Ram Pratap Singh and Gauri Shanker, in the Court of the Assistant Collector I Class Mirzapur, for recovery of possession of plots nos 332/2, 455, 466 and 430 situate in village Chand Lewa Kalwan Tappa, district Mirzapur.

3. Before the suit giving rise to this appeal was filed, the defendant, Ram Pratap Singh has filed a suit under Section 180 of the U. P. Tenancy Act against the plaintiff-appellant, Harinath for his ejection from the aforesaid four plots as also plot no. 453/2 and for some damages. In that suit a compromise was arrived at between the parties on 8-12-

1948, to the effect that the suit shall stand dismissed for plot no. 453/2 and Harinath would give up possession of the other four plots. The suit was decreed in terms of the compromise the same day, i. e. 8-12-1948 and in execution of the decree Ram Pratap Singh obtained possession of the other four plots on 26-5-1949

4. In the suit under section 232 of the U. P. Z. A. & L. R. Act, referred to above, Harinath claimed possession, as already stated earlier, on the ground that he had acquired Adhivasi rights and was entitled to reinstatement of possession in view of the provisions of Explanation I of Section 20 of the U. P. Z. A. & L. R. Act. He claimed possession of those plots which he was to give up under the compromise entered into the suit under section 180 of the U. P. Tenancy Act, and of which he was dispossessed on 26-5-1949 in execution of the decree passed in the suit under section 180 of the U. P. Tenancy Act.

5. The trial court decreed the suit with costs on 14-8-1957. Ram Pratap Singh appealed against the decree passed by the lower Court. This appeal was numbered as revenue appeal no. 32 of 1957 and was allowed by Sri B. K. Sharma on 31-7-1958.

6. The submissions that were made before the trial court or the first appellate court or before us centred round Explanation I to section 20 of the U. P. Z. A. & L. R. Act. Section 20, so far as relevant for our purposes, reads:—

"Every person who —

.....
(b) was recorded as occupant,

(i) of any land other than grove land or land to which section 16 applies or land referred to in the proviso to sub-section (3) of section 27 of the U. P. Tenancy (Amendment) Act, 1947 in the khasra or khatauni of 1356F. prepared under sections 28 and 33 respectively of the U. P. Land Revenue Act, 1901, or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947, or

(ii) of any land to which section 16 applies, in the Khasra or Khatauni of 1356 Fasli prepared under sections 28 and 33 respectively of the United Provinces Land Revenue Act, 1901, but who was not in possession in the year 1359F., shall unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under clause (h) of section 21, be called adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof.

Explanation I: — Where a person referred to in clause (b) was evicted from the land after June 30, 1948, he shall notwithstanding anything in any order or decree, be deemed to be a person entitled to regain possession of the land.

.....

7. In part I of the Khatauni of the year 1356 F. all the five plots mentioned above have been entered in the name of Ram Pratap Singh as mortgagor and Ram Chandra as mortgagee. There is a note appended to the entry that "suit no. 12 dated 7-4-1948 to expunge name of Ram Chandra, mortgagee". In part II of the Khatauni the name of Harinath has been shown under Zaman 20. In the Khasra for 1356 F. Harinath has been shown as sub-tenant. In the remarks column he is recorded Kabiz (qa) in respect of plot no. 430 alone. The case of Harinath is that he must be treated to have been evicted within the meaning of Explanation I to section 20 of the U. P. Z. A. & L. R. Act.

8. The submission on behalf of Ram Pratap Singh, however, is that the eviction involves forcible or compulsive dis-possession and inasmuch as in the compromise entered into by the parties in the section 180 of the U. P. Tenancy Act suit, Harinath had agreed to give up possession of the four plots, he cannot be treated to have been evicted within the meaning of that word occurring in Explanation I to section 20 of the U. P. Z. A. & L. R. Act. Mr. G. P. Singh, who has appeared for Ram Pratap Singh has placed reliance upon several cases in support of the contention that a compromise decree is nothing, but an agreement between the parties to which is superadded the command of the court and for that reason even though the suit under Section 180 of the U. P. Tenancy Act was decreed in terms of the compromise and in execution of that decree Ram Pratap Singh obtained possession of the plots in dispute (four plots) on 26-5-1949, it must be held that Harinath was not evicted from those plots but had willingly surrendered them to Ram Pratap Singh.

It is true that a compromise decree is an agreement between the parties to which the command of the court is super-added, but that does not mean that the decree passed under Section 180 of the U. P. Tenancy Act for the ejectment of Harinath was not a decree or was not one for ejectment or eviction. Though on the basis of the compromise, a decree under section 180 of the U. P. Tenancy Act had come into existence, the decree clearly was for ejectment and it was in execution of that decree that Ram Pratap Singh obtained possession of the four disputed plots. It is, therefore, difficult to see how it can be said that Har-

nath was not evicted from the plots in dispute in execution of a decree for his ejectment. The decree passed by the court under Section 180 of the U. P. Tenancy Act cannot be ignored and the circumstance that it was a decree passed on a compromise does not make it any the less a decree for ejectment of Harinath from the four disputed plots. "Decree" has been defined in Sec. 2(2), C. P. C., as follows:—

"'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final"

Can it be contended that the decree passed in section 180 of the U. P. Tenancy Act suit was not "the formal expression of an adjudication" or can it even be urged that it did not "conclusively determine the rights of the parties with regard to all matters in controversy in the suit?"

9. For the enforcement of an agreement simpliciter, the only remedy for a party is to file a suit for specific performance of the contract, but can such a suit lie in respect of a decree which is passed on the basis of a compromise between the parties. Clearly for the enforcement of the terms of the compromise contained in a decree, the remedy is not to bring a suit for specific performance of the contract, but to execute the decree. The compromise stands merged in the decree and cannot have a separate existence or identity from the decree itself. Consequently once a decree for ejectment is passed, though in terms of a compromise and not after contest, it is nonetheless a decree and does not remain a mere compromise. The law does not recognise any distinction between a consent or compromise decree and one passed after contest as regards effectiveness or the force behind it.

10. It is well settled that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. See *Sailendra Narayan Bhanja Deo v. State of Orissa*, AIR 1956 SC 346

11. Clearly and admittedly a suit under section 180 of the U. P. Tenancy Act is a suit for ejectment. Equally clearly and admittedly a decree in such a suit is a decree for ejectment. The only difference between a consent decree or a decree on a compromise on the one hand and a decree after contest on the other is that in the former case the suit is decided and a decree passed on the basis of a compromise or consent, in the latter case it is passed after the court has

on the basis of the evidence recorded its findings. In both the cases there is an adjudication by the court conclusively determining the rights of the parties in respect of the matter in dispute. The decree in first case is as effective as the decree in the second case.

12. Clearly and admittedly Ram Pratap Singh obtained possession of the four plots on 26-5-1949 by executing the decree that was passed under Section 180 of the U. P. Tenancy Act case. Harinath did not surrender the plots immediately after the compromise on 8-12-1948.

13. Mr. G. P. Singh has cited in the matter of a *Plaint* between Emery and Barnett, (1858) 140 ER 1149, *Upton v. Townend*, (1855) 104 R.R. 562, and *Newby v. Sharpe*, (1878) 8 Ch. D. 39 for the proposition that eviction involves compulsive dispossession. He has also relied upon Section 1213 at page 552 of *Halsbury's Laws of England*, third Edition Volume 23, which reads:—

"1213. Eviction under title paramount. Similarly, in order to constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession, or that ejectment should be brought. A threat of eviction is sufficient, and if the tenant, in consequence of such threat, attorns to the claimant, he can set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor's title. There is no eviction, however, if the tenant gives up possession voluntarily."

14. True, the word "eviction" is generally used in the sense of compulsive dispossession, but can it be denied that the element of compulsion did exist when the decree for ejectment was executed and Harinath was dispossessed from the plots covered by the decree? Was Harinath free to ignore the decree? Could he have avoided it?

15. The compromise decree passed under Section 180 of the U. P. Tenancy Act case was an adjudication. It had, like all other decrees behind it, the authority of the judicial power of the State. It was a command of the court, sealed and signed. Consequently, the element of compulsion was clearly involved in the execution of the decree and in the dispossession of Harinath from the four plots. In execution of that decree the compulsive aspect may be latent and not visible yet its existence cannot be doubted or denied.

16. Mr. Singh has relied upon an unreported decision of Mootham, C. J. and Mukerji, J. dated 22-7-1958 in *Civil Miscellaneous Writ No. 2023 of 1958 (All)* and a single Judge decision of Dhavan, J. in *Saqr Sai v. Ram Charitar Singh*,

1963 R. D 151 (All). The first case is of voluntary surrender. In that case no decree for ejectment was passed and possession had not been obtained in execution of that decree. In the second case, Dhavan, J. relied upon the following passage occurring in the first case.—

"a tenant who voluntarily surrenders all his interest in a plot of land cannot subsequently claim rights therein to which he might have been entitled had there been no surrender."

In this case the findings of facts recorded by both the Courts were that the plaintiff had voluntarily surrendered the land. His (plaintiff's) case that he was ejected was rejected by both the courts below. These cases, therefore, clearly being of voluntarily surrender are distinguishable from the case before us.

17. In Ramanatha Iyer's Law Lexicon of British India, the following meaning is given to the word "eviction" :—

"In its original and technical meaning it is an expulsion by the assertion of a paramount title, and by process of law, a recovery of land etc., by form of law; a lawful dispossession by judgment of law; an ouster Act of the landlord with the intention and having the effect of depriving the tenant of the enjoyment of the demised premises, the term is now popularly applied to every class of expulsion."

In Wharton's Law Lexicon the meaning given to the word "eviction" is "dispossession; also a recovery of land etc., by form of law." In Stroud's Judicial Dictionary, the meaning given to the word is to the effect that "eviction" is not confined to mere expulsion as it was formerly understood but "something of a more permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the whole or part of the demised premises." In Murray's Dictionary, the meaning given to the word is to recover property from anyone by judicial process.

18. In the present case the judicial process was set in motion by Ram Pratap Singh against Harinath by filing a suit under Section 180 of the U. P. Tenancy Act. It was continued when a decree was obtained for ejectment of Harinath though on the basis of a compromise. The judicial process ultimately culminated in the execution of the decree and dispossession of Harinath from the four plots. I am, therefore, unable to accept that Harinath was not evicted from the four plots.

19. I would also like to point out that there is good authority for the proposition that the word "eviction" "is not confined in its meaning to the act of expulsion, but may, in its more modern sense, extend so as to cover the whole process by which recovery of property is

obtained at law; in that sense, an eviction may be said to commence when the landlord files his suit." See Ram Labhaya v. Dhanu Ram. AIR 1947 Lah 296.

20. Mr. Singh has placed reliance upon *Lievesley v. Gilmore*, (1866) 1 C. P. 570. That is a case of arbitration. Its facts are wholly different from the facts before us. The case is clearly distinguishable.

21. Reliance has also been placed upon *Mohiuddin v. Mt. Kashmiro Bibi*, AIR 1933 All 252 (FB). That case is an authority for the proposition that it is open to a court executing a compromise decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. The question before us is a different one. This case is also clearly distinguishable.

22. It has been contended that Harinath surrendered possession of the four disputed plots of his own free will because he entered into the compromise willingly. I am of the opinion that even this argument is not correct. Harinath entered into the compromise only after the suit under section 180 of the U. P. Tenancy Act had been filed against him. By the compromise he saved one plot to himself and agreed to leave the other four. It is thus clear that there was the pressure of the suit on him and the compromise was in the nature of an adjustment in the suit. Inasmuch as there was a pressure of the suit, it cannot be said that there was a spontaneous and willing surrender of the plots. But, to my mind, the question that Harinath entered into a compromise willingly is immaterial because the compromise was followed by a decree, which was put in execution and Harinath was dispossessed through the process of law under the compulsive force of the decree. I am satisfied that the case of Harinath clearly falls under Explanation I to Section 20 of the U. P. Z. A. & L. R. Act.

23. I find no merits in the submission of Mr. G. P. Singh that Harinath is not entitled to the benefit of Section 20(b) of the U. P. Z. A. & L. R. Act because his possession over the disputed plots was on behalf of Ram Pratap Singh. It is contended that inasmuch as the suit under section 180 of the U. P. Tenancy Act was filed on 26-10-1948 and the compromise was arrived at between the parties on 8-12-1948 on which date the suit was decreed in terms of the compromise, possession of Harinath after 26-10-1948 or at any rate after 8-12-1948 must be held to be permissive and on behalf of Ram Pratap Singh.

I am unable to agree. Harinath did not enter into possession of the disputed plots on behalf of or with the permission of Ram Pratap Singh. Ram Pratap Singh himself treated Harinath to be a tres-

passer and filed a suit under Section 180 of the U. P. Tenancy Act Harinath did not leave possession of the plots immediately after the institution of the suit or after the compromise decree. Actually he was dispossessed in execution of the decree under section 180 of the U. P. Tenancy Act on 26-5-1949. The execution proceeded against Harinath on the footing that he was a judgment-debtor and was in occupation of the plots in dispute in derogation of the rights of the decree-holder, Ram Pratap Singh.

24. Mr. Singh next contended that inasmuch as the Khasra and Khatauni entries relating to the year 1356F are at variance, neither of them can be relied upon and in any case the Khasra entries must prevail over the entries in the Khatauni. In part II of the Khatauni of 1356F. Harinath is shown under Zaman 20 in respect of the four plots, but in the Khasra of that year, he is shown as Kabiz only on plot no. 430, though he is shown as sub-tenant of all the disputed plots. In the first place section 20(b)(i) provides that entry as occupant must exist either in the Khasra or in the Khatauni of 1356F. Since the entry exists in the Khatauni of that year, it complies with the provisions of section 20(b)(i) of the U. P. Z. A. & L. R. Act Secondly, in the Khasra also Harinath has been shown as sub-tenant of all the disputed plots.

25. It is also contended that inasmuch as the suit under Section 180 of the U. P. Tenancy Act was decreed on 8-12-1948, the entries in favour of Harinath must be deemed to have been corrected with the result that Explanations II and III to section 20 of the U. P. Z. A. & L. R. Act would apply. Explanation III provides that "an entry shall be deemed to have been corrected before the date of vesting if an order or decree of a competent court requiring any correction in records had been made before the said date and had become final even though the correction may not have been incorporated in the records". In the first place there is no order or decree of a competent court requiring any correction in the records. The compromise decree does not say that correction of papers shall be made. Secondly, Explanation I would exclude the operation of Explanations II and III in this case. Explanation I clearly provides that notwithstanding anything in any order or decree a person evicted from the land after 30th June 1948, the person entered as occupant, shall be entitled to regain possession. Harinath was evicted on 26-5-1949 which is clearly after the 30th of June, 1948. He is, therefore, entitled to obtain reinstatement over the land in dispute.

26. Learned counsel for Harinath placed reliance upon *Dwarika Prasad v. Board of Revenue*, 1957 All LJ 593. For

the reasons given in this judgment, I agree with the view taken in this case.

27. In *Amba Prasad v. Mohaboob Ali Shah*, AIR 1965 SC 54 it was held that section 20 eliminates inquiring into disputed possession by accepting the record in the Khasra or Khatauni of 1356F. and that if a person was evicted after June 30, 1948, he is entitled to regain possession in spite of any order or decree to the contrary. I find considerable support for my view from this decision.

28. The learned Additional Civil Judge did not give any importance to the circumstance that Harinath was dispossessed from the plots in dispute in execution of the decree passed under section 180 of the U. P. Tenancy Act. He has dismissed the circumstance in the following words:—

"The mere fact that the present defendant took formal delivery of possession through court, will not amount to forcible dispossession of the present plaintiff. When a compromise decree was passed, it was but incumbent on the defendants to take formal delivery of possession through the court."

The learned Additional Civil Judge failed to appreciate that if it was a case of surrender simpliciter, Harinath would have given up possession of the plots in dispute on 8-12-1948, i. e., the day on which the compromise was entered into and the compromise decree passed or soon thereafter. He did not do so, but was evicted in execution of the decree. The learned Additional Civil Judge also failed to see that the decree and its execution had a compulsive aspect.

29. For the reasons mentioned above I am of the opinion that Harinath is entitled to reinstatement over the plots in dispute.

30. On the question whether Ram Pratap Singh was a disabled person within the meaning of that term as occurring in section 157 of the U. P. Z. A. & L. R. Act, the learned Additional Civil Judge has recorded a finding that he is not a disabled person. That is a finding of fact. It has not been challenged before us.

31. I, therefore, allow the appeal, set aside the decree of the learned Additional Civil Judge dated 31-7-1958 and restore that of the Assistant Collector I Class dated 14-8-1957. The respondent, Ram Pratap Singh, shall pay the appellant, Harinath, the costs of this appeal.

32. R. S. PATHAK J. :— I agree.

33. S. N. SINGH, J.:— I have read the judgment of brother Jagdish Sahai and I agree that this appeal should be allowed.

34. It is not necessary to state the facts of the case which have already been given in the judgment of brother Sahai.

35. This case was listed before me and finding an apparent conflict between two Division Bench cases of this Court in the case of 1957 All LJ 593 and Civil Misc. Writ No. 2023 of 1958 (All) *Jian v. Board of Revenue*, I referred the case to a larger Bench. When this case was listed before a Division Bench, the Division Bench considered it proper to refer the case to a Full Bench. This is how the case came before us.

36. The precise argument based on explanation I to section 20 of the U. P. Zamindari Abolition and Land Reforms Act which has been advanced before us by the learned counsel for the respondent Sri G. P. Singh had been canvassed before the Division Bench case in 1957 All LJ 593 and was rightly repelled. I agree with brother Sahai when with reference to the above case he has observed as follows—

"For the reasons given in this judgment I agree with the view taken in this case."

Thus it necessarily follows that in order to successfully maintain an application under Section 232 of the U. P. Zamindari Abolition and Land Reforms Act the applicant need only prove that he was a recorded occupant and that he was not in possession at the date of the filing of the application and further that the application was within time. Explanation I to section 20 of the Act does not lay down any additional condition which an adhvasi who is covered by Section 20 (b) should comply with, in order to get relief under Section 232 of the Act. The explanation does not control the section. It simply explains it by saying that even if an adhvasi is evicted from the land after June 30, 1948 he shall notwithstanding the decree would be deemed to be entitled to regain possession of the land.

37. The explanation cannot be interpreted to mean that a person claiming relief under Section 232 of the Act has to prove further that there was forcible dispossession. The contention of the respondent that the applicant in order to get relief must prove eviction cannot be accepted to be correct.

38. Subsequent to the decision in 1957 All LJ 593 a similar question arose before another Division Bench in Civil Misc. Writ No. 2023 of 1958, D/- 22-7-1958 (All) in which it was held that "a tenant who voluntarily surrenders all his interest in a plot of land cannot subsequently claim rights therein to which he might have been entitled had there been no surrender."

39. This case did not notice the decision in Dwarika Prasad's case, 1957 All LJ 593 nor did it notice the relevant sections on the point.

40. Again this very point was argued before a learned Single Judge and before

the learned Single Judge the unreported decision in Civil Misc. Writ No. 2023 of 1958, D/- 22-7-1958 (All) referred to above was cited. The decision in 1957 All LJ 593 was not brought to his notice with the result that relying on the unreported decision in Civil Misc. Writ No. 2023 of 1958, D/- 22-7-1958 (All) he decided the case accordingly, vide 1963 R. D. 151 (All).

41. This point again was agitated before a learned Single Judge of this Court in Civil Misc. Writ No. 2502 of 1958 (All) and the learned Single Judge having noticed a conflict between the two Division Bench decisions referred to above, i. e., 1957 All LJ 593 and the unreported decision in Civil Misc. Writ No. 2023 of 1958, D/- 22-7-1958 (All) referred it to a larger Bench and the case came before a Division Bench consisting of Hon. V. G. Oak and Hon. Satish Chandra, JJ., who considered the point involved in the case and preferred to follow the decision reported in the case of 1957 All LJ 593 and dissented from the view taken in the case of Civil Misc. Writ No. 2023 of 1958, D/- 22-7-1958 (All). In this case a distinction was drawn between a surrender made before the passing of the U. P. Zamindari Abolition and Land Reforms Act and a surrender made after the passing of that Act. It was rightly pointed out that a right which had not come into existence before the passing of the U. P. Zamindari Abolition and Land Reforms Act could not be surrendered, and if a surrender was made after the passing of the U. P. Zamindari Abolition and Land Reforms Act that would affect the right of an adhvasi.

42. In that case 32 plots were in dispute which were divided in two groups: the first group consisted of 15 plots in respect of which the petitioners had executed a surrender in favour of the Zamindar and so far the remaining 17 plots were concerned they were ejected. The dispute before the Division Bench was in respect of the 15 plots that had been surrendered in favour of the Zamindar. The Division Bench held as follows:

"If an Adhvasi surrenders his rights after the date of vesting, that would be a good ground for not recognising the Adhvasi rights after such surrender. But bearing in mind that the Adhvasi rights did not accrue till 1-7-1952, the question of surrender of such rights before that date hardly arises. In the present case, it is common ground that the surrender in question took place before the date of vesting. In such a case it would be open for a party to establish Adhvasi rights in spite of the surrender prior to 1-7-1952. On this point, we are in agreement with the view taken by the first Bench in Dwarika Prasad's case, 1957 All LJ

593" vide Jhamman Lal v. Deputy Custodian General, 1964 All LJ 273=(AIR 1965 All 253)

43. Thus it will appear that in spite of surrender the Division Bench held that recorded occupant although he had executed a surrender could claim recovery of possession. I am in respectful agreement with the view expressed in this Division Bench case. For maintaining an application under section 232 of the U.P. Zamindari Abolition and Land Reforms Act it is immaterial whether the plaintiff has lost his possession by forcible dispossession or by voluntarily giving up of possession before the date of vesting.

44. In view of what has been said above and for the reasons given in the judgment of brother Sahai, I would allow the appeal, set aside the decree of the learned Civil Judge dated 31st July 1958 and restore that of the Assistant Collector Ist Class dated 14th August 1957. The appellant Harinath will be entitled to his costs of this appeal.

DVT/D.V C

Appeal allowed.

AIR 1969 ALLAHABAD 177 (V 56 C 34)

S N DWIVEDI AND
GANGESHWAR PRASAD, JJ.

Municipal Board, Kanpur, Petitioner
v. Additional Commissioner, Kanpur and
another, Respondents

Special Appeals Nos 399 to 403 and
407 of 1959 & 115 to 117 of 1960, D/-
12-3-1968

(A) Municipalities — U. P. Municipalities Act (2 of 1916), Ss. 160, 296, 2(17)(i) — Words "as may be prescribed" in S. 160 (2) means "as may be prescribed by State Government" — Assessment to tax on annual value of certain buildings and lands — State Government may prescribe appellate authority without framing rule under S. 296 — (Civil P. C. (1908), Preamble — Interpretation of Statutes—Meaning of words — Variation in language and absurdity).

The words, "as may be prescribed" used in S 160(2) mean "as may be prescribed by the State Government" and the State Government may prescribe the appellate authority against assessment to tax on annual value of certain buildings and lands without framing a rule in that behalf under S 296 (Para 7)

Sub-section (2) of S 160 is in the nature of a proviso to sub-section (1) It is of no consequence that the two portions of S 160 have been described as separate sub-sections, because that is only a matter of legislative style and not a matter affecting their real relation to

each other. Sub-section (2) has, therefore, not to be read in isolation but as a part of sub-section (1). No doubt the legislature is ordinarily presumed not to have employed in an enactment different words in regard to the same subject matter without contemplating a difference in the idea conveyed, particularly when such different words find place in the same provision. But, that is a presumption to which undue importance is not to be attached in the ascertainment of the legislative intent. The variation in language is not indicative of any variation in meaning. Sub-section (2) is not a self-contained provision and just as the words "the appeal" occurring therein have reference to the appeal provided for in sub-section (1), the words "such authority as may be prescribed" have reference to the other appellate authority besides the District Magistrate provided for in that sub-section. Precision certainly required adherence to the phraseology employed in sub-section (1), but a repetition in sub-section (2) of the words "as may be empowered by the State Government in this behalf" might have been thought by the draftsman to be a little lacking in grace of style or unnecessary. Thus in order to effectuate sub-section (2) it has to be held that the necessary implication of the words "such authority as may be prescribed" is that the authority is to be prescribed by the State Government

(Paras 8, 9)

S. 296(2)(a) postulates two things: firstly, that, either expressly or by implication, the power to make provision in respect of a matter has been conferred; and secondly, that, either expressly or by implication, the said power has been conferred upon the State Government. The alternative of so reading the sub-section as to make it totally ineffective and nugatory has to be avoided if it is possible to do so on a reasonable construction of its language in the context of the preceding sub-section of which it is a part and a proviso and of the Act in which it finds place. If S. 160(2) is to serve any purpose and the absurdity of having provided for an appeal without providing for the constitution of the appellate authority is not to be imputed to the legislature, the words "such authority as may be prescribed" must be interpreted as meaning and be read as "such authority as may be prescribed by the State Government."

(Para 9)

If, the words "such authority as may be prescribed" mean and have to be read as "such authority as may be prescribed by the State Government", it is not necessary for the State Government to make a rule under Section 296 of the Act for prescribing the appellate authority. The State as may prescribe the

authority under S. 160(2) itself and if it does so, the authority will be an authority prescribed under the Act and, therefore, "prescribed" in accordance with the definition of that expression in S. 2(17) (i) of the Act. (Paras 10, 11, 12)

It is another matter altogether that the State Government may have the power to prescribe the appellate authority by means of a rule too, but that is not the only method of doing so. Considering the language used in these provisions it seems reasonable to infer that whenever the legislature intended that a certain thing has to be prescribed only by a rule framed under the rule-making power of the State, it has explicitly said so. (Para 12)

(B) Municipalities — U. P. Municipalities Act (2 of 1916), S. 160(2) — Appellate authority has power to take additional evidence. (Para 14)

Cases Referred: Chronological Paras
(1953) AIR 1953 SC 394 (V 40) =

1953 SCR 1188, Shiv Bahadur Singh v. State of Vindhya Pradesh 9
(1866) 1 QB 444 = 35 LJMC 177,
Hadley v. Perks 8
(1845) 5 Moore PC 130 = 13 ER
439, Casement v. Fulton 8

S. C. Khare, for Petitioner.

GANGESHWAR PRASAD, J. :— These nine Special Appeals have been filed by the Municipal Board of Kanpur (hereinafter referred to as the Board) against the judgments of a learned Single Judge of this Court in nine writ petitions filed by the Board. All the writ petitions raised identical questions and they were all dismissed by the learned Judge for reasons given in his judgment in writ petition No. 1451 of 1959 which has given rise to Special Appeal No. 407 of 1959. All the Special Appeals are, therefore, being disposed of by a common judgment.

2. The Board, which was functioning under an Administrator, assessed respondent No. 2 of each of these appeals to a tax on the annual value of certain buildings and lands. Against the assessment, the said respondents (hereinafter referred to as the assessee) preferred appeals under section 160 of the U. P. Municipalities Act (hereinafter referred to as the Act) before Sri A. P. Misra, Additional Commissioner, Kanpur, who had been appointed as the appellate authority by the State Government through a notification which was as follows:—

"Section A Municipal

January 2, 1958

No. 5077-B/XI-C-192-57. In supersession of notification No. 4501-B/XI-C-192-57, dated November 23, 1957 and in partial modification of notification No.

4396(a)-P/XI-B-182-50, dated August 31, 1956, the Governor has, in exercise of the powers conferred by sub-section (2) of Section 160 of the U. P. Municipalities Act, 1916, read with item (ii) of the Schedule appended to the 'U. P. Local Bodies (Adaptation of Laws) Order, 1953' published with notification No. 4613/XI-B-7 (Kabai)-58, dated December 18, 1953, been pleased to empower Sri A. P. Misra, Additional District Magistrate, Kanpur, to entertain appeal as specified in sub-section (1) of the said section in respect of the Municipal Board, Kanpur.

By Order,
B. D. Sanwal, Sachiv."

It will be noticed that the notification described Sri A. P. Misra as Additional District Magistrate Kanpur, and not as Additional Commissioner Kanpur, but it is admitted that this was a mistake and that the mistake was rectified by the State Government through a corrigendum. Sri A. P. Misra heard the appeals and by his orders dated January 31, 1959, he reduced the amount of tax in the case of each of the assesseees. It was against the said orders of Sri A. P. Misra Additional Commissioner Kanpur, that the writ petitions giving rise to these appeals were filed by the Board and the prayer was that the orders passed by Sri A. P. Misra be quashed.

3. The contentions raised by the Board before the learned Single Judge were three: firstly, Sri A. P. Misra was not a duly appointed authority for entertaining appeals under sub-section (2) of section 160 of the Act; secondly, Sri A. P. Misra acted without jurisdiction in taking evidence in appeal as he did; and thirdly, the appeals were not decided by Sri A. P. Misra on correct principles. All these contentions were rejected by the learned Judge and the petitions were dismissed. Before us, Sri S. C. Khare, the learned counsel for the Board, emphasised only the first of the abovementioned three contentions, and it is essentially that contention which we have to examine in these appeals.

4. Section 160 of the Act, which provides for appeal against taxation, runs as follows:—

"(1) In the case of a tax assessed upon the annual value of buildings or lands or both an appeal against an order passed under sub-section (3) of Section 147, and, in the case of any other tax an appeal against an assessment, or any alteration of an assessment, may be made to the District Magistrate or to such other officer as may be empowered by the State Government in this behalf.

(2) Provided that where a board has been superseded under Section 30 and the District Magistrate has been appoint-

ed under clause (b) of Section 31 or where an Administrator has been appointed under Section 3 of the U. P. Local Bodies (Appointment of Administrators) Act, 1953, to exercise and perform the powers and duties of the Board, the appeal shall lie to such authority as may be prescribed."

It is not in dispute that, by virtue of the provisions of the U. P. Local Bodies (Adaptation of Laws) Order, 1953 referred to in notification quoted above, sub-section (2) of Section 160 of the Act, under which the notification purports to have been issued, is applicable to the Board. The point which, on the argument advanced by Sri S. C. Khare, needs determination is whether the issue of the notification fulfilled the requirement of sub-section (2) of Section 160 of the Act and had the effect of constituting Sri A. P. Misra the appellate authority under the said provision.

5. The argument of the learned counsel was this:

The expression 'prescribed' used in sub-section (2) of Section 160 means, according to its definition given in section 2(17)(i) of the Act, prescribed by or under the Act or rules made thereunder or by or under any other enactment. Sub-section (2) of Section 160 does not itself prescribe the appellate authority but only empowers the prescribing to be done, and it cannot, therefore, be said that the authority has been prescribed by the Act; again, sub-section (2) of section 160 does not provide by whom the appellate authority is to be prescribed and, consequently, it is not within the power of the State Government to prescribe the authority by means of a mere notification and no authority prescribed in that manner can be an authority prescribed under the Act. Having regard to the definition of the expression 'prescribed', the only method of prescribing the appellate authority is by a rule made under section 296 of the Act. The notification issued by the State Government is, however, not a rule, and in any case it is not a rule made under the Act as the requisite conditions to the making of a rule as laid down in Section 23 of the U. P. General Clauses Act, which is attracted because of Section 300 of the Act, were not complied with.

6. Obviously, no appellate authority has been prescribed by the Act. The question to be considered is whether the State Government is competent, by virtue of sub-section (2) of Section 160, to prescribe the appellate authority without recourse to its rule-making power under section 296 of the Act and, if it does so, the appellate authority may be said to have been prescribed under the Act. The view taken by the learned

Single Judge is that since sub-section (2) of Section 160 is, as its opening words show, a proviso to sub-section (1) of the section, it has to be read along with sub-section (1) and not as detached from it. The result to which, according to the learned Judge, a reading of the two sub-sections together leads may be stated in his own words:

"In my opinion, the effect of reading sub-section (2) along with sub-section (1) would be that the words 'shall lie to such authority as may be prescribed' occurring in sub-section (2) shall have reference to the words 'to such other officer as may be empowered by the State Government in this behalf' occurring in sub-section (1). In other words, all that the words 'the appeal shall lie to such authority as may be prescribed' mean is such authority as may be prescribed under sub-section (1) of section 160. Apart from the fact that this is the only logical and grammatically correct interpretation possible, it would be noticed that if the idea was that some other authority was to prescribe the appellate authority contemplated by sub-section (2) of section 160 provision would have been made for prescribing such an authority and the legislature would not have left the whole matter in a vacuum. It was not necessary to mention after the words 'the appeal shall lie to such authority as may be prescribed' the words 'by the State Government' because as I have said above sub-section (2) has got to be read along with sub-section (1) of Section 160 and inasmuch as it was already provided that the authority other than the District Magistrate shall be appointed by the State Government it was not necessary to repeat the same thing again after the words 'the appeal shall lie to such authority as may be prescribed' occurring in sub-section (2) of Section 160."

7. Sri S. C. Khare urged that in view of the definition of the expression 'prescribed' in Section 2(17)(i) the words 'as may be prescribed' used in sub-section (2) of section 160 cannot have the same meaning as the words 'as may be empowered by the State Government' occurring in sub-section (1) and they must be understood in terms of the definition. The learned counsel contended that, even if sub-section (2) is only a proviso to sub-section (1), the difference in the language employed by the legislature in the two sub-sections is indicative of the fact that two different methods of constituting the appellate authority are contemplated by the two sub-sections. He further contended that on the interpretation put forward by him prescribing of the appellate authority under sub-section (2) of Section 160 would not be left in a vacuum, as observed by the

learned Single Judge, and the State Government may prescribe the appellate authority by framing a rule in exercise of the power conferred upon it by section 296 of the Act after complying with the conditions imposed by Section 23 of the U. P. General Clauses Act. After a careful consideration of the arguments advanced before us and after examining the relevant provisions of the Act, we have, however, reached the conclusion that the words, 'as may be prescribed' used in sub-s (2) of S. 160 mean 'as may be prescribed by the State Government', and that the State Government may prescribe the appellate authority without framing a rule in that behalf under section 296.

8. It does not admit of any doubt that sub-section (2) of Section 160 is in the nature of a proviso to sub-section (1). It is of no consequence that the two portions of Section 160 have been described as separate sub-sections, because that is only a matter of legislative style and not a matter affecting their real relation to each other. Sub-sec. (2) has, therefore, not to be read in isolation but as a part of sub-section (1). Now, sub-section (1) of Section 160 made an order of assessment appealable to the District Magistrate also, and a different provision in regard to the appellate authority had consequently to be made for that situation in which the District Magistrate had been appointed under Section 31(b) of the Act to exercise the powers and duties of a Board. Sub-section (2) of Section 160 was, therefore, enacted to take out appeals against assessments made in the aforesaid situation from the operation of sub-section (1) to this extent that they would lie not to the District Magistrate also but only to the other authority indicated in sub-section (1).

It is true that the words used in sub-section (1) are 'such other officer as may be empowered by the State Government' whereas the words in sub-section (2) are 'such authority as may be prescribed', but the difference in phraseology is not, to our mind, suggestive of any difference in the idea sought to be expressed. No doubt, the legislature is ordinarily presumed not to have employed in an enactment different words in regard to the same subject matter without contemplating a difference in the idea conveyed, particularly when such different words find place in the same provision. But, that is a presumption to which undue importance is not to be attached in the ascertainment of the legislative intent. In Maxwell's Interpretation of Statutes (9th Edition), at page 326 the position in regard to this presumption has been stated as follows—

"But, just as the presumption that the same meaning is intended for the

same expression in every part of an Act is, as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any document) seems entitled to less weight in the construction of a statute than in any other case, for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament."

Similarly, in Craies on Statute Law (6th Edition), at page 143, it has been said:

"But although, as has been said, this presumption is generally to be made, and 'it is certainly to be wished', as the Judicial Committee said in *Casement v. Fulton*, (1845) 5 Moore PC 130 at p. 141, "that, in framing statutes the same words should be employed in the same sense", still, there are many instances to be found of the legislature departing from language previously used for the purpose of conveying a certain meaning without intending to depart from that meaning 'when the legislature', said Blackburn J., 'change the words of an enactment, no doubt it must be taken prima facie that there was an intention to change the meaning'. This, however, is not necessarily so, for we find as a matter of fact, that the same learned Judge observed in *Hadley v. Perks*, (1866) 1 QB 444 at p. 457 in drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change the words without intending to change the meaning."

Having regard to the manner in which the two sub-sections of section 160 are related to each other and to the object of enacting sub-section (2) it seems to us, that the variation in language referred to above is not indicative of any variation in meaning. Sub-section (2) is not a self-contained provision and just as the words "the appeal" occurring therein have reference to the appeal provided for in sub-section (1), the words "such authority as may be prescribed" have reference to the other appellate authority besides the District Magistrate provided for in that sub-section. Precision certainly required adherence to the phraseology employed in sub-section (1), but a repetition in sub-section (2) of the words "as may be empowered by the State Government in this behalf" might have been thought by the draftsman to be a little lacking in grace of style or

unnecessary. It may also be noted that sub-section (2), in the shape in which it stands at present, was not enacted contemporaneously with sub-section (1) but was introduced by an amendment made in the Act in 1953. Having regard to the form and the context of sub-section (2) and to the reason and purpose behind its enactment, we agree with the learned Single Judge that the words "such authority as may be prescribed" used in the sub-section mean and should be read as "such authority as may be prescribed by the State Government."

9. It cannot be disputed and was indeed not disputed by Sri S. C. Khare that if the words "such authority as may be prescribed" used in sub-section (2) of section 160 are to be read as "such authority as may be prescribed by the State Government", Sri A. P. Misra was a duly constituted appellate authority. What was urged by Sri S. C. Khare was that in construing the words "such authority as may be prescribed" it is not permissible to add to them the words "by the State Government" because the words employed by the statute do not in view of the definition of the expression "prescribed", remain meaningless and ineffective without that addition. On a close examination of the provisions of the Act, it would, however, appear that in order to effectuate sub-section (2) it has to be held that the necessary implication of the words "such authority as may be prescribed" is that the authority is to be prescribed by the State Government. According to the contention of the learned counsel, the appellate authority has not been prescribed either by or under the Act, and in view of the definition of the expression "prescribed" the authority can only be prescribed by a rule made under the Act. Now, the obligation and the power of the State Government to make rules are contained in section 296 of the Act which, in so far as it is relevant for our purpose, runs as follows:—

"296 Obligation and power of State Government to make rules — (1) The State Government shall make rules consistent with this Act in respect of the matters, described in Sections (95, 127, 153 and 235)

(2) The State Government may make rules consistent with this Act —

(a) providing for any matter for which power to make provision is conferred, expressly or by implication, on the State Government by this or any other enactment in force at the commencement of this Act."

It would be noticed that sub-section (1) casts a duty upon the State Government to make rules consistent with the Act in respect of matters described in the provisions enumerated therein. It would also be noticed that all those provisions

expressly provide that the matters with which they deal shall be regulated by rules. We may mention that the first two among them state that the rules are to be made by the State Government, but the remaining two do not explicitly say so. The difference is, however, not material because sub-section (1) of Section 296 itself makes it obligatory for the State Government to make rules in regard to the matters described in the aforesaid provisions. In contrast to sub-section (1) of Section 296, sub-section (2) of the said section is general in its terms and clause (a) thereof confers upon the State Government the power to make rules consistent with the Act providing for any matter for which power to make provision is conferred expressly or by implication on the State Government by the Act or by any other enactment in force at the commencement of the Act.

Clause (a) of sub-section (2) of Section 296, therefore, postulates two things: firstly, that, either expressly or by implication, the power to make provision in respect of a matter has been conferred; and secondly, that, either expressly or by implication, the said power has been conferred upon the State Government. It seems clear that the words "expressly or by implication" govern not merely the preceding words in the clause but also the words "on the State Government" and, indeed, it is only by reading the clause in this manner that, even according to the contention of the learned counsel, a rule in respect of the matter mentioned in sub-section (2) of section 160 may be made by the Government. The power to make a provision with respect to the appellate authority has certainly been expressly conferred by sub-section (2) of Section 160, but there is no express conferment of that power upon the State Government. How then can the State Government make a rule in respect of the matter dealt with by sub-section (2) of Section 160 unless it is held that the sub-section has conferred the power on the State Government by implication? And this implication can be found in sub-section (2) of Section 160 because of sub-section (1) of that Section and because of the general scheme of the Act which confers powers of this nature only on the State Government.

The position, therefore, is that sub-section (2) of Section 160 has either to be regarded as altogether devoid of meaning, use and effect and, to use the words of the learned Single Judge as having 'left in a vacuum' the matter for which it attempted to make a provision, or it has to be understood as implying that the prescribing of the appellate authority under it has to be done by the State Government. Surely, the alternative of

so reading the sub-section as to make it totally ineffective and nugatory has to be avoided if it is possible to do so on a reasonable construction of its language in the context of the preceding sub-section of which it is a part and a proviso and of the Act in which it finds place. We may here draw attention to the following observations of their Lordships of the Supreme Court in *Shiv Bahadur Singh v. State of Vindhya Pradesh*, AIR 1953 SC 394:

"While no doubt it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal it is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. The construction urged for the appellant renders section 6 (of the Vindhya Pradesh Criminal Law Amendment (Special Courts) Ordinance No. 5 of 1949) futile and leaves even a convicted person without appeal. We have no hesitation in rejecting it." (Words in brackets ours)

We may also mention that Sri S. C. Khare did not press for the acceptance of the first of the two alternatives indicated above and he only urged that the purpose of the sub-section has to be effectuated by the State by having recourse to its rule-making power under Section 296. That power, however, can, as shown above, be held to be exercisable only if the words "such authority as may be prescribed" are construed as carrying the implication that the prescribing has to be done by the State Government or, in other words, they are read as "such authority as may be prescribed by the State Government." Thus, there is no escape from the conclusion that if sub-section (2) of Section 160 is to serve any purpose and the absurdity of having provided for an appeal without providing for the constitution of the appellate authority is not to be imputed to the legislature, the words "such authority as may be prescribed" must be interpreted as meaning and be read as such authority as may be prescribed by the State Government."

10. If, then, words "such authority as may be prescribed" mean and have to be read as "such authority as may be prescribed by the State Government", it is not necessary for the State Government to make a rule under section 296 of the Act for prescribing the appellate authority. The State may prescribe the authority under sub-section (2) of Section 160 itself and if it does so, the authority will be an authority prescribed under the Act and, therefore, "prescribed" in accordance with the definition of that expression in section 2(17)(i) of the Act.

11. It is another matter altogether that the State Government may have the power to prescribe the appellate authority by means of a rule too, but that is not the only method of doing so. In fact, it appears to us that the requirements of section 23 of the General Clauses Act which attach to the making of a rule by the State Government would be a little inappropriate in relation to the prescribing of appellate authority to hear appeals against assessment. But quite apart from that, there seems to be no doubt that sub-section (2) of Section 160, by its own term, authorises the State Government to appoint the appellate authority, and it is not necessary for the State Government to employ its rule-making power under section 296 for that purpose.

In this connection it is significant that in Ss. 119(2) and 151(2), the Act expressly lays down that the things to be prescribed thereunder have to be prescribed by rule; in Section 228(2) the legislature has taken care to say that in sub-section (1) of the said section the word "prescribed" means prescribed by rule; while in Section 59(3) where the words "State Government" find place in the first part of the sub-section the legislature has not expressly stated by whom the prescribing spoken of in the second part has to be done. Considering the language used in these provisions it seems reasonable to infer that whenever the legislature intended that a certain thing has to be prescribed only by a rule framed under the rule-making power of the State, it has explicitly said so. In sub-section (2) of Section 160 the legislature has not done so and this supports the conclusion that the State Government need not prescribe the appellate authority by means of a rule framed under the power given by section 296 and may do so even under sub-section (2) of Section 160 in exercise of the power conferred upon it by that sub-section itself.

12. For the reasons discussed above we hold that Sri A. P. Misra who was empowered by the State Government under the notification quoted above to entertain appeals against assessment was a duly constituted appellate authority under sub-section (2) of section 160 of the Act, and the impugned orders cannot be said to have been passed without jurisdiction. This disposes of the main contention advanced before us on behalf of the appellant, but, before leaving it, we may refer to a question which was raised on behalf of the respondents in connection with that contention.

13. It was urged on behalf of the respondents that at no stage of the appeals before Sri A. P. Misra did the appellants take any objection as to the jurisdiction of Sri A. P. Misra to entertain the appeals, and the appellant, was, therefore,

precluded from raising the question of jurisdiction in a writ petition. The stand taken by the appellant was that till the disposal of the appeals by Sri A. P. Misra it was unaware of the fact that no rule constituting Sri A. P. Misra the appellate authority for hearing appeals against assessment had been framed by the State Government, and there was, in these circumstances, nothing in the conduct of the appellant which may preclude it from challenging the jurisdiction of Sri A. P. Misra by means of writ petitions, and, in any case, even the acquiescence of the appellant to the assumption of jurisdiction by Sri A. P. Misra could not act as a bar to claiming relief on the ground of lack of jurisdiction.

The respondents repudiated the correctness of the stand taken by the appellant and contended that after the appointment of the Administrator over the Board which took place in July 1953 appellate authorities for assessment appeals were appointed by the State Government from time to time under notifications of the kind quoted above, that thousands of assessment appeals were preferred by assesseees during this period without any plea of want of jurisdiction having ever been raised by the Board, that the appellant was fully aware of the fact that it was only by means of the above quoted notification that Sri A. P. Misra was appointed as the appellate authority under sub-section (2) of section 160, and that the conduct of the appellant disentitles it to raise the question of lack of jurisdiction. Since we have come to the conclusion that Sri A. P. Misra was a duly constituted appellate authority and he had jurisdiction to hear and decide the appeals filed by the assesseees and to pass the impugned orders, it is wholly unnecessary for us to deal with this aspect of the controversy between the parties.

14. Sri S C Khare did not seriously dispute before us the power of the appellate authority to take additional evidence. An appeal is a continuation of the original proceeding and we agree with the learned Single Judge that the powers exercisable by the appellate authority must be regarded as co-extensive with those of the Board. Sri A. P. Misra was, therefore, competent to take additional evidence. We further agree with the learned Judge that as the appellant never objected to the taking of the additional evidence by Sri A. P. Misra, it is not open to it to urge that Sri A. P. Misra had no power to do so.

15. The correctness of the principle of assessment adopted by the appellate authority was not challenged before us by the learned counsel for the appellant

in the course of his argument and we are, therefore, not called upon to examine that question.

16. The appeals have no force and they are accordingly dismissed with costs. SSG/D.V.C.

Appeals dismissed.

AIR 1969 ALLAHABAD 183 (V 56 C 35)

J. N. TAKRU, J.

Shyam Lal, Petitioner v. State, Opposite Party.

Criminal Reference No. 37 of 1966, D/-23-8-1967, against order of S. J., Mathura, in Criminal Revn. No. 141 of 1965.

Public Gambling Act (1867), S. 13 — Gambling — Offence of, when complete — Doing something by either of parties to bet, which decides who won bet, is necessary — Offer and acceptance of bet — Amounts to making preparation for gambling — Not punishable under S. 13.

(Para 3)

Ghanshiamnath Sharma, for Petitioner.

ORDER :— This criminal reference has been made by the learned Sessions Judge of Mathura in the following circumstances.

2. According to the prosecution, Nur Singh Dutt, Head Constable, and the other prosecution witnesses saw Shyam Lal accused writing down some numbers on a piece of paper and Har Prasad accused offering two annas on number 98. When the latter saw the police they took to their heels. They were, however, arrested and from the possession of Shyam Lal two parchas with some numbers written on them, two pieces of cardboard, a pencil, and Rs. 2.25 were recovered, while from the possession of Har Prasad eight annas were recovered. On these allegations Shyam Lal and Har Prasad were prosecuted under Section 13 of the Gambling Act and were convicted and sentenced to a fine of Rs 150 in default to one month's R. I. each. As the case was tried summarily Shyam Lal went up in revision to the Sessions Judge, Mathura, who feeling satisfied that the examination of the accused under Section 342 Cr. P. C. was not conducted in accordance with law and had resulted in prejudice to him made the aforesaid reference to this Court.

3. After perusing the judgment and the explanation of the learned Magistrate I am satisfied that apart from the ground on which this reference has been made the conviction and sentence of Shyam Lal cannot be defended on merits either, as all that the prosecution evidence shows is that he was making preparation for gambling, the preparation consisting in Har Prasad offering two

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annas on No. 98 to the applicant. But the mere offer and acceptance of the bet assuming that the two annas were given as such would not show that Shyam Lal and Har Prasad were gambling, though as stated above, it might show that they were making preparation for gambling. The stage of gambling would have been reached when either party did something which would have decided whether the bet was won by Shyam Lal or Har Prasad and still then the parties can only be said to have made preparation for gambling, Section 13 of the Gambling Act however, does not make preparation for gambling an offence. As such Shyam Lal could not be convicted thereunder. The result therefore is that the conviction and sentence of Shyam Lal cannot be sustained. I accordingly accept the reference not only on the ground on which it was made by the learned Sessions Judge but also on the additional ground mentioned above, quash the judgment and order of the learned Magistrate referred to above and while ordering the acquittal of Shyam Lal direct that the fine if paid shall be refunded to him.

DVT/D.V.C. Reference accepted.

AIR 1969 ALLAHABAD 184 (V 56 C 36)

D. P. UNİYAL, J.

On difference of opinion between KHARE AND YASHODA NANDAN, JJ. State, Appellant v. Banshidhar, Respondent.

Govt Appeals Nos. 2195 to 2198 of 1963, D/- 26-7-1967.

Defence of India Rules, 1962, R. 125(2) — Essential Articles (Price Control) Order, 1963 — Order silent on time of operation — Mere publication in gazette does not bring it into immediate effect — General Clauses Act (1897), S. 5, not applicable to executive order.

The Essential Articles (Price Control) Order, 1963, passed under sub-rule (2) of Rule 125 of the Defence of India Rules 1962, since it does not specifically mention in it the time of its operation, cannot be said to have come into force immediately on its publication i.e. on 1-3-1963 in the Gazette of India (Extraordinary). Therefore, the shopkeepers and traders whose shops were raided on 25-3-1963 are not liable to be convicted for the contravention of the said Order.

The question as to how, when and where an Order issued under the Defence of India Rules will take effect cannot be left to conjecture; it must appear clearly on the face of the Order that it is to operate with immediate effect or from future date. Where there is no such indication in the Order itself it does not

become effective and cannot come into operation. (Para 7)

Rule 141 of the Defence of India Rules merely provides for publication of the Order in such manner as may appear to the authority, officer or person to be best adapted for informing persons likely to be affected by the Order. It merely gives discretion to the authority making the Order to publish the same in the manner best adapted for informing persons whom the Order concerns. The Rule does not say that the Order shall become effective and come into operation immediately on its publication in the Gazette. (Para 5)

It is true that the Acts of Central Legislature become law from the moment they are published. But that is because the General Clauses Act says so. The only consequence of the Essential Articles (Price Control) Order being published in the official gazette was that it came into being as a piece of subordinate legislation on the Statute Book. From this it would not follow that it became law with immediate effect. (Para 6)

It is not permissible to hold by analogy with regard to the construction of statutes that Orders of this kind take effect immediately on publication in the official gazette. Such a construction would be nothing short of legislating by the Courts. There is a fundamental difference between an Act of Parliament and an Order made under the D.I.R. (Para 7)

It is not possible to consider an executive Order made by the President as law made by Parliament and in principle the law passed by the Central Legislature cannot be placed on the same footing as an Order made by a subordinate authority. (1918) 1 KB 101 & AIR 1951 SC 467 & AIR 1950 All 562 & 1966 All LJ 796, Rel. on. (Para 8)

Cases Referred: Chronological Paras
(1966) 1966 All LJ 796=1966 All
WR (HC) 316, State of U. P. v.
Mahavir Prasad 12
(1951) AIR 1951 SC 467 (V 38)=
1952 Cri LJ 54, Harla v. State of
Rajasthan 13
(1950) AIR 1950 All 562 (V 37). Har-
pal Singh v. State 8
(1918) 1918-1 KB 101=87 LJ KB
122, Johnson v. Sargent and Sons 9
A. G. A., for Appellant; R P Goyal,
S. N. Mulla and P. C. Chaturvedi, for
Respondent.

UNIYAL, J. :— These connected appeals raise a common question of law and may be disposed of by a common order.

2. The four respondents were prosecuted for contravention of Clause 4 of the Essential Articles (Price Control) Order, 1963 (hereinafter referred to as the Order) which requires every dealer

to cause to be prominently displayed price-lists of articles for sale at his shop. The Magistrate recorded a conviction but in appeal the Sessions Judge passed an order of acquittal on the ground that the prosecution had failed to prove that the Order was in force on 25-3-63, the date on which the shops had been raided by the police. The State Government appealed against the acquittal of the respondents and the appeals were heard by my brothers Khare and Yashoda Nandan, JJ.

The learned Judges differed in their opinion on the principal question whether the Order had come into force in Uttar Pradesh on 25-3-63, the date on which the alleged offences were said to have been committed. Khare, J. was of the view that in the absence of any indication in the Order that it shall come into force at once or from some future date, the respondents were not liable to be convicted inasmuch as the provisions of the Order had not come into operation on the date of the alleged offence. Yashoda Nandan, J. on the other hand, came to the contrary conclusion and held that when the legislative organ has completed the act of legislation without expressing the intention that its effectiveness stands postponed to a future date, the only intention that can be attributed to it is that that law has become effective and enforceable from the date of its publication in the official gazette. In view of the difference of opinion between the two learned Judges the following question has been referred to me for opinion:

"Whether or not the Essential Articles (Price Control) Order, 1963 had come in force in Uttar Pradesh in March, 1963, the date when the offences in the four connected Government Appeals are alleged to have been committed?"

3. In exercise of the powers conferred by S. 3(1) of the Defence of India Act, 1962 (hereinafter referred to as the Act) the Central Government was empowered by issuing a notification in the official gazette to make such rules as appeared to it necessary or expedient, inter alia, for maintaining supplies essential to the life of the community. The Central Government accordingly framed rules known as the Defence of India Rules, 1962 (hereinafter referred to as the Rules). By Rule 125 of the Rules the Central Government, as well as the State Government, were empowered to make such orders as they might consider necessary or expedient for securing equitable distribution and availability of any article or thing at fair prices. The manner in which an Order made in pursuance of Rule 125 aforesaid was to be published is laid down in Rule 141. This Rule, so far as material, reads as follows:—

"(1) Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these rules, shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such order in such manner as may, in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns

(2) If in the course of any judicial proceeding a question arises whether a person was duly informed of an order made in pursuance of these Rules, compliance with sub-rule (1), or where the order was notified, the notification of the order, shall be conclusive proof that he was so informed; but a failure to comply with sub-rule (1) —

(i) shall not preclude proof by other means that he had information of the order,

(ii) shall not affect the validity of the order."

4. In pursuance of the powers conferred by sub-rules (2) and (3) of Rule 125 the Central Government made an order called the Essential Articles (Price Control) Order, 1963 and the same was published in the Gazette of India (Extraordinary) dated 1-3-1963. Clause 3 of the Order lays down that "no wholesale dealer or retail dealer, as the case may be, shall, with effect from the commencement of this Order, sell any essential article to any person at a price which is in excess of the control price." Clause 3 aforesaid was later amended by the Central Government and the same was published in the Government of India Gazette dated 6th March 1963. One of the changes introduced by the amendment was that the words 'with effect from the commencement of this Order' originally appearing in clause 3 were deleted from the Order.

5. The main argument advanced on behalf of the State was that the Order having been published in the Government Gazette on the 1st March 1963 it should be deemed to have come into force from that date. It was said that the principle underlying section 5 of the General Clauses Act was applicable to the Order, even though it was not applicable in terms of Orders of this kind but only to Central Acts and Regulations. It will be noticed that neither in the Defence of India Rules nor in the impugned Order made in pursuance of Rule 125 is there anything which would suggest that an Order made by the Central Government was to come into force immediately on the publication of the said Order in the Government Gazette. Rule 141 merely provides for publication of the Order in such manner as may appear to the authority, officer or person to be

best adapted for informing persons likely to be affected by the Order. It merely gives discretion to the authority making the order to publish the same in the manner best adapted for informing persons whom the Order concerns. Whether the mode adopted is by publication in the Government Gazette or by beat of drum or by effecting personal service of the notice on the individuals concerned, is a matter left to the discretion of the authority making the Order. The Rule does not say that the Order shall become effective and come into operation immediately on its publication in the gazette.

6. The only consequence of the impugned Order being published in the official gazette was that it came into being as a piece of subordinate legislation on the Statute Book. From this it would not follow that it became law with immediate effect. Indeed, there are no words express or implied in the Order itself that it was intended to enforce its provisions from the date of its publication. In India Acts of Central Legislature become law from the moment they are published. But that is because the General Clauses Act says so. The practice prevailing in England is that a statute which contains no express provision as to its commencement comes into operation on the date endorsed on it as the date on which it received the Royal assent.

The precise moment on which a statute, or a particular provision of a statute, takes effect is the moment of expiry of the day immediately preceding that on which it comes into operation; and where a statute or provision has extra-territorial effect the moment is determined for any particular territory by reference to local time. Even in England the commencement of many modern statutes is expressly postponed, the provision in question in some cases itself fixing the date and in others empowering Her Majesty or a specified Minister of the Crown to appoint a date by order; and it is by no means unusual for different dates to be fixed for different provisions of the same statute, or for authority to be given to appoint different dates for different provisions. (Vide Halsbury's Laws of England (Simonds Edition) Volume 36, Para 638).

7. The question as to how, when and where an Order issued under the Defence of India Rules will take effect cannot be left to conjecture; it must appear clearly on the face of the Order that it is to operate with immediate effect or from some future date. Where there is no such indication in the Order itself it does not become effective and cannot come into operation. In my opinion it is

not permissible to hold by analogy with regard to the construction of statutes that Orders of this kind take effect immediately on publication in the official gazette. Such a construction in my view would be nothing short of legislating by the courts. There is a fundamental difference between an Act of Parliament and an Order made under the D.I.R. Acts of Parliament are passed after a public debate in which the accredited representatives of the people have opportunity for free and full discussion of the issues involved. They are also given wide publicity in the press and over the radio. Everyone has opportunity to know or to find out what the law is to be, but not so in the case of Orders issued by the Executive or administrative authority. The decisions are made in the secret recesses of a chamber to which the public has no access and of which they can have no means of knowledge. It would be shocking to judicial conscience if Orders made in such circumstances and likely to affect the life and liberty of the subject were allowed to operate from the moment of their publication in the official gazette.

8. The argument that an Order of this kind should be placed on the same footing as an Act made by Parliament by importing the provisions of Section 5 of the General Clauses Act for construing such Orders needs to be mentioned only to be rejected. In *Harpal Singh v. State*, AIR 1950 All 562 it had been urged that an Order passed by the President should be deemed to be a law made by Parliament. *Raghubar Dayal, J.*, delivering the judgment of the Court, observed that it was not possible to consider an executive Order made by the President as law made by Parliament and that in principle the law passed by the Central Legislature should not be placed on the same footing as an Order made by a subordinate authority.

9. The difference between a statutory Order of this kind and an Act of Parliament was stressed in *Johnson v. Sargent and Sons*, (1918) 1 KB 101. That was a case in which an Order called the Peas, Beans and Pulses (Requisition) Order, 1917 was made on May 16, 1917 by the Food Controller under Regulation 2-F of the Defence of the Realm. It became known to the public on May 17, 1917. The Order prohibited sale of peas, beans and pulses and the said articles were required to be placed at the disposal of the Food Controller. Certain persons had sold beans on 16th May 1917 and the question arose whether the sales came within the prohibition contained in the Order. Although the facts of that case were different, the principle laid down can be applied here. The learned Judge dealing with the question of enforceability of the Order said.

"While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing. In the absence of authority I am unable to hold that the Order came into operation before it was known."

10. I have not known of any Order made under the Defence of India Rules and none has been brought to my notice in which the time of its operation was not specifically mentioned. By way of example I may refer to the following orders made under the D. I. R. in which it was clearly mentioned that they were to come into force at once:

- (1) Cotton Control Order, 1955.
- (2) Cotton Textile Order, 1948.
- (3) Cotton Textile Export Control Order, 1949.
- (4) Cotton Textile Control of Movement Order, 1948.
- (5) Textile Production by Handlooms Control Order, 1956

The Order in question is perhaps a solitary instance where no date was fixed for its coming into operation.

11. I now proceed to consider another argument advanced on behalf of the State that the Order as originally published on 1-3-63 may not have become effective from that date by reason of the use of the words "with effect from the commencement of this Order" in clause 3 thereof. But in view of the amendment deleting the words "with effect from the commencement of this order introduced in clause 3 aforesaid by a subsequent order published in the Government of India Gazette on 6-3-63, and re-published in the U. P. Gazette on 6-4-63, it must be considered that the impugned Order was intended to come into force with immediate effect.

12. The point was considered in *State of U. P. v. Mahavir Prasad*, (1966 ALJ 796) by a Division Bench of this Court and the learned Judges observed —

"Mere removal of the expression 'with effect from the commencement of this Order', which took place by the notification of the 6th of March, 1963 without anything more, cannot be tantamount to enforcement of the Order which had not till then been enforced. The result was that clause 3 of the Order cannot be deemed to have come into force even on the 6th of March 1963. In our opinion, the same reasoning must, a fortiori, apply to Clause 4 of the Order with which we are concerned, inasmuch as it cannot be that, even though, with reference to Clause 3 the Order had not become operative, it had become operative in respect of Clause 4."

I am in respectful agreement with the view expressed by the Bench in the above case.

13. An important factor which may be emphasised in construing Orders of this kind is that here we are dealing with a penal measure. Clause 5 makes punishable sales made in contravention of Clause 4 of the Order. If the impugned Order is held to operate from 1-3-63 when it was first published in the official gazette, then dealers irrespective of whether they knew of the Order or not would render themselves liable. It is a well known rule of construction that penal laws must be strictly construed. Dealing with this aspect of the matter the Supreme Court in *Harla v. State of Rajasthan* (AIR 1951 SC 467) observed:

"In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural diligence requires that before a law can become operative it must be promulgated and published. It must be broadcast in some recognisable way so that all men may know what it is."

14. It is obvious that shop-keepers and traders could not have prepared a price-list in accordance with Clause 3 of the Order as they had no knowledge that such a law was in operation on 25-3-63. The Order being silent as to the date of its operation, the respondents were not liable to be prosecuted under the impugned Order.

15. My answer to the question referred to me is that the Essential Articles (Price Control) Order, 1963 had not come into force in Uttar Pradesh on 25-3-63, the date when the offences in the four connected Government Appeals are alleged to have been committed. The above opinion shall be sent to the bench concerned with the relevant records.

16. **KHARE AND YASHODA NANDAN JJ.:**— In all these four Government Appeals and also in the connected Criminal Revision No. 670 of 1965 the main point that arises for consideration is as to whether the Essential Articles (Price Control) Order, 1963, passed under sub-rule (2) of Rule 125 of the Defence of India Rules, 1962, had come into operation on or before the 25th March, 1963.

17. All these connected Government Appeals were heard by us and there was difference of opinion. For that reason all the four connected appeals were referred to another Hon'ble Judge for delivery of his opinion. Hon'ble Uniyal, J., to whom the four connected Govern-

ment Appeals were referred, has arrived at the conclusion that the Essential Articles (Price Control) Order, 1963, had not come into force in Uttar Pradesh on 25th March, 1963, the date when the offences in the four connected Government Appeals and the connected Criminal Revision are alleged to have been committed

18. All the four connected Government Appeals are, therefore, dismissed. The Criminal Revision is allowed and the conviction and sentence of Jai Dayal Popli are set aside. Fine, if already paid by him, shall be refunded to him.
GDR/D.V.C. Appeals dismissed.

**AIR 1969 ALLAHABAD 188 (V 56 C 37)
V. G. OAK, C. J. AND R. S. PATHAK J.**

Commissioner of Income Tax, U. P., Appellant v. Bharat Engineering and Construction Co., Respondent.

Income Tax Reference Appln. No. 151 of 1964, D/- 12-1-1968.

Income Tax Act (1922), S. 66(2) — Question whether certain item is capital or income does not involve a question of law — Decision of Appellate Tribunal thereon cannot be interfered in revision. (Paras 6 and 13)

Cases Referred: Chronological Paras
(1963) 47 ITR 516=ILR (1963)

Andh Pra 636, Hazari Lal v. Commr. of I. T. Andhra Pradesh 10
(1959) AIR 1959 SC 291 (V 46)=35

ITR 148, Commr. of I. T. v. Rai Bahadur Jairam Valli 12
Gopal Behari, for Appellant.

OAK, C. J. :— This is an application under section 66(2) of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act). M/s. Bharat Engineering and Construction Company is the assessee. The assessment year is 1944-45. Under Section 34 read with section 23(3) of the Act the Income Tax Officer made the assessment. In making the assessment certain receipts of the assessee were treated as income. The assessee protested that these items did not constitute income of the assessee. When the matter went before the Income Tax Appellate Tribunal, Bombay Bench at Allahabad, the Appellate Tribunal partly accepted the assessee's claim. Two items of Rs 2,50,000/- and 40,000/- were excluded from the assessee's income. The Commissioner of Income Tax, U. P., filed before the Appellate Tribunal an application under Section 66(1) of the Act requesting for reference of two questions of law to this Court. The application was dismissed by the Appellate Tribunal. The Commissioner of Income Tax, U. P., has

filed the present application in this Court under Section 66(2) of the Act.

2. We may mention at the outset that the Appellate Tribunal accepted the assessee's claim with respect to two separate items for Rs. 2,50,000/- and Rs. 40,000/-. Although the assessee's claim with respect to the sum of Rs 40,000/- was in some respects similar to its claim with respect to the sum of Rs. 2,50,000/- the Commissioner has, in the present application, made no grievance with respect to the sum of Rs 40,000/-. The present application is confined to the sum of Rs 2,50,000/-.

3. The controversy with respect to the amount of Rs. 2,50,000/- arises thus. In the account books of the assessee there are five separate entries between 1-6-1943 and 15-3-1944 with respect to five separate sums making a total of Rs. 2,50,000. These entries are in the name of Benaras Investment Corporation. According to these entries, the assessee received in all a sum of Rs 2,50,000/- from the Benaras Investment Corporation between June 1943 and March, 1944. The question arose whether this sum of Rs 2,50,000/- indicated an undisclosed income of the assessee. The Appellate Tribunal accepted the assessee's explanation that this was merely money raised by the assessee for carrying out the business of the firm.

4. The point in dispute was disposed of by the Appellate Tribunal in paragraph 13 of its judgment dated 13-3-1963. The Tribunal observed.—

"At the same time, it is difficult to visualize the assessee having an undisclosed source of income from which it can bring large sums from time to time and effectively conceal the income as borrowings. We are, therefore, prepared to give the benefit of doubt to the assessee in respect of the sum of Rs 2,50,000 that have come into the account books in the earlier stages of its business."

Some of the facts, which have a bearing on this question, are these. The assessee is a firm constituted under a partnership deed dated 6-2-1943. Originally, there were two partners. Two other persons joined the partnership after a few days under a supplementary deed dated 15-2-1943. There is some indication that business in some form commenced in December, 1942. The five items in question relate to the period from June 1943 to March, 1944.

5. One of the partners of the assessee firm is Sri Jyoti Bhushan Gupta. He is interested in a number of business concerns including the Benaras Investment Corporation, in whose name the five entries in dispute stand. The question for consideration is whether the five relevant entries represent income of the assessee firm of money raised by the firm by way of a loan.

6. The applicant has proposed three questions of law. They are as follows.—

"1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in giving the benefit of doubt to the assessee in respect of the sum of Rs. 2,50,000?

"2. Whether on the facts and in the circumstances of the case, the deletion of the sum of Rs. 2,50,000 is based on proper appraisal of facts and evidence on record?

3 Whether there was any material on the record for the finding of the Tribunal that the sum of Rs. 2,50,000/- was out of the past savings and was not the income from undisclosed source as held by the Income-tax Officer?

7. On going through the Appellate Tribunal's order, we do not find any finding to the effect that the sum of Rs. 2,50,000 represents the past savings of the assessee. No such question appears to have been raised by the applicant in his application under Section 66(1) of the Act. Question No. 3 cannot, therefore, possibly arise in the present application.

8. Under question no. 2, the applicant has raised the question whether the decision of the Appellate Tribunal is based on a proper appraisal of facts and evidence on record. This is largely a question of fact. The proposed question is hardly a question of law.

9. Question no. 1 no doubt raises some difficulty. Mr. Gopal Behari, appearing for the applicant urges that the Tribunal was wrong in giving the benefit of doubt to the assessee.

10. In *Hazarilal v. Commissioner of Income Tax Andhra Pradesh* (1963) 47 ITR 516 (A. P.) it was held by Andhra Pradesh High Court that both with regard to credits in the names of the assessee as also credits in the names of third parties the burden is on the assessee to explain the credit entries. If an assessee fails to prove satisfactorily the source and nature of the amount of cash received during the accounting year, the Income Tax Officer is entitled to draw the inference that the receipts are of an assessable nature.

11. It may be that if a fact is exclusively within the knowledge of an assessee, the burden of explaining the fact will lie upon the assessee. However, the general burden of proving that a certain item constitutes income of the assessee will always lie on the Income Tax Department.

12. In *Commissioner of Income Tax v. Rai Bahadur Jairam Valli*, 35 ITR 148=(AIR 1959 SC 291) it was held by the Supreme Court that the question whether a certain item is capital or income involves a conclusion of law to be drawn from certain facts. It does not

follow that in every case whether certain receipt is income or not necessarily raises a question of law.

13. According to the relevant entries in the assessee's account books, the assessee received a total sum of Rs. 2,50,000 from the Benaras Investment Corporation. The question before the Appellate Tribunal was whether this receipt represented income or a loan. It is true that the finding of the Appellate Tribunal on this question is not happily worded. But the view taken by the Appellate Tribunal seems to be that the receipt represented a loan. The Appellate Tribunal took two circumstances into consideration. Firstly, the receipt of the amount in question was shortly after the commencement of the business of the firm. Secondly, Shri Jyoti Bhushan Gupta was interested in a number of allied concerns including the assessee firm and Benaras Investment Corporation. We are not called upon to decide whether the finding of fact arrived at by the Appellate Tribunal is sound or not. The point for consideration by us is whether the appellate decision of the Tribunal raises a question of law. We do not think that the order of the Appellate Tribunal raises a question of law.

14. The application is, therefore, dismissed. We make no order as to costs in this application.

DGB/D.V.C.

Application dismissed.

AIR 1969 ALLAHABAD 189 (V 56 C 38)

J. N. TAKRU, J.

Vivekanand Nand Kishore, Applicant
v. State, Opposite Party.

Criminal Revn. No. 1092 of 1965, D/- 26-8-1967, against order of S. J., Allahabad, D/- 3-3-1965.

(A) Criminal P. C. (1898), S. 195 (1) (c) — Bar under — Operating even if forgery is committed subsequent to initiation of proceedings all that S. 195(1)(c) lays down is that if a forged document is produced or given in evidence by a party to any proceeding in any Court, the bar laid down in that section is attracted and for that purpose it is immaterial whether the forgery was committed prior or subsequent to the initiation of the said proceeding. (Para 6)

(B) Criminal P. C. (1898), S. 195(1)(c) — Scope — Penal Code (1860), Ss. 471, 406, 467 and 420 — Main offence under S. 471 — Other offences flowing from it — Mere tacking of other offences to S. 471 will not take case out of ambit of S. 195(1)(c), Cr. P. C.

When the main offence is the one under S. 471, Penal Code, namely, the offence of using a forged document as genuine document and the other offences

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all flow from it, in the sense that if the charge under S 471 fails, the charges for the other offences would also fail, none of which offences can 'in truth and substance' be said to be of a distinct nature, the mere fact that Ss. 406, 467 and 420, Penal Code are also tacked on to the offence under S 471, Penal Code, would not serve to take the case out of the scope and ambit of S 195(1)(c). 1964 All LJ 467 & AIR 1953 SC 293, Foll. (Para 9)

Cases Referred: Chronological Paras

(1964) 1964 All LJ 467=1964 All

Cri R. 159, Hari Nath Singh v. State 7

(1953) AIR 1953 SC 293 (V 40)=

1953 Cri LJ 1232, Basi-ul-Haq v. State of W. B 8

R. Pandey, for Applicant; G. A., for Opposite Party.

ORDER :— Vivekanand has filed this revision against the revisional judgment and order of the learned Civil and Sessions Judge, Allahabad, rejecting his application praying for the dropping of the proceedings initiated against him under Sections 406, 420, 467 and 471, I. P. C.

2. The facts giving rise to this revision lie within a narrow compass. It appears that the applicant presented an application before the Compensation Officer, Meja on the 19th, November, 1958 praying for the withdrawal of a sum of Rs 80-98 P which was payable as compensation to one Bans Bahadur. The application was accompanied by a Vakalatnama purporting to be signed by Bans Bahadur. The case for the prosecution is that the said Vakalatnama was forged by the applicant as Bans Bahadur had died some time before, and that after withdrawing Rs 80 98 P on the strength of it, he misappropriated the said sum. When the matter came to the knowledge of the A. D. M. (E), Allahabad he made a report to the Police and the latter after enquiry submitted a charge-sheet against the applicant under sections 406, 420, 467 and 471 I. P. C.

3. When the case came up for hearing in the trial Court the applicant took a preliminary objection that as the present prosecution was in respect of offences relating to a document given in evidence the learned Magistrate could take cognizance of them only on the complaint in writing of the court before which the said document was produced, or some court to which such court was subordinate, and as no such a complaint had been made he could not take cognizance of those offences under Section 195(1)(c) Cr. P. C. Both the Courts below rejected this objection thus giving rise to the present revision.

4. On behalf of the applicant his learned counsel urged two contentions in

support of this revision. His first contention was that as the offence under section 471 I. P. C. was allegedly committed by the applicant as a party to the proceeding initiated by him in the court of the Compensation Officer, Meja and as it was in respect of a document produced by him in that court, Section 195 (1)(c) of the Criminal Procedure Code barred the Magistrate from taking cognizance of that offence except on the complaint in writing of the said court or of some other court to which such Court was subordinate. His second contention was that as all the other offences for which the applicant was also charged, namely, sections 406, 420, and 467 I. P. C. were all cognate to the offence under Section 471 I. P. C. and, in fact and substance stemmed from it the Magistrate could not take cognizance of those offences as well under Section 195 (1)(c) Cr. P. C. After hearing the learned counsel for the parties I am satisfied that both these contentions are well founded. I shall, therefore, proceed to give my reasons of coming to that conclusion after quoting the material parts of Section 195(1) Cr. P. C. Thus quoted Sec. 195(1) reads as follows:

"195(1) No Court shall take cognizance

(a)

(b)

(c) "of any offence described in section 463 or punishable under Section 471, sec. 475 or Section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such court, or of some other court to which such court is subordinate"

5. A plain reading of this sub-section shows that two conditions are necessary for its applicability, (1) that the offence mentioned therein should be committed by a party to any proceeding in any court, and (2) that such offence should be in respect of a document produced or given in evidence in such proceeding. So far as the question whether the Compensation Officer is a court or not, the learned Civil and Sessions Judge has held and, in my opinion rightly, that it is a court. It was not disputed, as indeed it could not be disputed, that the document in question, viz the alleged forged vakalatnama was produced in the court of the Compensation Officer. Hence the only point which remains for determination is whether the said vakalatnama was produced by a party to any proceeding in that court. It will be noticed that the expression "by a party to any proceeding in any court" is not preceded or followed by any words of limitation which might go to show that

when the forged document is produced or given in evidence in a court, some proceeding to which the person producing or giving the said document in evidence is a party, should have been pending. Hence if a person initiates a proceeding in a court and in connection with it produces or gives in evidence a forged document, his case would also be covered by the expression "by a party to any proceeding in a court." In the present case it is common ground that there was no proceeding pending in the court of the Compensation Officer when the application in question was made there by the applicant on the 19th November 1958. But as soon as he moved that application a proceeding to which he was a party came into existence and as in that proceeding an allegedly forged vakalatnama was produced, both the ingredients of Section 195(1)(c) Cr. P. C. must be held to have been made out.

6. On behalf of the State it was, however, contended that as the offence of forgery as described in section 463 I. P. C. was committed prior to the applicant becoming a party to the aforesaid proceeding in the Court of the Compensation Officer, section 195(1)(c) had no application to this case. I do not agree, for the simple reason that there is nothing in this section to warrant such an interpretation. All that that section lays down is that if a forged document is produced or given in evidence by a party to any proceeding in any court the bar laid down in that section is attracted and for that purpose it is immaterial whether the forgery was committed prior or subsequent to the initiation of the said proceeding. Thus on the plain terms of the section I am satisfied that the first contention of the applicant's learned counsel is correct.

7. As stated earlier the second contention of the applicant's learned counsel is also well founded. It is unnecessary, however, to enter into a detailed discussion of it as it is, in my judgment, concluded by the Division Bench decision of this Court in *Hari Nath Singh v. State*, 1964 All LJ 467. It was held in this case that:

"Even for offences cognizance of which was not per se barred under section 195, Cr. P. C. no Magistrate could be allowed to take their cognizance if it was not a 'distinct' offence or if in truth and substance the offence fell under the category of sections mentioned in section 195, Cr. P. C."

8. The aforesaid view was founded upon the following observations of their Lordships of the Supreme Court in the case of *Basirul Haq v. State of West Bengal*, AIR 1953 SC 293.

"Though, in our judgment, section 195, does not bar the trial of an accused per-

son for a 'distinct' offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to device or camouflages. The test whether there is evasion of the section or not 'is whether the facts disclosed primarily and essentially an offence for which a complaint of the Court or of the public servant is required'. In other words, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian Penal Code, though in truth and substance the offence falls in the category of sections mentioned in the Section 195, Cr. P. C. merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it" (the underlining is mine (here in ' '))

9. Applying the aforesaid test to the present case, we find that the main offence is the one under section 471 I. P. C. namely, the offence of using a forged document as a genuine document. The other offences all flow from it, in the sense that if the charge under Section 471 I. P. C. fails the charges for the other offences would also fail. In addition, none of those offences can 'in truth and substance' be said to be of a distinct nature. I am therefore, satisfied, that the mere fact that sections 406, 467, and 420 I. P. C. are also tacked on to the offence under Section 471 I. P. C. would not serve to take the case out of the scope and ambit of Section 195(1)(c), Cr. P. C.

10. Thus for the reasons stated above the preliminary objection of the applicant was wrongly rejected by the courts below. I accordingly set aside their judgments and allow the revision and order the present proceeding to be dropped.

DGB/D.V.C.

Revision allowed.

AIR 1969 ALLAHABAD 191 (V 56 C 39)
GANGESHWAR PRASAD, J.

Nathu Ram, Applicant v. Smt. Atar Kunwar, Opposite Party.

Criminal Reference No. 283 of 1965,
D/- 14-8-1967, against order of Civil and S. J., Oral

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Criminal P. C. (1898), S. 488 — Claim for maintenance under—Decree for judicial separation under S. 10 of Hindu Marriage Act does not operate as bar — Parties living separately by mutual consent — Wife held not entitled to maintenance — Children, not deprived of their right to claim maintenance — (Hindu Marriage Act (1955), S. 10).

A decree for judicial separation under S. 10 of Hindu Marriage Act does not operate as a bar to a claim for maintenance under S. 488 Criminal P. C. of course, if the decree goes to establish any fact which, on the terms of S. 488 Cr. P. C. itself, precludes a claim for maintenance, the claim may be said to be barred. What may deprive the wife of a right to claim maintenance under S. 488 Cr. P. C. is, therefore, not the bare fact of the decree but the establishment, by means of the decree of any of these facts which, according to S. 488 Cr. P. C. disentitle a wife to a claim for maintenance. If the decree for judicial separation does not establish any such fact, it cannot, obviously, take away the right conferred upon a wife by S. 488 Cr. P. C. AIR 1966 All 133, Expld. (Para 5)

Whether a husband and a wife are living separately by mutual consent, has in most cases to be determined on the basis of their conduct and the surrounding circumstances. When the separate living proceeds from the common desire of the husband and the wife to live separately, whatever the reason for the desire may be, it is certainly by mutual consent. Where, therefore, since the passing of the consent decree for judicial separation the parties have been living separately by mutual consent, the wife is not entitled to receive any maintenance under S. 488 Cr. P. C. She may pursue such remedies as may be available under Hindu Marriage Act. (Para 10)

The fact that the wife and the husband are living separately by mutual consent creates only a personal disability in the wife for receiving an allowance for herself under Section 488 Cr. P. C. and it does not bar a claim made by her on behalf of her children. The fact that the children are living with the mother, cannot deprive the children of their right of receiving a maintenance allowance under section 488 Cr. P. C. if they are otherwise entitled to it. The rejection of wife's claim for allowance in regard to herself cannot entail the rejection of the claim made by her on behalf of the children. (Case remanded to consider case of children separately). (Para 11)

Cases Referred: Chronological Paras
(1966) AIR 1966 All 133 (V 53)=
1965 All LJ 602, Smt. Ravendra
Kaur v. Achant Swarup 3, 4, 6

(1958) AIR 1958 Punj 390 (V 45)=
1958 Cri LJ 1340, Dr. Mukund
Lal v. Smt. Jotishmati 9
(1954) AIR 1954 All 33 (V 41)=
1954 Cri LJ 19, Smt. Chameli v.
Gajraj Bahadur Gupta 9
(1937) AIR 1937 All 115 (V 24)=
38 Cri LJ 312, Ram Saran Das v.
Ram Piar 9
(1935) AIR 1935 Rang 359 (V 22)=
37 Cri LJ 6, J. Chand Toon v.
Ma Tai 9

R. Dwivedi, for Applicant; P. N. Tewari, for Opposite Party.

ORDER :— This is a reference by the Civil and Sessions Judge of Orai recommending that the order of the Sub-Divisional Magistrate, Jalaun dated 4-1-1965 by which he directed payment of maintenance allowance to a wife in a proceeding under Section 488 Cr. P. C. be set aside and the application for the allowance be rejected.

2. The claimant is Smt. Atar Kunwar and she claimed maintenance from her husband, Nathu Ram, for herself and for her two children. The claim was contested by Nathu Ram who, while admitting that the claimant was his wife, denied that she was entitled to maintenance. After taking the evidence of the parties, the Sub-Divisional Magistrate, Jalaun granted to the claimant an allowance of Rs. 30/- per month from the date of the application. Against this order Nathu Ram filed an application in revision in the Court of Session, and that has led to the reference.

3. Admittedly, Smt. Atar Kunwar was married to Nathu Ram about eight years before the commencement of this proceeding. After a peaceful married life for some time the couple became estranged and eventually started living apart. Smt. Atar Kunwar then filed an application for the grant of an allowance against Nathu Ram under section 488 Cr. P. C. and on 12-11-1960 an order was passed in her favour granting an allowance of Rs. 20/- per month. Later, however, the parties got reconciled to each other and resumed living together; but, again, there was a rupture, and it was followed by an application under Section 488(3) Cr. P. C. by Smt. Atar Kunwar for arrears of the allowance granted to her by the order dated 12-11-1960. The Sub-Divisional Magistrate who dealt with the application held that, in view of the subsequent resumption of married life by the parties, Smt. Atar Kunwar was not entitled to claim any allowance on the basis of the order dated 12-11-1960 and rejected the application on 19-7-1963. He, however, observed that the applicant would be at liberty to apply afresh for the grant of an allowance.

The proceeding giving rise to this reference was then started by Smt. Atar Kunwar on 25-9-1964. It appears that some time in 1964 Nathu Ram instituted a proceeding under Section 10 of the Hindu Marriage Act against Smt. Atar Kunwar praying for a decree for judicial separation. In that proceeding Smt. Atar Kunwar filed an application on 10-11-1964 stating that for the preceding three years she had been living with her father and had not gone to her husband Nathu Ram, and further that she was neither prepared to go to him then nor would she go to him ever afterwards. The prayer in the application was that the decree claimed by the plaintiff be passed. A decree for judicial separation was, accordingly, passed by the Civil Judge of Orai on 13-11-1964. Before the learned Civil and Sessions Judge of Orai who has made this reference, it was contended on behalf of Nathu Ram that a decree for judicial separation bars a claim for an allowance under Section 488, Cr.P.C. and reliance for this contention was placed on Smt. Ravendra Kaur v. Achant Swarup, 1965 All LJ 602 = (AIR 1966 All 133). The learned Civil and Sessions Judge was of the view that the above decision completely supported the contention, and the reference is based entirely on the acceptance of that contention.

4. A careful reading of the decision would, however, make it clear that it does not lay down the broad proposition on which the reference is based. It will be noticed that before pronouncing upon the effect of the decree for judicial separation which was pleaded in that case as a bar to the claim for maintenance allowance, Tripathi, J., who decided the above case, 1965 All LJ 602 = (AIR 1966 All 133), said:

"Judicial separation can be obtained by either party to a marriage inter alia also on the ground that the other party has deserted him or her for a continuous period of not less than two years immediately preceding the presentation of the petition under S. 10 of the Hindu Marriage Act of 1955. The allegation made by the opposite party before the Magistrate was that he had obtained the decree for judicial separation on this ground."

The learned Judge then proceeded to observe as follows:—

"Sub-section (4) of Section 488, Cr.P.C., provides that no wife shall be entitled to receive an allowance from her husband... if without any sufficient reason she refuses to live with her husband. It is, therefore, clear that in view of the decree passed by the Civil Court granting judicial separation to the opposite party, the applicant cannot be held entitled to receive maintenance allowance from him and under the law it was the duty of the Magistrate to have noticed the decision of the Civil Court as provided under sub-section (2) of Section 489 of the Code even though there was no specific application under that section before him."

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The conclusion obviously is that the decree for judicial separation passed against the wife in that case was found to be based on the fact that she had refused to live with her husband without any sufficient reason, and it was on that account that she was held to be disentitled to receive an allowance. There is nothing in the decision to suggest that decree for judicial separation in itself and irrespective of the facts on which it is based must in all cases preclude a claim for maintenance by a wife under Section 488, Cr.P.C., and the learned Civil and Sessions Judge has, to my mind, failed to appreciate the true basis and import of the decision.

5. Neither the Criminal Procedure Code nor the Hindu Marriage Act anywhere provides that a decree for judicial separation operates as a bar to a claim for maintenance under Section 488 of the former enactment, and there can, consequently, be no warrant for holding that it has that effect. Of course, if the decree goes to establish any fact which, on the terms of Section 488, Cr.P.C., itself, precludes a claim for maintenance, the claim may be said to be barred. What may deprive the wife of a right to claim maintenance under Section 488, Cr.P.C., is, therefore, not the bare fact of the decree but the establishment by means of the decree of any of these facts which, according to Section 488, Cr.P.C., disentitle a wife to a claim for maintenance. If the decree for judicial separation does not establish any such fact, it cannot, obviously, take away the right conferred upon a wife by Sec. 488, Cr.P.C.

6. Sub-section (4) of Section 488, Cr.P.C. provides that no wife shall be entitled to receive an allowance from her husband under that section if, without any sufficient reason, she refuses to live with her husband. The decree for judicial separation which was involved in the case of 1965 All LJ 602 = (AIR 1966 All 133), established the fact that the claimant was without any sufficient reason, refusing to live with her husband, and it was for this reason that the decree was held to act as a bar to the claim. The decision in the above case cannot be interpreted as laying down that, irrespective of the nature of the decree or the facts which form its basis, a decree for judicial separation bars a claim for maintenance under Section 488, Cr.P.C.

7. The question, therefore, is whether the decree for judicial separation passed against Smt. Atar Kunwar establishes any of those facts which disentitle her to receive an allowance under S. 488, Cr.P.C. It is not in dispute that for several years past the parties have been living separately. Prior to the decree for judicial separation this separate living was, however, not the result of mutual consent. The wife accused the husband of cruelty towards her and the husband charged the wife with living in adultery. The separate living was the result of

an establishment and there is nothing to indicate that the parties had ever before the decree for judicial separation agreed to live separately. But, from the date of the decree the position clearly underwent a change and there seems to be no doubt about the fact that, thereafter, their separate living has been by mutual consent.

8. It is true that separate living of a couple brought about only by the force of circumstances wantonly created by the husband cannot be said to be by mutual consent. An unwilling submission to the compulsion of such circumstances on the part of the wife who finds herself helpless in face of them cannot constitute consent. But when such is not the case, and the separate living proceeds from the common desire of the husband and the wife to live separately, whatever the reason for the desire may be, it is certainly by mutual consent. In the instant case the husband Nathu Ram obviously expressed his desire to live separately by instituting a proceeding for judicial separation. The wife, Smt. Atar Kunwar, did not oppose the petition of her husband and prayed that a decree for judicial separation be passed. As already noted, she further stated that she was living with her father for the preceding three years and was not prepared to go to her husband then or ever afterwards.

It was on the basis of this statement of Smt. Atar Kunwar which was expressive of her own desire, that the decree for judicial separation was passed. The decree, therefore, only conferred the sanction of the Court upon what both the parties desired and gave rise to certain legal consequences which they themselves wanted to bring about. Whatever might originally have been the reason for the separate living, I think that from the date of the consent decree for judicial separation passed on 13-11-1964, if not from 10-11-1964 when Smt. Atar Kunwar made an application praying that such a decree be passed, the parties must be regarded as having started living separately by mutual consent. This separate living did not have for its basis the decree for judicial separation but the mutual consent on which the decree was itself founded.

9. Whether a husband and a wife are living separately by mutual consent has in most cases to be determined on the basis of their conduct and the surrounding circumstances. The authorities dealing with the question as to what amounts to living separately by mutual consent can, therefore, only indicate broad lines of approach to that question and not lay down any fixed rules of judgment. I need not, therefore, discuss the cases bearing on the point and may only observe that the view that I have taken is in consonance with the view expressed in *Ram Saran Das v. Ram Piari*, AIR 1937 All 115, *Smt. Chameli v. Gajraj Bahadur Gupta*, AIR 1954 All 33, *Dr. Mukand Lal v. Smt. Jyotishmati*, AIR 1958

Punj 390 and *J. Chand Toon v. Ma Tai*, AIR 1935 Rang 359.

10. Since Smt. Atar Kunwar and Nathu Ram have been living separately by mutual consent the former is not entitled to receive any maintenance allowance under Sec. 488, Criminal P. C. Her claim, in so far as it relates to an allowance for herself, must therefore be rejected. She may of course pursue such remedies as may be available to her under the provisions of the Hindu Marriage Act.

11. Smt. Atar Kunwar has, however, claimed a maintenance allowance not only for herself but also for her two children. The Sub-Divisional Magistrate granted a consolidated allowance of Rs. 30 per month and the learned Civil Judge has not at all considered the claim made by Smt. Atar Kunwar on behalf of the children. The fact that the wife and the husband are living separately by mutual consent creates only a personal disability in the wife for receiving an allowance for herself under Sec. 488, Cr.P.C. and it does not bar a claim made by her on behalf of her children. It is a matter of no consequence that the children are living with the mother, and this circumstance cannot deprive the children of their right of receiving a maintenance allowance under Section 488, Criminal P. C. if they are otherwise entitled to it. The two capacities in which the application under Section 488, Criminal P. C., has been filed by Smt. Atar Kunwar and the two heads of claim mentioned in it have to be kept apart.

The rejection of Smt. Atar Kunwar's claim for allowance in regard to herself cannot entail the rejection of the claim made by her on behalf of the children has not been specifically and separately considered by the Sub-Divisional Magistrate it appears necessary to remand the case and I accordingly do so (Sic). The claim of Smt. Atar Kunwar in so far as it relates to an allowance for herself shall stand rejected, but the Sub-Divisional Magistrate will decide what allowance, if any, is payable by Nathu Ram for the maintenance of the children mentioned in the application of Smt. Atar Kunwar and then pass such orders as the case may require.

12. The reference is accepted partially as indicated above, and the case is sent back to the Sub-Divisional Magistrate Jalaun for being disposed of in accordance with the directions given in this order.

SSG/D.V.C. Reference accepted partially,

AIR 1969 ALLAHABAD 195 (V 56 C 40)
(LUCKNOW BENCH)

L. PRASAD, J.

Kashi Prasad Saksena, Petitioner v. State Government of U. P. Lucknow, Opposite Party.

Writ Petn. No. 754 of 1967, D/-3-12-1968.

(A) Notaries Act (1952), S. 10 — Notaries Rules (1956), R. 13 — Enquiry under R. 13 — Absence of allegation of professional misconduct — Report of Competent Authority — Notification of State Government based on such report, held not valid — (Constitution of India, Art. 226 — Natural justice.)

On report of Competent Authority, the State Government by notification under S. 10, Notaries Act read with R. 13 (13) and 13 (12) (b) of Notaries Rules, cancelled certificate of practice granted to one K and ordered removal of his name from register of Notaries. This notification proceeded on the basis that K. was guilty of professional misconduct, but charges framed by Competent Authority in enquiry under R. 13 indicated that there was no allegation of professional misconduct with the result that K had no occasion to show that the allegations against him would not establish professional misconduct.

Held, that the notification was not valid. The fact that the enquiry before Competent Authority purported to proceed in accordance with Rule 13 of Notaries Rules, it should not be taken for granted that K was apprised of the fact that the question whether or not K was guilty of such professional misconduct as would render him unfit to practise as a Notary was being enquired into. No enquiry under R. 13 of the Rules could legitimately be initiated unless it could be said on the basis of the allegations contained in the complaint that those allegations, if proved, would establish professional misconduct on the part of K being of such a nature as would render him unfit to practise as a Notary. (Para 6)

Held, also that in so far as that opportunity had been denied to K, the State Government had violated the principles of natural justice. (Para 10)

(B) Stamp Act (1899), Sch. I, Art. 42 — Notaries Act (1952), S. 8 (1) (e) — Certificate or endorsement by Notary Public on affidavits falls within Art. 42 so as to require notarial stamp.

A certificate or endorsement given or made by a Notary Public on the affidavits is required to be stamped under Art. 42 only when it can be taken to have been granted or made "in the execution of the duties of his office... as a Notary Public". After oath has been administered or an affidavit has been taken by a Notary unless that fact is certified or endorsed on the affidavit the affidavit remains a waste paper.

So under S. 8 (1) (e) an endorsement to that effect has got to be made. Since the administration of oath is a notarial act, the statement of the fact that oath has been administered in the endorsement given on the affidavit subsequent to the administration of oath cannot but be taken to have been made in execution of the duties of the Notary, namely, to administer oath. Thus a certification to that effect or an endorsement to that effect would fall within Art. 42 of the Stamp Act so as to require notarial stamp. (Para 5)

(C) Notaries Act (1952), S. 10—Notaries Rules (1956), Rr. 11 (2), 11 (9), 13—Under R. 11 (2) no entry need be made in notarial register in respect of affidavits — Requirement in regard to maintenance of register under R. 11 (9) showing all fees and charges does not imply the entry of particulars of affidavits themselves in that register — Enquiry under R. 13 — Charge in regard to failure on part of Notary public concerned to enter affidavits in register — Finding of Competent Authority that Notary Public failed to maintain register under R. 11 (9)—Finding held not in consonance with the charge and suffered from apparent error of law — (Constitution of India, Article 226). (Para 6)

(D) Constitution of India, Art. 226 — Mala fide — Notaries Act (1952), Ss. 10, 5 — Earlier notification quashed by judgment of High Court in special appeal — Delay in issue of certificate to practise as a Notary signed much earlier — No inference that Government acted mala fide deliberately with view to deprive a Notary Public of his right to practise as a Notary. (Para 7)

(E) Notaries Act (1952), S. 10 (d) — Removal of name of a Notary from register necessarily implies cancellation of certificate — Cancellation of certificate does not per se amount to perpetual debarment from practice. (Para 8)

Cases Referred: Chronological Paras
(1967) AIR 1967 All 173 (V 54) =
ILR (1966) 2 All 886, Kashi Prasad
Saxena v. State of Uttar Pradesh, Lucknow 1, 4
(1965) Writ Petn. No. 380 of 1964,
D/-7-5-1965 (All) 1

K. S. Hajela, for Petitioner; Chief Standing Counsel, for Opposite Party.

ORDER: This is a petition under Article 226 of the Constitution. The petitioner was enrolled as a Notary Public for the first time in 1959 to practise as such at Lucknow. His certificate was renewed for a period of three years with effect from 20th August, 1962. It was during this period of renewal that a complaint was made against him by another Advocate, Sri Krishan Chandra on 2nd May, 1963 to the State Government in Form 13 as required by the Notaries Rules, 1956. This complaint was referred for enquiry to the Competent Authority, namely, the District Judge, Lucknow. On the basis

of the allegations made in the complaint the Competent Authority framed the following three charges :

1. That he (the petitioner) made no entry in his register regarding the three affidavits dated 25-7-1961, 24-8-1961 and 24-8-1961 of Sarju Prasad, Inder Prakash and Chandra Mohan and thus contravened Rule 11 of the Notaries Rules.

2. That none of these four affidavits were stamped with notarial stamp as required under Article 42 of the Stamp Act.

3. That none of these four affidavits was stamped with adhesive stamps in accordance with Sections 10 and 11 of the Stamp Act, though it was the duty of the Notary to see that the affidavits were duly stamped before he administered oath to the deponents, and got them verified.

The petitioner was called upon to file a written statement which he did. A true copy of the written statement is Annexure 4 to the petition. After holding an enquiry on the basis of the above mentioned charges the Competent Authority submitted his report on 18th February, 1964 to the State Government saying that the charges levelled against the respondent (the petitioner) have been brought home to him. After receipt of the said report of the Competent Authority the State Government on 11th March 1964 issued a notification purporting to be under Section 10 of the Notaries Act, 1952 read with clause (b) of sub-rule (12) of Rule 13 of the Notaries Rules, 1956 cancelling with effect from the date of the notification the certificate of practice granted to the petitioner and perpetually debaring him from practising as such. Aggrieved by this notification the petitioner filed a writ petition under Article 226 of the Constitution which came to be registered as Writ Petition No. 380 of 1964 (All). It was dismissed by a learned Single Judge of this Court by his order dated 7th May, 1965.

Aggrieved by the said order the petitioner preferred a special appeal which came to be decided in his favour on 6th September, 1966. The decision of that special appeal is reported in AIR 1967 All 173, Kashi Prasad Saxena v. State of Uttar Pradesh, Lucknow. As a result of the decision in the special appeal the State Government issued notification dated 28th February 1967, a copy of which is Annexure 6 to the petition, cancelling the earlier notification by which the petitioner's certificate to practise as a Notary was cancelled. Soon thereafter the certificate authorising the petitioner to practise as a Notary for a period of three years with effect from 20th August, 1965 was issued and as alleged by the petitioner he actually received it on 10th March 1967. A copy of the certificate thus issued is filed as Annexure 1 to the petition. It purports to have been signed on 29th September, 1967 but the petitioner showed me the original in the course of the arguments and it appears therefrom that it was signed on 25th September, 1967. Obviously, the year

1967 as mentioned therein is a mistake for the year 1966. It is also the allegation in paragraph 17 of the petition though no doubt there also the mistake is committed in so far as it purports to say that it was signed on 25th June, 1966 whereas the fact appears to be that it was actually signed on 25th September, 1966.

Another communication dated 3rd March 1967, a copy of which is Annexure 7 to the petition, was issued to the petitioner along with which a copy of the report of the Competent Authority dated 18th February, 1964 was furnished to the petitioner and he was required to submit his explanation in his defence within 14 days of the receipt of the communication. The petitioner actually submitted his explanation on 10th April, 1967 by which time he was allowed to submit his explanation. A true copy of that explanation is Annexure 8 to the petition. Thereafter on 30th June, 1967 the State Government issued another notification, a copy of which was issued to the petitioner and which is Annexure 9 to the petition, by which the State Government purporting to act under Section 10 of the Notaries Act, 1952 read with clause (b) of sub-rule (12) and sub-rule (13) of R. 13 of the Notaries Rules, 1956 cancelled with effect from the date of publication of the notification in the Gazette the certificate of practice granted to the petitioner and ordered the removal of his name from the register of Notaries with effect from the same date. It is against this order that the present petition is directed.

2. The petitioner challenges the validity of the impugned order on various grounds including that of mala fides. The prayer in the petition is that the notification (Annexure 9) be quashed and the State Government, namely, the opposite party, be directed not to give effect to the orders contained in the impugned notification.

3. The petition is opposed by the opposite party. A counter affidavit has been filed on behalf of the opposite party.

4. I have heard the learned counsel for the petitioner and the learned Standing Counsel appearing for the opposite party. The first and the foremost contention raised on behalf of the petitioner is that the impugned order which proceeds on the basis that the petitioner has been guilty of such professional misconduct as to render him unfit to practise as a Notary stands vitiated for the simple reason that no charge of professional misconduct was ever levelled against the petitioner. This argument proceeds on the basis that the charges framed by the Competent Authority, as enumerated above, clearly indicate that there was no charge of professional misconduct with the result that the petitioner never had any opportunity to show to the Competent Authority that, even though those charges be taken to have been proved, there would

be no basis for coming to the conclusion against the petitioner that he was, therefore, guilty of professional misconduct much less guilty of such professional misconduct as would render him unfit to practise as a Notary. Likewise, it is further pointed out that even the notice calling upon the petitioner to submit his defence with reference to the report of the Competent Authority, (Annexure 7) makes no mention of the fact that the charge against the petitioner in view of the findings reached by the Competent Authority was that he was guilty of professional misconduct with the result that he had no opportunity even to show to the State Government that there could be no such charge on the basis of the charges framed and findings recorded by the Competent Authority.

As against that the contention of the learned Standing Counsel is that having regard to the language of Rule 13 of the Notaries Rules 1956 under which the enquiry was admittedly held, there is no escape from the conclusion that the enquiry was being made on the basis that there was a reasonable ground to believe that the petitioner had been guilty of professional misconduct though no doubt that belief was based on the allegations contained in the complaint lodged by Sri Krishna Chandra. Nobody has cared to place a copy of the complaint that was actually lodged by Sri Krishna Chandra. If one is to judge the allegations in the complaint on the basis of the charges framed by the Competent Authority which I have reproduced above then the inevitable conclusion is that there was no allegation of professional misconduct against the petitioner. At this stage learned Standing Counsel has drawn my attention to the fact that the file is with him on the record of which is the complaint filed by Sri Krishna Chandra which may be perused. It is unnecessary to peruse it because it is conceded that it does not contain any express allegation of professional misconduct. Thus, it is now conceded that the allegations in the complaint of Sri Krishna do not go beyond the charges framed by the Competent Authority. Such being the position I am of opinion that the stand taken by the petitioner as mentioned above is not without substance. In the special appeal reported in AIR 1967 All 173 it is observed in paragraph 27 of the report on page 180:—

"We have seen the record of the case maintained in the U. P. Secretariat. It does not appear that the State Government ever addressed itself to the question as to whether or not on the facts proved in the case the petitioner-appellant could be adjudged guilty of professional misconduct as distinct from negligence or mere lapse and whether the professional misconduct, if any, was so gross 'as, in the opinion of the Government, renders him unfit to practise as a Notary'." It is thus abundantly clear that till before the disposal of the special appeal of the

petitioner the authorities did not at all advert to the relevant requirement of the rule of law in order to take action which they purported to do under the notification of 1964, since quashed (Sic) the rule of law contained in Clause (d) of Section 10 of the Notaries Act, 1952. That being so, it is difficult to accept the contention of the learned Standing Counsel that simply because the enquiry purported to proceed in accordance with rule 13 of the Rules it should be taken for granted that the petitioner was apprised of the fact that the question whether or not he was guilty of such professional misconduct as would render him unfit to practise as a Notary was being enquired into as a result of the complaint made by Sri Krishna Chandra. What is still more surprising is that even though the opposite party thought fit to resume proceedings from the stage subsequent to the submission of the report by the Competent Authority in view of the decision given in the special appeal, it still omitted to take notice of the material observations made in paragraph 27 of the report referred to above while issuing notice to the petitioner calling upon him to submit his defence with reference to the report of the Competent Authority, as is abundantly clear from a perusal of Annexure 7, which is a true copy of that notice.

Thus, on the facts of the case as appear from the record there is no escape from the conclusion that all concerned with the enquiry were totally oblivious of the fact that no enquiry under Rule 13 of the Rules could legitimately be initiated unless it could be said on the basis of the allegations contained in the complaint that those allegations, if proved, would establish professional misconduct on the part of the petitioner of such a nature as would render him unfit to practise as a Notary. Had it been otherwise there must have been a mention of that fact, if not in the charges themselves, at any rate, at any stage subsequent thereto till the stage of the issue of notice (Annexure 7). In these circumstances I have no hesitation in coming to the conclusion that the impugned order proceeds on a basis of which the petitioner was never apprised with the result that he had no occasion either to convince the Competent Authority or thereafter the opposite party that the allegations contained in the complaint of Sri Krishna Chandra, even if found proved, would not establish professional misconduct much less professional misconduct of such a nature as to render him unfit to practise as a Notary. In that view of the matter the impugned order cannot possibly be sustained.

5. Another contention raised on behalf of the petitioner was that of the three charges, one relating to failure to affix adhesive stamp, as appears from the discussion in the body of the report of the Competent Authority, was found by the Competent Authority itself in favour of the petitioner

and the other charge relating to the failure of the petitioner to have notarial stamp affixed, though found by the Competent Authority, against the petitioner, could not be sustained having regard to the provisions of the Notaries Act and Article 42 of the Stamp Act. Notwithstanding the observation in the course of discussion that it was not the duty of the petitioner to see that adhesive stamp was affixed to the affidavits, the Competent Authority at the end of the report vaguely stated that the charges levelled

against the petitioner were proved. It has, however, been conceded before me by the learned Standing Counsel that the position stated by the Competent Authority in the course of the discussion in regard to the question if or not adhesive stamp should have been affixed to the affidavits is correct. It is thus obvious that of the three charges only two remained. We may, therefore, at this stage consider if or not notarial stamp is required to be affixed to the affidavits. Art. 42 of the Stamp Act provides:

One rupee

"Notarial Act, that is to say, any instrument, endorsement, note, attestation, certificate or entry not being a Protest (No. 50) made or signed by a Notary Public in the execution of the duties of his office, or by any other person lawfully acting as a Notary Public".

The argument raised on behalf of the petitioner is that the view of the Competent Authority that notarial stamp was necessary in accordance with the said provision on the certificate given by the petitioner on the affidavits to the effect that such and such person had verified the affidavit on such and such date at such and such place and at such and such hour after having been explained the contents of the affidavit is erroneous for the simple reason that such a certificate or endorsement is required to be stamped under Art. 42 only when it can be taken to have been granted or made "in the execution of the duties of his office...as a Notary Public". Learned counsel contends that there is nothing either under the Notaries Act or the rules thereunder to require the Notary Public to give such a certificate or make such an "endorsement" on an affidavit. In this connection he has drawn my attention to various clauses of sub-section (1) of Section 8 of the Notaries Act. He points out that whereas Clause (a) requires a Notary Public to verify, authenticate, certify or attest the execution of any instrument, its Clause (e) simply says "administer oath to, or take affidavit from, any person." Thus, the argument is that all that is required of a Notary under the provisions of the Act in relation to an affidavit is to administer oath and in so far as it is nowhere said that a certificate in token of such administration be granted, it cannot be said that a certification to that effect or an endorsement to that effect would fall within Article 42 of the Stamp Act so as to require notarial stamp. In my view the argument is not sound. After oath has been administered or an affidavit has been taken by a Notary unless that fact is certified or endorsed on the affidavit the affidavit remains a waste paper. So, in my view the language employed in Clause (e) of Section 8 (1) of the Act clearly implies that an endorsement to that effect has got to be made. At any rate, since the administration of oath is a notarial act the statement of the fact that oath has been administered in the endorsement given on the

affidavit subsequent to the administration of oath cannot but be taken to have been made in execution of the duties of the Notary, namely, to administer oath. I am thus unable to accept the contention that the view of the Competent Authority on the point is erroneous.

6. Another contention raised on behalf of the petitioner was that the finding of the Competent Authority regarding charge No. 1 was also erroneous in law. The argument is that when the Competent Authority found that sub-rule (2) of Rule 11 of the Notaries Rules did not require entry of affidavits in the notarial register it chose to fall back on sub-rule (9) of Rule 11 for recording a finding against the petitioner on charge No. 1 even though charge No. 1 never purported to be with reference to Rule 11 (9). On a perusal of Rule 11 (2) of the Notaries Rules I am satisfied that the contention that in accordance therewith no entry need be made in the notarial register in respect of affidavits is correct. As shall appear from Rule 11 (2) it concerns itself with three matters stated therein. Matters mentioned at Items 1 and 2 have nothing to do with the point in issue. What is mentioned at Item No. 3 is:

"all certificates issued by him etc., for certification, authentication, verification and attestation of the execution of the instrument and affix his signature to each entry in the said Register".

Obviously, this too refers to matters stated therein with reference to an instrument. An affidavit is not an instrument. So, what is mentioned at item No. 3 can also not be taken to apply to affidavits. This position, as appears from the report of the Competent Authority, was appreciated by the Competent Authority itself and that is why it chose to fall back on Rule 11 (9) which says:

"Every notary shall grant a receipt for the fees and charges realized by him and maintain a register showing all the fees and charges realized".

It is nobody's case that the petitioner ever failed to issue receipt for any fee or charge

realized by him. What appears to be the finding in relation to charge No. 1 as given by the Competent Authority is that the petitioner failed to maintain a register showing all the fees and charges realized. It is difficult to see as to how this finding could possibly be recorded having regard to the language of charge No. 1 which has been reproduced above. The requirement in regard to maintenance of a register showing all the fees and charges realized does by no means imply the entry of the particulars of the affidavits themselves in that register. The charge was expressly in regard to failure on the part of the petitioner to enter affidavits in "his register". It is again difficult to follow as to what the Competent Authority means by the expression "his register". If it means notarial register, then obviously this particular charge must be taken to confine itself to what is provided in Rule 11 (2) with the result that there could be no finding on the basis of this charge with reference to Rule 11 (9).

If this expression "his register" be taken to mean the register envisaged by Rule 11 (9) then also it would appear that the language of the charge is not such as to require the petitioner to answer if or not he maintained a register showing all the fees and charges realized by him. So, in any view of the matter it appears that the finding recorded by the Competent Authority is not in consonance with the charge. In other words, on a reading of the charge and the finding together it seems that the charge is different whereas the finding is with regard to another matter not incorporated in the charge. Hence, the contention of the petitioner that the finding recorded by the Competent Authority on charge No. 1 suffers from an apparent error of law appears to be correct.

7. Yet another contention raised on behalf of the petitioner was that the opposite party acted mala fide in issuing the impugned order. According to the petitioner proof of that assertion of his is furnished by what is alleged in paragraphs 15, 16 and 17 of the petition which allegations, it may be noted, are not controverted by the opposite party. The material facts which emerge from the aforesaid allegations are that the judgment of the special appeal was delivered on 6th September, 1966 whereafter the notification cancelling the earlier notification quashed by the said judgment was issued on 28th February, 1967 and the certificate authorizing the petitioner to practise as Notary was received by him on 10th March, 1967. These facts by themselves hardly furnish any proof of mala fide. There is nothing surprising if the State Government took four months or a little more subsequent to the judgment of the special appeal for the issuing of the notification dated 28th February, 1967.

It may be that the certificate authorizing the petitioner to practise as Notary was

actually signed by the Judicial Secretary on 25th September, 1966 but in view of the earlier notification which was quashed by the judgment in the special appeal and cancelled subsequently by the State Government by another notification dated 28th February, 1967, it is contended by the opposite party that the petitioner could not be given the certificate authorizing him to practise as Notary till the notification quashed by the judgment in the special appeal had actually been cancelled by the State Government in implementation of that judgment. This contention may or may not be strictly correct but the fact remains that if the Government laboured under that impression and hence delayed in the issue of the certificate signed much earlier, it cannot be legitimately inferred that in doing so the Government acted mala fide deliberately with a view to deprive the petitioner of his right to practise as a Notary soon after the judgment in the special appeal was pronounced. In my view, no case of mala fide is made out.

8. The last contention urged on behalf of the petitioner was that the impugned order even though it does not specifically say that the petitioner is perpetually debarred from practising as Notary virtually suffers from that very defect which was pointed out in the judgment of the special appeal dated 6th September, 1966. The argument is that once the certificate is cancelled without specifying the period for which it is cancelled it necessarily implies a perpetual debarment from practising as Notary. I am unable to accept the contention. S. 10 (d) of the Act clearly empowers the State Government to remove the name of a Notary from the register on a finding that he has been guilty of such professional misconduct as in the opinion of the Government renders him unfit to practise as a Notary. In my view, removal of the name from the register necessarily implies cancellation of the certificate. It is wrong to contend that cancellation of the certificate per se amounts to perpetual debarment from practice.

Obviously, perpetual debarment from practice would disentitle the person so debarred from ever seeking to have his name restored on the register and to have a certificate issued to him for practising as a Notary. This is not necessarily the effect of a mere cancellation of the certificate which is a necessary consequence, as I view it, of the removal of one's name from the register. Where the name of a Notary is removed from the register and his certificate is cancelled he can at any time subsequent to that apply for the issue of a certificate and the same can be issued if the Government is satisfied that he is fit to be permitted to practise as a Notary. I accordingly repel the contention.

9. No other point was urged before me.

10. In view of the foregoing discussion it is clear that having regard to the language

of the charges framed against the petitioner there was hardly any scope for the State Government to come to the conclusion that the petitioner has been guilty of professional misconduct much less that he has been guilty of such professional misconduct as renders him unfit to practise as a Notary. If the Government intended to come to such a conclusion it was its duty to say so expressly in the charge or charges levelled against the petitioner so as to afford him an opportunity to show whether or not the allegations on the basis of which it is sought to come to that conclusion even if established would lead to such a conclusion. In so far as that opportunity has been denied to the petitioner it must be held that in coming to the conclusion the opposite party has arrived at, it has violated the principles of natural justice. Hence the petition must succeed.

11. The petition is accordingly allowed with costs and the impugned order (Annexure 9) is quashed. As prayed by the learned Standing Counsel it is clarified that this order does not disentitle the State Government to proceed against the petitioner according to law if it is so intended.

SSG/D.V.C.

Petition allowed.

AIR 1969 ALLAHABAD 200 (V 56 C 41)

FULL BENCH

V. G. OAK, C J, R. S. PATHAK AND RAJESHWARI PRASAD, JJ.

Messrs Janta Cycle and Motor Mart, Kanpur, Petitioner v. Asst. Commissioner (J), III Sales Tax Kanpur Range, Kanpur and another, Opposite Parties.

Civil Misc. Writ Petn. No. 874 of 1967, D/-14-5-1968

(A) Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 9 (1), First Proviso—U. P. Sales Tax Rules (1948), R. 66 (2) — Word “entertained” in First Proviso to S. 9 (1), meaning of — Appeal against assessment order — Entire admitted tax must be deposited within period of limitation — Manner of furnishing proof of payment is of secondary importance — Observations of the Supreme Court to this effect in AIR 1968 SC 488 are not obiter and are binding—(1963) 14 STC 518 (All), Overruled—Civil P. C. (1908), O. 21, R. 90 (as amended by Allahabad High Court) — Constitution of India, Art. 141.

The word ‘entertain’ in first proviso to S. 9 (1) is meant the first occasion on which the Court takes up the matter for consideration. It may be at the admission stage or if by the rules of the Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal. But on the first occasion when the Court takes up the matter for consideration, satisfactory proof must be presented that the admitted tax was

paid within the period of limitation available for the appeal. AIR 1968 SC 488, Foll. (1963) 14 STC 518 (All), Overruled. Case-law discussed. (Paras 14, 15)

The entire admitted amount of tax must be deposited within the period prescribed for filing appeal against an order of assessment of sales tax. (Paras 24, 34, 39)

It is true that the provision for limitation is contained in sub-section (1) of Section 9 of the Act; and the first proviso does not expressly deal with the question of limitation. But the two provisions have to be read along with the main provision contained in sub-section (1) of Section 9 of the Act and when the first proviso is read along with the main provision of sub-section (1) of Section 9, the deposit of admitted tax has also to be made within limitation. The important thing is that the admitted tax has to be deposited within limitation, i.e., within a period of 30 days from the date of service of notice of assessment and demand. The period is identical with the period for filing the appeal. The provision of the same period for payment of the tax and filing the appeal is not a fortuitous coincidence. Once this basic condition is fulfilled, the manner of furnishing proof of payment is a matter of secondary importance. Observations of the Supreme Court in AIR 1968 SC 488 to this effect are not obiter and are binding on the Court under Art. 141 of the Constitution. (Para 17)

Therefore, where the assessee filed an appeal against the order of assessment within the period of limitation but the amount deposited fell short of the admitted tax and the shortage was deposited long after the period of limitation for filing appeal and for depositing the admitted tax had expired:

Held, that the assessee failed to present the satisfactory proof that the tax was paid within the period of limitation available for appeal and hence the appeal was not maintainable. (Paras 24, 34, 39)

(B) Limitation Act (1963), S. 5 — U. P. Sales Tax Act (15 of 1948), S. 9 (1). First Proviso and S. 9 (6) — Appeal under S. 9 (1) filed within time — Delay in depositing admitted tax — S. 5 which applies to appeals by virtue of Section 9 (6) of Sales Tax Act, held not attracted — Application for condonation of delay in depositing entire amount held not maintainable. (Paras 22, 37)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 488 (V 55) =
1968-21 STC 154, Lakshmiratan
Engineering Works Ltd. v. Assistant
Commissioner (Judicial.) Sales
Tax, Kanpur 14, 15, 24, 29, 35
(1963) AIR 1963 All 320 (V 50) =
ILR (1963) 2 All 368, Hai Rahim
Bux & Sons v. Firm Samiullah &
Sons 12
(1963) 1963-14 STC 518 (All),
Swastika Tannery of Jajmau v.
Commissioner of Sales Tax, U. P. 13, 14

(1962) AIR 1962 All 42 (V 49)=1960

All LJ 578, Bawan Ram v. Kunj Behari Lal

(1962) AIR 1962 All 543 (V 49) = 1962 All LJ 729, D. C. Jain v. C. L. Gupta

(1962) AIR 1962 All 547 (V 49) = 1962 All LJ 574 = ILR (1962) 2

All 256, Kundan Lal v. J. N. Sharma Swamidayal, for Applicant; Standing Counsel, for Opposite Parties.

OAK, C. J.: This petition under Art. 226 of the Constitution arises out of proceedings under the U. P. Sales Tax Act, 1948 (hereinafter referred to as 'the Act'). Messrs. Janta Cycle and Motor Mart, Kanpur, are the petitioner. The Assistant Commissioner (Judicial), Kanpur, is respondent No. 1.

2. The petitioner is a dealer at Kanpur dealing in cycles and cycle parts. On 29-8-1966 the Sales Tax Officer, Kanpur, passed an assessment order for the year 1964-65. The petitioner's net turnover was fixed at Rs. 2,60,000. A sum of Rs. 12,940 was assessed as sales tax payable by the dealer. The petitioner filed on 19-9-1966 an appeal against the assessment order, dated 29-8-1966. According to the memorandum of appeal, the amount of sales tax admitted by the appellant was Rs. 1,612.91. By this time the appellant had deposited a sum of Rs. 1,610.91 as sales tax. The amount so deposited fell short of the amount of admitted tax by Rs. 2. The appellant deposited an additional sum of Rs. 5 in January, 1967.

3. When the appeal came up for hearing before the Assistant Commissioner (Judicial), Kanpur, on 1-3-1967, it was urged for the Sales Tax Officer that the appeal ought to be rejected on the ground that proof of payment of the admitted tax did not accompany the memorandum of appeal. This contention was accepted by the appellate authority. There was an application by the appellant under Section 5, Indian Limitation Act for condoning delay. It was held that Section 5, Indian Limitation Act, could not be pressed into service for condoning non-fulfilment of the condition prescribed by the proviso to Section 9 of the Act. In the result, the Assistant Commissioner dismissed the appeal on 1-3-1967 on the ground that it was not maintainable. The present writ petition by the dealer is directed against the appellate order of respondent No. 1, dated 1-3-1967.

4. When the writ petition came up for hearing before a Division Bench of this Court, it was noticed that there was a conflict of opinion between Division Benches of this Court as regards the meaning to be given to the word 'entertained' appearing in the first proviso to sub-section (1) of Sec. 9 of the Act. The case, therefore, is referred to a Full Bench.

5. Section 9 of the Act provides for appeals. Sub-section (1) of Section 9 states: "Any dealer objecting to an order allowing.....or to an assessment made under

Section 7.....may within 30 days from the date of service of the copy of the order or notice of assessment, as the case may be, appeal to such authority as may be prescribed:

Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such instalments thereof as may have become payable:

Provided, secondly.....

6. Rules have been framed under the Act. Rule 66 deals with contents of memorandum of appeal. Sub-rule (2) of Rule 66 states:

"The memorandum of appeal shall be accompanied by adequate proof of payment of the fee payable and a certified copy of the order appealed against and the chalan showing deposit in the treasury of the tax admitted by the appellant to be due, or of such instalments thereof as might have become payable."

7. The question for consideration is whether the petitioner complied with requirements of the first proviso to sub-section (1) of Section 9 of the Act and sub-rule (2) of Rule 66, when it appealed against the assessment order dated 29-8-1966. The decision of this case turns largely upon the meaning to be given to the word 'entertained' appearing in the first proviso to sub-section (1) of Section 9 of the Act.

8. The word 'entertained' also appears in the proviso to O. XXI, R. 90, Civil P. C., as amended by this Court. That proviso runs thus:—

"Provided that no application to set aside a sale be entertained—

(a)

(b) Unless the applicant deposits such amount not exceeding twelve and half per cent of sum realised by the sale or furnishes such security as the Court may, in its discretion, fix....."

9. The proviso to O. 21, R. 90, Civil P. C., came up for consideration before this Court in a number of cases. In Bawan Ram v. Kunj Behari Lal, AIR 1962 All 42, it was held by Bhargava, J., that Clause (b) of the proviso debars a Court from entertaining an objection unless the requirement of depositing the amount or furnishing security is complied with. If the requirement as to deposit or security is not complied with at the time of filing of an objection within limitation and security is furnished after expiry of limitation, the subsequent compliance does not save limitation.

10. In Kundan Lal v. J. N. Sharma, 1962 All LJ 574 = (AIR 1962 All 547), it was held that the expression 'entertained' cannot be given the same meaning as the word 'filed'. The true intention of the proviso appears to be to allow the judgment-debtor to prosecute his application to set aside the sale if he complies with the conditions contained in the proviso to Rule 90

before the application is finally heard and disposed of by the Court.

11. Similarly, in *D. C. Jain v. C. L. Gupta*, 1962 All LJ 729 = (AIR 1962 All 543), it was observed that the word 'entertain' bears the meaning of admitting to consideration.

12. In *Haji Rahim Bux & Sons v. Firm Samiullah & Sons*, AIR 1963 All 320, it was held that the word 'entertain' in the proviso to O. 21, Rule 90, Civil P. C., does not mean 'receive' or 'accept', but 'proceed to consider on merits' or 'adjudicate upon'.

13. The first proviso to Section 9 (1) of the U. P. Sales Tax Act, 1948, came up for consideration before a Division Bench of this Court in *Swastika Tannery of Jajmau v. Commissioner of Sales Tax*, (1963) 14 STC 518 (All). The facts of that case were these. The last date for filing an appeal against an assessment order was 24-10-1953. Although the assessee admitted its liability for payment of Rs. 510 as sales tax, the memorandum of appeal filed on 12-10-1953 was accompanied by a chalan for Rs. 443 only. On 27-11-1953 the assessee presented two chalans—one dated 6-10-1953 for about Rs. 9 and the other dated 26-11-1953 for about Rs. 58. It was held by the Division Bench that the Judge (Appeals) rightly rejected the memorandum of appeal on the ground that it was not accompanied by satisfactory proof of the payment of the admitted amount of the tax.

14. The first proviso to Section 9 (1) of the Act came up for interpretation before the Supreme Court in a recent case reported in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (Judl.) Sales Tax, Kanpur*, (1968) 21 STC 154 = (AIR 1968 SC 488). The facts of that case were these. The Sales Tax authority served an order of assessment on the appellant on 16-4-1966. The appellant filed his appeal to the Appellate Assistant Commissioner on 16-5-1966 within time. The memorandum of Appeal was not accompanied by a chalan showing deposit in the treasury of the tax admitted to be due by the appellant as required by Rule 66 (2). The appellant had, however, even before the assessment order was made, paid the major portion of the tax. The appellant deposited the balance of Rs. 99.99 on April 26, 1966, before the appeal was filed. The appellant filed on 24-1-1967 before the Assistant Commissioner a certificate of payment of tax issued by the Sales Tax Officer. In April, 1967, the Asst. Commissioner rejected the appeal on the ground that Section 9 of the Act read with Rule 66 (2) had not been complied with inasmuch as no proof had been given along with the memorandum of appeal that the tax had been paid. It was held by the Supreme Court that the Assistant Commissioner was wrong in rejecting the appeal. Their Lordships observed on pp 162 and 163 (of STC) = (at p. 493 of AIR).

"We are of opinion that by the word 'entertain' here is meant the first occasion on which the Court takes up the matter for consideration. It may be at the admission stage or if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal."

In view of this decision of the Supreme Court, the view taken by Allahabad High Court in (1963) 14 STC 518 (All), as regards the interpretation of the word 'entertained' in the first proviso to Section 9 (1) of the Act cannot be accepted.

15. Mr. B. D. Agarwal appearing for the respondents drew our attention to the following passage on p. 163 (of STC) = (at p. 493 of AIR) in the judgment of the Supreme Court in (1968) 21 STC 154 = (AIR 1968 SC 488):

"But on the first occasion when the Court takes up the matter for consideration, satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal."

Mr. B. D. Agarwal contended that, apart from the question of furnishing proof of payment, the tax has to be deposited within the period of limitation prescribed for appeals.

16. Mr. Swami Dayal appearing for the petitioner urged before us that that observation on p. 163 (of STC) = (at p. 493 of AIR) in the judgment of the Supreme Court was merely an obiter dictum. On reading the entire judgment delivered by the Supreme Court in that case, I am unable to accept the suggestion that that observation was merely an obiter dictum.

17. In that case, the Supreme Court had to decide whether the appellant had complied with requirements of the first proviso to Section 9 (1) of the Act and Rule 66 (2). It was noticed that there was no strict compliance with Rule 66 (2). Nonetheless the Court held that the appeal was competent. It is true that the provision for limitation is contained in sub-section (1) of Section 9 of the Act; and the first proviso does not expressly deal with the question of limitation. But the two provisos have to be read along with the main provision contained in sub-section (1) of Section 9 of the Act. It appears that, according to the Supreme Court, when the First Proviso is read along with the main provision of sub-section (1) of Section 9, the deposit of admitted tax has also to be made within limitation.

18. In that case the appeal could be filed up to 16-5-1966. The Supreme Court noticed that on the one hand, the entire amount of the admitted tax had been deposited by the appellant before 16-5-1966. On the other hand, proof of payment of the entire amount was not furnished at the time of filing the appeal. The necessary proof was furnished some time between the filing of the appeal and the time when the Assistant Commissioner took up the appeal for consideration. It was held that there was suffi-

cient compliance with the requirements of the first proviso to Section 9 (1) of the Act and Rule 66 (2). The discussion of the problem began on p. 157 (of STC) = (at p. 490 of AIR) of the judgment thus:

"The short question in this case is whether having made the deposit even before the appeal was filed and well within the period of limitation, the assessee could be deprived of his right of appeal under Sec. 9 of the Act."

It was observed on p. 162 (of STC) = (at p. 493 of AIR):

"The rule lays down one uncontestable mode of proof which the Court will always accept but it does not exclude the operation of the proviso when equally satisfactory proof is made available to the officer hearing the appeal and it is proved to his satisfaction that the payment of the tax has been duly made and in time."

Again, on the same page:

"Here the right of appeal has been made subservient to the payment of the admitted tax."

19. It will be noticed that the Supreme Court repeatedly emphasized the importance of paying the admitted tax within the period of limitation. The Supreme Court approached the problem thus. The important thing is that the admitted tax has to be deposited within limitation. Once this basic condition is fulfilled, the manner of furnishing proof of payment is a matter of secondary importance. In view of these considerations, the observation of the Supreme Court on p. 163 (of STC)=(at p. 493 of AIR) of the judgment that satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal cannot be dismissed as a passing remark. That is the declaration of the Supreme Court as regards the deposit of admitted tax. Under Art. 141 of the Constitution, that declaration of law is binding on this Court.

20. It may be that the view taken by this Court in the case of (1963) 14 STC 518 (All) that proof of payment must accompany the memorandum of appeal is not sound. Yet, the ultimate decision of this Court in that case may be supported on the ground that the appellant did not deposit the full amount of the admitted tax within the period of limitation.

21. Mr. Swami Dayal urged that, in view of the fact that the deposit by the petitioner was short by the trivial sum of Rs. 2, the Assistant Commissioner should have condoned delay under Section 5, Indian Limitation Act.

Section 5, Indian Limitation Act, states:
"Any appeal or application.....may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

.....
22. Under this provision, delay may be condoned if a party makes delay in filing

an appeal or moving an application. But no such situation arose in the present case. The petitioner made delay in depositing the admitted tax. The appeal itself was filed within time. The Assistant Commissioner rightly held that there was no room to give the appellant the benefit of Section 5, Indian Limitation Act.

23. It was faintly suggested before the Assistant Commissioner and before us that there was some mistake in calculating the turnover; and the admitted tax might not amount to Rs. 1,612.91. But that aspect of the matter does not appear to have been pressed before the Assistant Commissioner. The appellant proceeded on the assumption that the admitted tax came to Rs. 1,612.91, and there was shortage in depositing the admitted tax. The appellant proceeded to make good the deficiency. We may, therefore, proceed in the present case before us on the footing that the admitted sales tax was Rs. 1,612.91.

24. The assessment order is dated 29-8-1966. It was served on the petitioner on 5-9-1966. The last day of limitation for filing the appeal and for depositing the admitted tax was 5th October 1966. The appeal was filed within limitation on 19-9-1966. The admitted tax was Rs. 1,612.91. Out of that sum, a sum of Rs. 1,610.91 only had been deposited by the time of filing the appeal (19-9-1966) or by the time limitation expired (5-10-1966). According to the petitioner, the additional sum of Rs. 5 was deposited on 19-1-1967. According to the counter-affidavit, the sum of Rs. 5 was deposited on 25-1-1967. It is common ground that the shortage was made good some time in January, 1967. That was long after the period of limitation for filing the appeal and for depositing the admitted tax had expired. The appellant failed to satisfy the test laid down by the Supreme Court in (1968) 21 STC 154 = (AIR 1968 SC 488) that satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal. The Assistant Commissioner rightly held that the appeal was not maintainable. The appeal was rightly dismissed.

25. In my opinion, this petition should be dismissed with costs.

26. PATHAK, J.: I am also of opinion that the petition should be dismissed. I shall state my reasons briefly.

27. The principal question between the parties is whether the admitted tax was paid within time.

28. Section 9 (1) provides:—

"Any dealer objecting.....to an assessment made under Section 7.....may, within 30 days from the date of service of the.....notice of assessment.....appeal

Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the

appellant to be due, or of such instalments thereof as may have become payable."

29. It is clear there is a right of appeal under Section 9 (1) and that appeal cannot be entertained unless accompanied by satisfactory proof that the amount of the admitted tax has been paid. The Supreme Court has laid down in 1968-21 STC 154 = (AIR 1968 SC 488) that an appeal is entertained when the Court takes it up for the first time for judicial consideration. At that point of time there should be satisfactory proof that the admitted tax has been paid. That can only be if the appellant has paid the admitted tax. Now the petitioner says that while Section 9 (1) does not expressly specify the period for payment of the admitted tax it does imply that it may be paid at any time before the appeal is entertained. It is the validity of that contention which requires consideration.

30. What is the period within which the admitted tax must be paid is not mentioned in Section 9 (1). All that the sub-section does is to create a right of appeal and to prohibit the appellate authority from entertaining the appeal unless satisfactory proof of payment of the admitted tax has been adduced. The requirement of proof of payment of the admitted tax presupposes payment of the admitted tax. The obligation to pay the tax, and in what manner and within what time it is to be paid, has to be gathered from elsewhere. For that, in my opinion, you must look to Section 8 of the Act and the relevant rules framed under the Act. Section 8 (1) provides:

"The tax assessed under this Act shall be paid in such manner and in such instalments, if any, and within such time, not being less than fifteen days from the date of service of the notice of assessment (and demand), as may be specified in the notice....."

Rule 45 says,

"As soon as the assessment has been made the Sales Tax Officer shall send to the dealer a notice in Form XI together with a copy of the assessment order free of charge and the dealer shall pay the tax so assessed within the time and in the manner specified in the notice."

The notice in Form XI is described as a notice of assessment and demand for payment of tax. By paragraph 1 of the notice, the dealer is informed of the turnover and the tax to which he has been assessed, he is thus notified of the assessment. Para 2 mentions the amount of tax which is due. By paragraph 3, he is told that the tax must be paid "within 30 days from the date of service of this notice"; he is thus given notice of the demand. The notice in Form XI, therefore, bears the description that it does. Rules 43 and 49 detail the manner of payment. A perusal of these several provisions demonstrates that there is a complete self-contained code in the Act and the rules in respect of the payment of tax. You must have recourse to that code whenever you

wish to determine the manner and the time within which the tax has to be paid. The admitted tax, to which the proviso to Section 9 (1) refers, is merely a part of the assessed tax mentioned in Section 8 (1). It is part of the tax liability respecting which complete provision for payment has been made within the framework of the code.

31. It will also be noticed that the proviso to Section 9 (1) speaks of proof of payment of the admitted tax or of the instalments thereof which have become payable. The language is strongly reminiscent of Section 8 (1) which provides for the payment of tax either in one sum or in instalments. That is clear indication of the relationship between Section 8 (1) and the proviso to Section 9 (1).

32. Another circumstance of some significance is that the period within which the dealer is required to pay the tax is, by paragraph 3 of the notice of assessment and demand, 30 days from the date of service of the notice. That is also the period of limitation for filing the appeal. The period for paying the tax is identical with the period for filing the appeal. The dealer has thus been placed in a position enabling him to adduce proof of payment of the admitted tax before the appeal is entertained. It would seem that provision of the same period for payment of the tax and for filing the appeal is not a fortuitous coincidence.

33. After this survey, if we now turn to the proviso to Sec. 9 (1), the context in which it has been framed becomes clear at once. The Legislature envisages that before a dealer can have his appeal entertained, he must comply with the notice of assessment and demand at least to the extent of the tax admitted by him to be due, and he must show that he has done so before the appeal is entertained.

34. Upon the aforesaid considerations, the admitted tax, in my opinion, must be paid within a period of 30 days from the date of service of the notice of assessment and demand.

35. Our attention has been drawn to some observations of the Supreme Court in *Lakshmi Ratan Engineering Works Ltd.*, 1968-21 STC 154 = (AIR 1968 SC 488) (supra), that the admitted tax must be paid within the period of limitation for preferring an appeal. There was considerable debate before us whether those observations are binding upon us. The period of limitation for filing an appeal is 30 days from the date of service of the notice of assessment. I have taken the view that the admitted tax has to be paid within 30 days from the date of service of the notice of assessment and demand. In the circumstances, I consider it unnecessary to enter into the controversy involved in that debate.

36. Clearly, the petitioner did not deposit the entire amount of the admitted tax within 30 days from the date of service of the notice of assessment and demand. The

Assistant Commissioner (Judicial) was plainly right in declining to entertain the appeal.

37. The petitioner urges that the Assistant Commissioner (Judicial) should have considered his application for condonation of delay in depositing the balance of the admitted tax. The application was made under Section 5 of the Limitation Act read with Section 9 (6) of the U. P. Sales Tax Act. Section 9 (6) provides:

"Section 5 of the Indian Limitation Act, 1908, shall apply to appeals under this Act."

and Section 5 reads:

"Any appeal or application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for preferring the appeal or making the application within such period."

Section 5 provides for condoning the delay in filing an appeal or application. Sec. 9 (6), U. P. Sales Tax Act, applies Section 5 to appeals. Section 5 is not attracted when the question arises whether the delay in depositing the admitted tax should be condoned. It seems to me that the application made by the petitioner for condonation of the delay in depositing the entire amount of the admitted tax is not maintainable under Section 5 of the Limitation Act read with Section 9 (6) of the U. P. Sales Tax Act.

38. In my judgment, the petition should be dismissed with costs.

39. R. PRASAD, J.: For the reasons given by his Lordship the Chief Justice as well as those given by Hon'ble Pathak, J., I agree with the proposed order. The entire admitted amount of tax must be deposited within the period prescribed for filing appeal against an order of assessment of sales tax made under U. P. Sales Tax Act, 1948.

BY THE COURT

40. The petition is dismissed with costs. LGC/D.V.C. Petition dismissed.

AIR 1969 ALLAHABAD 205 (V 56 C 42)

FULL BENCH

BISHAMBHAR DAYAL, T. P. MUKERJI
AND R. L. GULATI, JJ.

National Carbon Co., Petitioner v. Commissioner of Sales Tax, U.P., Respondent.
Sales Tax Ref. No. 747 of 1962, D/-29-4-1968.

Constitution of India, Art. 286 (1) (b) — Exemption under — Sale in course of export — Sale must occasion export — (Sales Tax—U. P. Sales Tax Act (15 of 1948), S. 3—Sales Tax — Central Sales Tax Act (1956), S. 5).

In order that a sale may qualify for exemption under Art. 286 (1) (b) of the Consti-
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tution as being a sale in the course of export, the sale must occasion the export. In other words, the exportation of the goods must be a part of the contract of sale or must be a necessary incidence thereof. A sale can be said to occasion an export only, (a) if there is common intention of both seller and buyer to export; (b) there is an obligation to export; and (c) there is an actual export. The obligation to export may arise from statute, from contract or from the nature of the transaction. In other words, the obligation may be implicit or explicit. The bond between the sale and the export should be such as cannot be broken without a breach of the obligation. AIR 1952 SC 366 and AIR 1953 SC 333 and AIR 1964 SC 1752, Rel. on.

(Para 10)

The true test is whether the sale and the export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods for transport out of the country by land or sea. AIR 1963 Pat 559, Foll.

(Para 13)

The assessee manufactured and sold bulbs, torches, flashlights and radio batteries, etc. and has its factory and head office at Calcutta and some branches in U. P. In respect of the assessment year 1958-59, the assessee claimed under Art. 286 (1) (b) exemption from tax in respect of its turnover amounting to Rs. 2,14,153 being the sale proceeds of articles supplied to dealers in Nepal. The goods were to be supplied in Nepal and the assessee company did arrange for the supply of the goods in Nepal. The goods were booked and put on rail at Calcutta, for their ultimate destination in Nepal, by the assessee company. The documents of title were sent to the buyers through banks some of which were situated in Nepal and some in India. The goods were eventually exported to Nepal after having been transhipped at Varanashi and unloaded at a railway terminus near the Nepal border. As the goods were excisable upon which excise duty had already been paid, they were exported against form AR-4 in order to enable the assessee company to claim rebate of the excise duty. The question was whether the assessee was entitled to claim benefit under Art. 286 (1) (b).

Held, that the assessee was entitled to claim benefit of Art. 286 (1) (b) for sales in the course of export outside India, even though the actual delivery of the goods was taken by the purchaser inside India. ST Ref. No. 617 of 1961, D/-16-11-1966 (All.), Approved; STC No. 137 of 1961, D/-20-1-1967 (All.) and Spl. Appeal No. 105 of 1967 D/-26-9-1967, (All.), Distinguished.

(Paras 16, 15)

Cases Referred: Chronological Paras
(1967) Spl. Appeal No. 105 of 1967,
D/-26-9-1967 (All.), Gobind Sugar
Mills Ltd. v. Judge, Sales Tax

- (1967) STC No. 137 of 1964, D/-20-1-1967 = 1967-22 STC 60 (All)
M. H. Beg, JJ., Damodar Das Vishwanath v. Commr., Sales Tax, U. P., Lucknow 14
- (1966) ST Ref. No. 617 of 1964, D/-16-11-1966 = 1967 All LJ 568, Ram Narain Harcharan Lal v. Commr. of Sales Tax, U. P. 14
- (1964) AIR 1964 SC 1752 (V 51) = 1964-15 STC 753, Ben Gorm Nilgiri Plantation Co., Coonoor v. Sales Tax Officer, Spl. Circle, Ernakulam 9
- (1963) AIR 1963 Pat 359 (V 50) = 1964 BLJR 6, Dulichand v. State of Bihar 13
- (1953) AIR 1953 SC 333 (V 40) = 1953-4 STC 205, State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory 8
- (1952) AIR 1952 SC 366 (V 39) = 1952-3 STC 434, State of Travancore-Cochin v. Bombay Co. Ltd., Alleppey 7, 13
- S. P. Gupta, B. L. Gupta and Ashok Gupta, for Petitioner; Standing Counsel, for Respondent.

GULATI, J.: This is a reference under Section 11 (1) of the U. P. Sales Tax Act, 1948 (hereinafter referred to as 'the Act') soliciting the opinion of this Court on the following question of law:—

"Whether in the facts and circumstances of the case, the applicant is entitled to claim benefit of Article 286 (1) (b) for sales in the course of export outside India even though the actual delivery of the goods was taken by the purchasers inside India."

This reference came up for hearing before a Division Bench of this Court constituted by the Hon'ble Mr. Justice S. C. Manchanda and the Hon'ble Mr. Justice M. H. Beg. The Division Bench noticed that two cases involving somewhat similar question had already been decided by two different Benches of this Court and the decisions in the two cases were somewhat conflicting even though the facts in the two cases were different. It is for this reason that the instant case has been referred to Full Bench.

2. The facts of the case, as set out in the statement of the case accompanying the reference, are briefly these:

Messrs. National Carbon Company Limited (India) (hereinafter referred to as 'the assessee') manufactures and sells bulbs, torches, flashlights and radio batteries, etc., and has its factory and head office at Calcutta and some branches in U. P.

3. In respect of the assessment year 1953-59, the assessee claimed exemption from tax in respect of its turnover amounting to Rs. 2,14,153, being the sale proceeds of articles supplied to dealers in Nepal. The exemption was claimed under Article 286 (1)

(b) of the Constitution. The modus operandi of the sales to Nepal dealers and the manner in which the relevant goods were transported to Nepal are set out in two short paragraphs of the statement of the case which are reproduced below:—

"The head office at Calcutta received some orders from Nepal dealers for the supply of the above articles. The goods were packed at Calcutta and despatched to its godowns within U. P. from where they were sent by rail to the last railway station for Nepal. The documents of title were sent to the purchasers in Nepal through banks some situated in Nepal and the others situated in India.

The above articles were subject to the levy of Central excise duty. So they were sent out from Calcutta under a Form (AR-1) prescribed in Central Excise Manual which were filled up in Calcutta. The purchaser took delivery of the documents of title from the bank after making necessary payments. The actual delivery of the goods was taken by the purchasers from the railway station within India. The purchasers then transported the goods to Nepal. While crossing the Indian border, they presented the documents of title to the Excise authorities at the border who informed the Excise authorities at Calcutta that the goods had passed outside India."

The assessee company's claim is that in the circumstances of the case, its sales to its Nepal dealers were sales in the course of export outside India within the meaning of Article 286 (1) (b) and as such were exempt from sales tax. This claim of the assessee has not been accepted by the Sales Tax authorities on the ground mainly that the goods were taken delivery of by the purchasers at the railway terminus within the Indian territory and were thereafter transported by the purchasers into Nepal territory. This fact has been interpreted by the Sales Tax authorities to mean that the purchasers, after taking physical delivery of the goods within the Indian territory, were free to resell the goods in the Indian territory itself.

4. One more fact which is not in dispute may be mentioned here. It is common ground that there is no rail link between India and Nepal. The assessee company consigned the goods to the railway terminus near Nepal border from where the goods were transported into Nepal territory by other means of transport. Yet another fact which has been mentioned in the statement of the case but to which due importance does not appear to have been given is the fact that the goods which were the subject-matter of sales to Nepal dealers were excisable goods liable to excise duty under the Central Excise Act. These goods were despatched under Form AR-4 (wrongly mentioned in the statement of the case as AR-1) as prescribed in the Central Excise Manual. Form AR-4 has been prescribed for the purpose of Rule 12 of the Central Excise

Rules to enable the manufacturers of excisable goods to claim rebate or exemption from the excise duty in respect of the excisable goods which are exported outside India. Form AR-1 prescribes an application for payment of excise duty before the removal of the goods from the factory in accordance with R. 9 of the Excise Rules. From the entries in the form annexed to the statement of the case it appears that the excise duty on the goods in question was paid by the assessee company on 10-2-1960 against Form AR-1-1222. When the goods upon which excise duty has been paid are exported outside India, they are despatched against Form AR-4 to enable the exporter to claim refund of the excise duty.

5. Article 286 (1) (b) of the Constitution reads thus:

"286 (1) No law of State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a); or

(b) In the course of import of the goods into or export of the goods out of the territory of India."

The expression "sale of goods.....in the course of.....export out of the territory of India" came up for interpretation before the Supreme Court in several cases and the interpretation which was placed by the Supreme Court was given statutory recognition in Section 5 of the Central Sales Tax Act of 1956 which reads as under:

"A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by transfer of documents of title to the goods after the goods have crossed the customs frontiers of India."

A plain reading of Section 5 of the Central Sales Tax Act, as quoted above, makes it clear that a sale can be said to have taken place in the course of export only if it falls within either of the following two categories:—

(i) When the sale itself occasions the export; or

(ii) When the export has already commenced then the sale by transfer of documents if the goods have crossed the frontiers of India.

6. The assessee's case falls in the first category of sales which "occasions the export". This expression has been borrowed by the legislature from the decisions of the Supreme Court which interpreted the expression "in the course of export out of the territory of India" and has, therefore, to be understood in the same sense in which their Lordships used it in their pronouncements.

7. The State of Travancore-Cochin v. Bombay Co. Ltd., Alleppey, 1952-3 STC 434 = (AIR 1952 SC 366) is the first of these cases and is known as the first Travancore-Cochin case. In that case the Supreme

Court was dealing with a set of cases involving export sales to foreign buyers on c.i.f. or f.o.b. terms. The question was whether the sales of that type were the sales "in the course of the export of the goods out of the territory of India" within the meaning of Article 286 (1) (b) of the Constitution. The Sales Tax authorities rejected the claim of the assessee as in their view the sales were completed before the goods were shipped and could not, therefore, be considered to have taken place in the course of the export. After examining the rival contentions, the Court observed at p. 438 (of STC) = (at p. 367 of AIR):

"We are clearly of opinion that the sales here in question, which occasioned the export in each case fall within the scope of the exemption under Article 286 (1) (b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax authorities, the sales must nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under Article 286 (1) (b). That clause, indeed, assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned."

It is clear from the extract of the judgment quoted above that in the opinion of the Supreme Court a sale would be considered to be a sale in the course of export if the export was occasioned by the agreement of sale and the fact that the property in the goods passed to the foreign buyers within the Indian territory made no difference whatsoever.

8. The State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, (1953) 4 STC 205 = (AIR 1953 SC 333) is known as the 2nd Trav.-Cochin case. In that case the Supreme Court drew a distinction between an "export sale" and a "sale for export". The question involved in that case was as to whether the last purchase of goods made by an exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of the

business would also be covered by the exemption under Article 286 (1) (b) of the Constitution. The answer given by the Supreme Court was in the negative. It was held that a sale in favour of an exporter who bought the goods with the intention of exporting them outside India was not covered by the exemption contained in Art. 286 (1) (b) for the simple reason that such a sale did not occasion the export. In other words, there was no direct and immediate link between the sale to an exporter and the subsequent exportation of the goods by him. In the words of the Supreme Court "the purchase for the purpose of export by a dealer in the State from another dealer in the State is only a home transaction and it is only where the goods were sold to a buyer abroad that the sale can be said to have occasioned an export."

9. The next case in the series of the cases of this nature is the case of Ben Gorm Nilgiri Plantation Co., Coonoor v. Sales Tax Officer, Spl. Circle, Ernakulam, 1964-15 STC 753 = (AIR 1964 SC 1752). This also was a case of sale for export as distinguished from export sales and was concerned with the export of tea from India. In the State of Kerala, trade in tea is controlled and is carried on through certain definite channels. The manufacturers of tea are granted from the Tea Board allotment of export quota rights. The tea is then sent to a warehouse where it is auctioned. At the auction sale certain agents and intermediaries of foreign buyers bid for purchasing tea. The chests of tea are delivered to the buyers at the warehouse. The agents or intermediaries of the foreign buyers then obtain licence from the Government for the export of tea and thereafter the tea is exported outside the territory of India. The question was whether the sale by auction to the agents or intermediaries of the foreign buyers was a sale in the course of export and was exempt from the sales tax. It was held by the Supreme Court that such transaction of sale by auction did not occasion the export of the goods even though it was known to the owners of tea that the tea was intended to be exported outside India. It was held that between the sale and export there was no such bond as would justify the inference that the sale and the export formed part of a single transaction. In the course of his judgment, Mr. Justice Shah observed at p. 759 (of STC) = (at p. 1755 of AIR).

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation

to export, and there must be an actual export." Further down in the same paragraph, it was observed.

"The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export." Still further down in the same paragraph, there is the following observation:—

"No single test can be laid as decisive for determining that question. Each case must depend upon its facts. But that is not to say that the distinction between transactions which may be called sales for export and sales in the course of export is not real. In general, where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export."

On a combined reading of the three Supreme Court cases cited above, the following general principles emerge.

10 (i) In order that a sale may qualify for exemption under Article 286 (1) (b) of the Constitution as being a sale in the course of export, the sale must occasion the export. In other words, the exportation of the goods must be a part of the contract of sale or must be a necessary incident thereof.

(ii) A sale can be said to occasion an export only—

(a) if there is common intention of both seller and buyer to export;

(b) there is an obligation to export; and

(c) there is an actual export.

(iii) The obligation to export may arise from statute, from contract or from the nature of the transaction. In other words, the obligation may be implicit or explicit.

(iv) The bond between the sale and the export should be such as cannot be broken without a breach of the obligation. From a perusal of the facts of the instant case it is clear that all these tests are satisfied.

11. That there was a common intention of both the buyer and the seller to export cannot be doubted. The buyers are all foreign buyers belonging to Nepal. They placed orders for the supply of the goods direct with the assessee company. There was no intermediary. The goods were to be supplied in Nepal and the assessee company did arrange for the supply of the goods in Nepal. The goods were booked and put on rail at Calcutta, for their ultimate destination in Nepal, by the assessee company. The documents of title were sent to the buyers through banks some of which were situated in Nepal and some in India. The goods were eventually exported to Nepal after

Legislature as part of the statute. On that premise, he contended, that the power conferred by the legislature on the subordinate or delegated authorities to make a rule or notification to carry out the purposes of the Act, can be exercised to give retrospective operation to the rule or notification, just in the same way as a Legislature could, in exercise of its sovereign legislative power, enact legislation retrospectively. He had submitted that if there is no express prohibition, the executive will have power to issue a retrospective notification.

In that batch of Writ Appeals, Mr. Narasaraaju had intervened, because any decision rendered on this question was likely to affect the instant case. He contended that under the scheme of separation of powers, the power to make a law is vested in the legislature alone. The executive has no power to make a law. As such, the grant of a power to the executive by the legislature to make a rule or notification is governed by the terms of the delegation. It cannot, therefore, be said that when the legislature delegates its power, it abdicates its power, which includes the power to enact a retroactive law, and which is an incident of a sovereign legislature. It was therefore contended that because the executive derives the power to make a rule or notification from the legislature, the extent of the delegation is the deciding factor, it determines the scope and ambit of that power. In the circumstances, the power conferred by a legislature on an executive authority, does not by itself imply that the executive authority has power to exercise it retrospectively, unless that power is specifically conferred. After considering the several contentions in that case and the decisions referred to, the Bench, to which one of us (the Chief Justice) was a party, observed as follows:

"It appears to us that while a legislature, unless it is prohibited by the Constitution, in exercise of its sovereignty, has the power to legislate retrospectively, any power delegated by such legislature to an executive authority cannot, unless the power to exercise it retrospectively is either expressly or by necessary implication, granted to it, exercise it retrospectively. The extent of the powers of the legislature and of the delegate of an authority delegated to it are not co-extensive or similar. In construing the rules made or notifications issued in exercise of the powers vested in an executive authority, the ordinary rule of construction is that effect must be given to them from the date of their promulgation. The executive authority has no power to give effect to them retrospectively, unless the terms of the grant of the power by the

legislature empower the delegate to exercise it retrospectively.

"It appears to us that the preponderance of the view is that unless a power to give effect retrospectively is conferred for making a Rule or issuing a notification, it is not permissible to the delegate to exercise that power retrospectively. Their Lordships of the Supreme Court also have quite categorically, as has been seen, stated that the power must be exercised within the ambit of the delegation. In our view, if the power to act retrospectively is not delegated whether you come to this conclusion on a consideration of the policy, intentment or implication of the legislation under which the power is conferred or by adopting a rule that unless express delegation, retrospective effect cannot be given, there is no warrant for the broad proposition that every delegation carries with it the power to exercise it retrospectively."

9. The learned Advocate General submits that the contention now raised before us, namely that as the Governor is a direct recipient of the power under Article 309 of the Constitution, just in the same way as the Legislature is a recipient of that power, he can, likewise, make a law giving it retrospective effect was not decided in the case. It was further contended that we had pointed out in that judgment that in *B. N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 it was sought to be contended that under an Act of Parliament or an Act of a State Legislature, the executive cannot frame rules retrospectively unless the Act specifically empowers it to do so and that the position is the same under the proviso to Article 309 of the Constitution, but Sikri, J., delivering the judgment of their Lordships of the Supreme Court had observed that it was not necessary to decide that point in the cases before them because they were of the view that the appeal could be disposed of on another ground. In this view the argument of the Advocate-General in this case is a new one; as such it is necessary to consider this question and in doing so to examine the language of Article 309 of the Constitution, which we give below:—

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connec-

tion with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

10. It is contended by the learned Advocate-General firstly that a rule, by reference to the definition of "law" in Article 13 (3) and of "existing law" in Article 366 (10) of the Constitution, would mean a law, and if a rule is a law, the Governor or a person directed by him is a law-making authority, secondly that the power to legislate is conferred on the legislature of a State under Entry 41 of List II, and, therefore, when the Governor is called upon to make a rule, he is not, under the proviso, exercising the executive power, but is exercising a similar plenary or full power which is conferred on the Legislature

11. Before we consider these contentions, it is necessary to examine the basis of the power to enact retrospective laws or legislation. The proposition that all law is prospective unless it is given retrospective effect by an authority vested with a power to give retrospective force, admits of no doubt. The power to enact retrospective legislation is inherent in a sovereign legislature acting within the ambit of its legislative power. In England the Parliament, which is not the creature of a written constitution, has unfettered jurisdiction over the entire field of legislation, unlike under a written constitution where the legislative function is subject to the power conferred on the legislature and must, therefore, conform to the limits of that power. Even so, there is no difference between the Parliament and such legislatures within the ambit of the legislative powers conferred on them, in that they are supreme legislative bodies and can pass any law whatsoever subject to what we have stated. They cannot, by their previous Acts, bind their successors or limit their power in like manner as they are not bound by the Acts of their predecessors. As observed by Wade and Philips in Constitutional Law, 5 Edn. page 39. "Parliament alone possesses the power to legalise past illegality," or in the words of Lord Ashbourne in *Smith v. Callander*, 1951 AC 297. Of course, it is obviously competent for the Legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective."

Inasmuch as the power to enact retrospective laws is inherent in the supremacy of the legislature, can it be said that the power conferred on the Governor or any person directed by him under the proviso to Article 309 is of a similar nature

as that conferred upon the legislature of a State or on the Parliament? We may here point out that it is not every authority that has power to make a law, or a delegate under an Act of Parliament or the legislature of a State which has the power to make a law in the sense that once rules are framed they are part of that law, that is vested with the supremacy of a sovereign legislative body to enact retroactive laws. The Constitution in Part XI dealing with the relations between the Union and the States, deals with legislative relations and distribution of Legislative powers. Article 245 confers on the Parliament power to make laws for the whole or any part of the territory of India, and on the Legislature of a State for the whole or any part of the State. That this power is subject to the provisions of the Constitution, it is argued by the learned Advocate General, would imply that there are other authorities upon which the Constitution has conferred similar legislative power, while Mr. Subbarao on behalf of Sri Narasaraaju in reply submits that these words are words limiting the power of the Parliament or the legislature respectively to make laws within their respective spheres and within the powers conferred by the Legislative lists as provided under Article 246.

12. It appears to us that the power conferred on the Governor or his nominee under the proviso to Article 309 is not a sovereign legislative power, though it may be a power to make a law, if a rule made by him has that effect. That this power is not co-extensive with or coeval or similar to, the power conferred on the legislature is evident from the language of the Article. The Article confers on the legislature subject to the provisions of the Constitution, power to regulate the recruitment and conditions of services and posts and the Parliament in the case of Central Services and the Legislature of a State in respect of State services may enact laws under the powers respectively vested in them either by List I or List II. The power conferred by that Article on the President or the Governor to make rules is limited and the rules so made will have force until provision in that behalf is made by or under an Act of the appropriate legislature under that Article; and where such Legislatures have enacted laws regulating the recruitment and conditions of service the rules made by the President or the Governor as the case may be, will be subject to those legislative measures. If, as the learned Advocate General contended, these powers of the President or the Governor are co-extensive or coeval with Parliament or legislature of a State, then the subsequent statutes enacted by those legislatures should co-exist and not have su-

perior efficacy. It is a matter of history that neither under the Government of India Act, 1935, nor under the previous Government of India Act, 1919, nor under the present Constitution have the legislatures by their Acts regulated the recruitment and conditions of services of persons appointed in connection with the affairs of the Centre or of the States, even though there were similar powers contained in Section 241(2) in the Government of India Act, 1935.

13. In *State of U P v. Babu Ram* (AIR 1961 SC 751) Subbarao, J (as he then was) speaking for the majority. —Gajendragadkar, and Wanchoo, JJ (as they then were) contra—referred to the Governor acting under Article 309 as the “executive”. At page 759 he observed:

“Learned Counsel seeks to confine the operation of the opening words in Article 309 to the provisions of the Constitution which empower other authorities to make rules relating to the conditions of service of certain classes of public servants, namely, Arts 146(2), 148(5) and 229(2). That may be so, but there is no reason why Article 310 should be excluded therefrom. It follows that while Article 310 provides for a tenure at pleasure of the President or the Governor, Art 309 enables the Legislature or the executive as the case may be, to make any law or rule in regard, *inter alia* to conditions of service without impinging upon the overriding power recognised under Article 310”

13A. It is apparent from the passage extracted above that the power to make rules is a power conferred on the executive namely, the President or the Governor in whom the executive power of the Union or the State is vested either under Article 53 or 154, as the case may be. This power is similar to a power conferred by a statute upon the Governor to make rules and in just the same way the Constitution also has conferred that power. Both, in our view, are direct recipients from sovereign authorities, and we cannot really discern any difference, nor can any distinction be made between the rule-making power under a statute of a legislature describing it as a power conferred on a delegate and a power conferred directly by the Constitution. The proviso to Article 309 itself has made a distinction between the powers to be exercised by a sovereign authority, i.e., the legislature, and that to be exercised by the Governor or his nominee, as the rules made by the Governor or his nominee are subject to any enactments that may be made by the legislature. This clearly evinces an intention not to confer sovereign legislative powers on the Governor. It may be noticed that when the framers of the Constitution wanted to confer sovereign legislative powers upon the President or

the Governor they did so by express language

The Constitution has under Arts 123 and 213 respectively conferred power on them to enact an ordinance, subject to certain conditions and limitations, which when promulgated could enure only for the duration of 6 months, unless Parliament or the Legislature enacts before the expiration of the six months a law replacing it. The ordinance so made is placed on a par with the Act of a Legislature. This power to promulgate Ordinances is described by the Constitution as a Legislative function of the President or the Governor as the case may be. The limits imposed upon the power of the executive to make Ordinances itself shows the anxiety of the Constitution-makers to safeguard against any temptation on the part of the executive to exercise arbitrary power to govern indefinitely by Ordinances, and abrogate sovereign legislatures. In those circumstances the Constitution makers could not have intended to confer an unfettered legislative power on the President or the Governor under the proviso to Art 309 similar to that conferred on the Parliament or the Legislature of a State. They have particularly taken care to use the word “Act” with reference to the legislature while they used “rule” with reference to the Governor or his nominee, and this is further emphasised under the proviso to Art. 309 by the fact that the rules made by the Governor or his nominee are to have effect only subject to the provisions of any Act of the appropriate Legislature. The circumstance that the power to make a rule is conferred not only on the President or the Governor but on any nominee of his is a strong indication that the power was not intended to be co-extensive with or of the same nature as the legislative power of sovereign legislatures

14. The power to enact retroactive legislation itself has been considered to be a matter of questionable policy, because it is contrary to sound principles of legislation, since citizens whose acts and rights are regulated by laws, should not be mulcted or affected for acting and conducting themselves in consonance with their existing law by enacting retrospective legislation — See *Philips v. Eyre*, (1870) 40 L J Q B 28. It is for this reason that unless that sovereign legislative body or the paramount instrument i.e. the Constitution has conferred a power to give retrospective effect, to rules or orders, effect cannot be given for their retroactive operation

15. The learned Advocate General has referred us to *State of Punjab v. Ram Prashad*, AIR 1963 Punj 345, where a Bench consisting of Tek Chand and Sharma JJ, had observed that the

President and the Governors in their spheres enjoyed plenary powers to make rules regulating the recruitment and the conditions of service of persons appointed to the posts enumerated in Art. 309, and that they were not precluded from exercising these powers in cases where rules regulating the recruitment and the conditions of service were incorporated in any Act before the coming into force of the Constitution. In that case, the Ruler of Patiala, in exercise of his sovereign power, had made certain orders on 8-4-1947, which had the force of law. After the merger of the Patiala State in the State of Pepsu, the President assumed its Rule under Art. 356 of the Constitution. But before the President's rule was terminated on 7-3-1954, the Bank of Patiala Regulation and Management Order, 1954, was made on 27-2-1954, though published in the Official Gazette on 14-3-1954. The President had, under that regulation, delegated the power to frame rules regulating the conditions of service of the employees of the Patiala Bank, to the Board of Directors, which framed the Bank of Patiala Staff Rules, 1954. It was contended that the Bank of Patiala Regulation and Management Order 1954 stood spent up on the date the President's Rule came to an end. The Bench repelled this contention.

The learned Advocate General wants us to conclude that this decision establishes that the President in making rules under Art. 309 had the power to abrogate or amend or supersede laws enacted by sovereign legislative authority, and that, as the rules so made have the force of law by virtue of Art. 372, he must be deemed to have been vested with powers of sovereign legislative authority. In our view, this is begging the question, because if that were so, the President or the Governor could even abrogate Acts of the Parliament or the Legislature regulating the recruitment and conditions of service, after the Constitution came into force. But that power is specifically negated. The framers of the Constitution took note of the fact that under the previous Government of India Acts, the legislature did not enact any laws regulating the recruitment and conditions of service and consequently, the powers of the President or the Governor, which the Governor-General or Governor exercised previously, with certain changes were preserved.

Transitional provisions were made under Art. 313 under which it is provided that until other provision is made in that behalf under the Constitution, all the laws in force immediately before the commencement of the Constitution and applicable to any public service or any post which continues to exist after the commencement

of the Constitution, as an all-India Service or as service or post under the Union or a State, shall continue in force so far as consistent with the provisions of the Constitution. This provision preserves all laws in force immediately before the commencement of the Constitution which would also include the rules framed under the previous Government of India Acts. The phrase, "until other provision is made in this behalf" under this Constitution in Art. 313 would seem to empower the President or the Governor to make rules in respect of any public services or any posts which continue to exist notwithstanding the existing law in that behalf. All that the above decision lays down is that by reason of Art. 313 the President acting under Art. 309 can make rules to replace the existing law which continued to exist only until other provision is made under the Constitution.

16. If, however, it is contended that this decision implies that the President or the Governor has plenary or sovereign powers similar to that of a Legislature, we must, with great respect, dissent from such a construction.

17. In *Dr. Partap Singh v. State of Punjab*, AIR 1963 Punj 298 another Bench of the Punjab High Court consisting of Mehar Singh J. (as he then was) and Capoor J., was considering a similar question. That was a case where the rules made in 1941 under the Government of India Act, 1935 were sought to be amended under the power conferred under Art. 309. It was contended by the appellant that he was a Government servant prior to the inauguration of the Constitution and that rules made under Art. 309 would not apply to him. It was held that when a Government servant is employed under the rules, the employment is on the terms and conditions that he will be governed by the rules made from time to time, and since Article 313 provides that until other provision is made under the Constitution the previous rules or law governing the public services would continue to be in force and that those rules could be amended. At page 305 Mehar Singh J. said:

"It is clear from Article 313 that until other provision is made, all laws in force immediately before the Constitution and applicable to any public service or any post continue but only with regard to any public service or any post which continues to exist after the commencement of the Constitution so that any service that has continued after the Constitution has continued under the provisions of the Constitution and in the case of a State in connection with the affairs of that State".

18. Again the observations of Desai, C. J., in *A. J. Patel v. State of Gujarat*, AIR 1965 Gujarat 23 (FB) at P. 42 were

cited by the learned Advocate General, in support of the proposition that the power conferred on the President or the Governor is co-extensive and coeval with that of Parliament or legislature. Desai, C. J. had observed:

"The power of the Governor of a State under Article 309 to make rules regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of a State cannot be treated differently from the power of the legislature to do so by an Act under Article 309. The rules framed under the proviso to Article 309 would be statutory rules and would have force and affect as such and would confer rights which could be enforced in a Court of law so long as they did not impinge the provisions contained in Article 310 and did not deal with the tenure of office of such persons which, as provided by Article 310, was liable to be held during the pleasure of the Governor."

It is obvious from this passage that what the learned Chief Justice was dealing with was the effect of the rules and not the nature of the power conferred on the President or the Governor. Rules made in exercise of the powers conferred under Art. 309 certainly have statutory force, just in the same way as rules made in exercise of the powers conferred under any statute. But it is far from saying that sovereign powers to legislate have been conferred on the President or the Governor. To the same effect are the observations of the Supreme Court in *Raghavendra Rao v. Deputy Commissioner, South Kanara*, AIR 1965 SC 136 where their Lordships have held that Art. 309 gives, subject to the provisions of the Constitution, full powers to a State Government to make rules. When the Supreme Court refers to "full powers" being conferred on the State Government under Art. 309 which however does not speak of the State Government but of the Governor, it is conscious that the power is conferred on the executive, because after all, the Governor represents the executive. Sikri, J., speaking for the Court further observed at page 138 as follows:

"It has to be remembered that Article 309 of the Constitution gives, subject to the provisions of the Constitution, full powers to a State Government to make rules. The proviso to S. 115(7) (of the States Reorganisation Act) limits that power, but that limitation is removable by the Central Government by giving its previous approval".

In these circumstances, can it be said that the powers of sovereign legislature is vested in the President or the Governor when acting under Article 309 of the

Constitution. We think not; nor could the Supreme Court have intended to recognise such power as being vested in the President or the Governor.

19. In *Ram Autar v State of U. P.*, AIR 1962 All 328 (FB) no question of a rule having retrospective operation had arisen. The notification reducing the superannuation age from 58 years to 55 on 25-5-1961, to which it had been raised in 1957, was not applied with retrospective effect to the petitioner who reached the superannuation age on 3-5-1961. The petitioner in that case however was given extension of service till 31-12-1961. An argument seems to have been addressed no doubt, with respect to the power of the Governor of a State to make retrospective rules. Oak, J. (as he then was) did not deal with this matter. Srivastava and Dwivedi JJ., however, in their separate judgments assumed that the powers of the Governor under the proviso to Article 309 being identical with that of the legislation under the main Article the Governor can make rules with similar effect. At page 341, Dwivedi, J., said:

"The proviso is expressed in broad strokes. The scheme and setting of it both suggest that the Governor is constituted a co-ordinate authority with the State Legislature, and is invested with as extensive powers as the Legislature itself for effective regulation of service conditions of State servants for public weal."

At page 342, he further observed:

"The State Legislature, I venture to think, is not a sovereign Legislature, for it does not possess unlimited powers, and its acts are not uncontrollable. Its powers are conditioned both affirmatively and negatively, by the Constitution, its acts may be set at naught by courts if they are found by them to be inconsistent with the Constitution. The true fountain of its power is thus the Constitution."

While no one can deny that the true fountain of the power derived by the Parliament or the State Legislature is the Constitution, it will, with greatest respect, be incorrect to say that within the spheres prescribed by the Constitution, each of the Legislatures is not supreme and sovereign. To hold otherwise would be to deny the legislatures also the power to enact retroactive laws, which power is an attribute of sovereignty. The assumption that the State Legislature or Parliament has power to make retroactive laws without their being sovereign and therefore the powers conferred on the Governor, who is also not a sovereign legislative body, are also similar in nature, cuts across the very foundation of the juristic principle upon which the power to make retroactive laws are

based. At any rate, the learned Judge assumes that the Governor or the President has no sovereign power vested in them. We cannot, with greatest respect, accept the basic postulates upon which the observations are founded. Of course this Full Bench decision was followed by N U Beg J (as he then was) in *Vidya Sagar v Board of Revenue*, AIR 1964 All 356 because he was bound by it.

20. In *Govindaraju v State of Mysore* AIR 1963 Mys 265 Narayana Pai J., speaking for the Bench dealt exhaustively with all these aspects and came to conclusions similar to which we have arrived. At page 277, it was observed:

"We hold therefore that the Governor acting under the proviso to Art. 309 of the Constitution does not have the power to make a rule which takes away from Government servants a right already acquired by them under the pre-existing rules or previous transactions as from a date anterior to the promulgation of that rule or to make a rule validating what was invalid in its inception".

We respectfully agree with these conclusions. This decision was followed by another Division Bench of the Mysore High Court in *Siddappa v. Venkatesh*, AIR 1965 Mys 65.

21. No doubt the Supreme Court, as we have said earlier, left this question open in AIR 1966 SC 1942 and relied upon the application of Art. 162 in allowing the appeal and reversing the judgment of the Mysore High Court. It was argued by Mr Setalvad in that case that the Government is not acting as a delegate of any legislature while exercising powers under the proviso to Art. 309, it is exercising a power conferred by the Constitution directly on the executive and the Constitution has not prescribed any guiding principles to be followed by the State Government while it is exercising powers under the proviso to Art. 309, because the Constitution treats it as having the same powers as the legislature, and that even if it be the law that the executive when acting as a delegate under an Act of Parliament or an Act of State Legislature, cannot make rules retrospectively, this principle does not apply to the exercise of powers under the proviso to Art. 309 of the Constitution. Sikri, J., delivering the judgment of their Lordships said at page 1948

"In our opinion, it is not necessary to decide this point in these cases because we are of the view that the appeal can be disposed of on another ground. Assuming for the sake of argument that Mr Nambiar is right that the Mysore State Government could not make rules retrospectively and that the rules are thus void so far as they operate retrospectively, we must ignore these rules and see whether

the appointments made on October 31, 1961 can be upheld. We have come to the conclusion that these appointments can be considered to have been validly made in exercise of the executive power of the State under Article 162 of the Constitution".

22. Having regard to what we have stated, it is our considered view that the Constitution did not intend to confer upon the executive authority, namely, the President or his nominee, or the Governor or his nominee, sovereign legislative power, and particularly having regard to the power the President or the Governor, could confer on their respective nominees, it cannot be so presumed. In these circumstances, the Governor has no power to make ex post facto or retroactive rules.

23. The result is that this writ petition is allowed, with a direction that the State Government should refer the names of the Section Officers belonging to the Scheduled Castes and the Scheduled Tribes if any, who are eligible for appointment as Assistant Secretaries to Government, to the Andhra Pradesh Public Service Commission to consider the suitability or otherwise of the petitioner for including his name in the panel for the places reserved in the cycle of 25 vacancies. If the petitioner is found suitable and appointed his seniority to the 9th post should be fixed vis-a-vis the others as if his name was included in the panel when originally approved by the Public Service Commission. The respondent will pay the costs of the petitioner. Advocate's fee Rs. 100.

LGC/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 118
(V 56 C 34)

/ SESHACHELAPATHI, J.

V. V. Sarma and others, Petitioners v. State of Andhra Pradesh and others, Respondents

Writ Petns Nos. 607 and 938 of 1967, D/- 27-12-1967.

(A) Constitution of India, Arts. 311, 226 — Threat of reversion in service — Interference under Art. 226 when permissible.

A mere possibility of a threat of reversion in service may not normally justify the intervention of the High Court in a petition filed under Art. 226. But if the impugned order carries with it a real and substantial threat to the rights accrued to the petitioners, it is permissible for the Courts to interdict the trespass on such right. The question can only be considered in the context - of the actual

BL/HL/A695/68

rights which the petitioners have in their present employment and the nature of the threat of trespass on those rights implicit in the impugned order. (Para 7)

(B) Hyderabad State and Subordinate Services Rules, R. 37 — Rules regarding promotions — Effect of — Constitution of India, Arts. 399, 16.

Although a promotion under sub-rule (a) or (b) of Rule 37 will not entitle the person so promoted to any preferential claim to future promotion to the higher category where the promotions of petitioners though made under the emergency provisions, were in fact regularised and by appropriate orders, it was declared that they had satisfactorily completed their probation, they must be deemed to be approved probationers in the category of Superintendents within the meaning of sub-rule (3) of Rule 3 of the State and Subordinate Services Rules.

(Para 10)

(C) Constitution of India Art. 311 (2) — Demotion — When amounts to penalty.

If a particular Government servant is entitled to hold a substantive post in a category of service, his demotion to a lower category entailing evil consequences will prima facie mean a penalty to which the provisions of Art. 311 (2) could be attracted (Para 13)

(D) Constitution of India, Art. 309 — Scope.

Retrospective review of cases of public servant is not permissible. (Para 15)

Cases Referred: Chronological Paras (1969) AIR 1969 Andh Pra 109 (V 56) =

W P No 1148 of 1965, K.

Vishwanathan v. State of A. P. 15

(1966) AIR 1966 SC 1529 (V 53) =

(1966) 2 SCJ 535, Divisional Personnel Officer Southern Rly.

Mysore v. Raghavendrachar 13

(1963) AIR 1963 Andh Pra 412 (V 50) =

(1963) 1 Andh WR 216, State of

Andhra Pradesh v. Chinna Reddy 12

(1959) AIR 1959 Mad 1 (V 46) = ILR

(1958) Mad 968, N. Devasahayam v.

State of Madras 11

(1958) AIR 1958 SC 36 (V 45) = 1958

SCR 828, P. L. Dhingra v. Union

of India 12, 13

D Narasaru for K Raghava Rao and

K R Swamy, for Petitioners (in W. P.

No 607 of 1967) and Respondents Nos 3

to 5 (in W P 938 of 1967); T Dhanur-

bhanudu, for Petitioners (in W P. No.

938 of 1967) and Principal Govt Pleader,

for Respondents (in W P. No 607 of

1967) and Respondents Nos 1 and 2 (in

W P No 938 of 1967).

ORDER: W. P. No 607 of 1967 has been filed by three petitioners seeking a writ of Mandamus to restrain the Government from implementing the G. O. Ms. No 179 Public Works Department D/- 2-2-1966 in so far as it relates to them. W. P.

No 938 of 1967 has been filed by three petitioners seeking a writ of Mandamus to direct the respondents 1 and 2 to implement the G. O. Ms No 179, Public Works Department dated 2-2-1966 and the petitioners in W P No 607 of 1967 have been made respondents 3 to 5 in this writ petition. It will be convenient to deal with the two writ petitions separately

2. W P No 607 of 1967: The Electricity Department had two wings (1) Office of the Chief Engineer Electricity (Projects and Board) and (2) Office of the Chief Electrical Inspector to Government. By an appropriate order dated 14-8-1957, the post of the Chief Electrical Inspector to Government was merged with the post of the Chief Engineer Electricity. These two wings had separate non-technical staff functioning as separate units. As a measure of policy the Government of Andhra Pradesh decided to merge the non-technical staff of the Electrical Inspectorate with the office of the Chief Engineer (Projects and Board) with effect from 14-8-1957 and have issued G. O. Ms No 179, Public Works Department, dated 2-2-1966. The G. O. is in these terms:

Government of Andhra Pradesh
Abstract

Electricity Department — Establishment — Chief Electricity Inspector to Government — Merger of Non-Technical Staff with staff of the office of the Chief Engineer, Electricity (Projects and Board) — Orders — Issued.

... ..

Public Works Department
G. O. Ms No 179 Dated 2-2-1966
Read the following:

From the Chief Engineer (Projects and Board) Lr No. Adm. Roc 156-P5/59-99, dated 13-12-1965

ORDER. The Office of the Chief Electrical Inspector to Government continued to be a separate unit after 1-11-1956 and was under the control of an independent Officer. Subsequently, on 14-8-1957 the post of Chief Electrical Inspector to Government was merged with the post of the Additional Chief Engineer for Electricity. Consequently, the Additional Chief Engineer for Electricity was empowered to function as Chief Electrical Inspector to Government. Later on, on the abolition of the post of Additional Chief Engineer, the functions of Chief Electrical Inspector to Government and the Chief Engineer, Electricity, were combined in one and the same officer and this position continues till now. In these circumstances, it is considered that there is no need to keep the non-technical staff of the Electrical Inspectorate as a separate unit, and accordingly the Gov-

ernment accept the recommendations of the Chief Engineer, Electricity (Projects & Board) and direct that the non-technical staff of the Electrical Inspectorate be merged with the staff in the main office of the Chief Engineer (Projects & Board) with effect from 14-8-1957

2 The combined inter se seniority list of the two offices as on 14-8-1957, as approved by the Government is appended to this order

3 The Chief Engineer (Projects & Board) is requested to review all the promotions, confirmations etc., made by him from 14-8-1957 on the basis of the combined list approved in para 2 above. (By order and in the name of the Governor of Andhra Pradesh)

N. K. Seth,

Deputy Secretary to Government"

3. The petitioners challenge the legality and justice of the above G O

4. Mr Narasaraaju, the learned counsel, has contended firstly, that the direction that the Chief Engineer should review all promotions and confirmations effected since 14-8-1957 on the basis of a combined seniority list will affect the rights already accrued to and vested in the petitioners, secondly, that such a retrospective review of vested rights is repugnant to law and justice, and thirdly that, in truth and substance, the places allotted to the petitioners in the combined seniority list amount to their demotion or reduction in rank, which is violative of Article 311(2) of the Constitution

5. The case of the Government is that the merger of the two units of the Department was made for administrative convenience and in public interest to achieve uniformity and that such a policy decision is well within their powers and that the preparation of a provisional common gradation list does not visit the petitioners with any penalty or infringement of their rights. It is also urged that the present writ petition is not only misconceived but premature as, in fact, the petitioners have not yet been reverted

6. Mr Dhanurbhanudu, the learned Counsel for the petitioners in W P. No 938 of 1967 has addressed lengthy arguments generally supporting the contentions of the Government Pleader that the petitioners in W P No 607/67 have no right to interdict the implementation of the G O because first, the Government have plenary power to regulate the working of any department under their control either by effecting a division of the departments or the merger thereof, secondly, the impugned G O not being a rule or regulation but only an administrative order, the contention that it cannot be retrospectively applied is untenable and thirdly, the petitioners are not

permanently appointed to the category of Superintendents and as such, they can have no grievance with the terms of the G. O and the review of the seniority of all the non-technical staff as on 14-8-1957.

7. At the very outset, it may be necessary to deal with the point raised by the learned Government Pleader that, inasmuch as the petitioners have not yet been reverted to the position of Typists or Upper Division Clerks, they cannot maintain this writ petition. It is no doubt true that a man need not cry before he is hurt and a mere possibility of a threat may not normally justify the intervention of this Court in a petition filed under Article 226 of the Constitution. But it must also be borne in mind that, if the impugned order carries with it a real and substantial threat to the rights accrued to the petitioners, it is permissible for the Courts to interdict the trespass on such rights. This question can only be considered in the context of the actual rights which the petitioners have in their present employment and the nature of the threat of trespass on those rights implicit in the impugned G. O.

8. The three petitioners, V. V. Sarma, G R Govinda Reddy and M V. R C Mouleswara Rao, were appointed as Superintendents under emergency provisions. Their services were regularised and they were placed on probation for a period of two years and they were declared to have satisfactorily completed their probation in the category of Superintendents. I shall refer to the orders issued in connection with the first petitioner, V. V. Sarma. The order dated 6-4-1963 with respect to the first petitioner, V. V. Sarma, is as follows

"GOVERNMENT OF ANDHRA
PRADESH ELECTRICAL INSPECTORATE

Office of the Chief Electrical
Inspector to Government,
Khairathabad, Hyderabad

Memo No Adm D Dis 205-E3/63 dated
6-4-1963

"Sub—Establishment—Andhra Pradesh Ministerial Service Sri V. V. Sarma, Superintendent, Office of the Chief Electrical Inspector to Government—Regularisation of Services—Orders—Issued.

Under Rule 32(a) of Special Rules for Andhra Pradesh Ministerial Service Rules, Sri V. V. Sarma, who is working as Superintendent under emergency provisions in this office is placed on probation with effect from 30-4-1960 A. N. i.e 1-5-1960 F N for a period of two years on duty within a continuous period of three years

Sd/ S A. Quader,

Chief Electrical Inspector to Govt." Subsequently, on 27-5-1963, it was de-

clared that the first petitioner, Sri V. V. Sarma, had satisfactorily completed his probation. That order is in these terms

"Office of the Chief Electrical
Inspector to Government,
Khairathabad, Hyderabad-Dn.

Memo. No. Adm. D Dis 392 E3/63 dt. 27-5-1963

Sub.—Establishment — Andhra Pradesh Ministerial Service — Sri V V Sarma, Superintendent — Declaration of completion of probation — Orders — Issued.

Under Rule 32(a) of the Madras Ministerial Service Rules as adopted by Andhra Pradesh Government, Sri V. V. Sarma, Superintendent of this office is declared to have completed his probation satisfactorily with effect from 1-2-1962 A N in the category of Superintendents

Sd/- S A. Quader
Chief Electrical Inspector to
Government "

Similarly, by an order dated 6-4-1963, the Services of the Second petitioner, Sri C. R. Govinda Reddy, were regularised under Rule 32(a) of Special Rules for Andhra Pradesh Ministerial Service Rules and he was placed on probation as Superintendent with effect from 7-5-1960 for a period of two years on duty within a continuous period of three years. By an order dated 28-5-1963, he was declared to have completed his probation satisfactorily with effect from 1-2-1962. Similarly, by an order dated 6-4-1963, the services of the third petitioner, Sri M. V. R. Chandramouleswara Rao, were regularised and he was placed on probation as Superintendent with effect from 3-5-1961 for a period of one year on duty within a continuous period of two years. By an order dated 27-5-1963, it was declared that he had completed his probation satisfactorily with effect from 4-4-1963.

9. The petitioners were recruited under the Hyderabad Civil Service Rules. So far as the emergency provisions in regard to the appointments and promotions are concerned, there is, in substance, no difference between the provisions of the Hyderabad Civil Service Rules and the corresponding provisions of the State and Subordinate Service Rules. The relevant rule of the State and Subordinate Service Rules regarding promotions is Rule 37. It is in the following terms

"Temporary promotions.— (a)(i) Where it is necessary in the Public interest to fill emergently a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from a lower category and if the filling of such vacancy in accordance with the rules is likely to result in undue delay, the appointing authority may promote a person

temporarily otherwise than in accordance with the said rules.

(ii) No person who does not possess the qualifications, if any, prescribed for the said service, class or category, shall ordinarily be promoted under clause (i). Every person who does not possess such qualifications and who has been or is promoted under clause (i) shall be replaced as soon as possible by promoting a person possessing such qualifications

(b) Where it is necessary to fill a short vacancy in a post borne on the cadre of a higher category in a service or class by promotion from a lower category and the appointment of the person who is entitled to such promotion under the rules would involve excessive expenditure on travelling allowance or exceptional administrative inconvenience the appointing authority may promote any other person who possesses the qualifications, if any, prescribed for the higher category

(c) A person temporarily promoted under clause (i) of sub-rule (a) shall, whether or not he possesses the qualifications prescribed for the service, class or category to which he is promoted, be replaced, as soon as possible, by the member of the service who is entitled to the promotion under the rules.

(d) A person promoted under sub-rule (a) or (b) shall not be regarded as a probationer in the higher category or be entitled by reason only of such promotion to any preferential claim to future promotion to such higher category.

(dd) The appointing authority shall have the right to revert to a lower category or grade any person promoted under sub-rule (a) or sub-rule (b) at any time without assigning any reason and without notice

(e) If such person is subsequently promoted to the Higher category in accordance with the rules he shall commence his probation, if any, in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may determine".

10. A combined reading of sub-rules (d) and (e) of Rule 37 would show that a person promoted under sub-rule (a) or (b) shall not be regarded as a probationer in the higher category. But, if such a person i.e. a person promoted under sub-rule (a) or (b) is subsequently promoted to the higher category, he will be deemed to be a probationer in such category from the date of such promotion or from such earlier date as the appointing authority may determine. It is true, as contended by the learned Government Pleader, that a promotion under sub-rule (a) or (b) of Rule 37 will not certainly entitle the person so promoted to any preferential claim to future promotion to the higher category. But in this case as

is stated supra, the promotions of these three petitioners though made under the emergency provisions, were, in fact, regularised. They were placed on probation for a period of two years in the category of Superintendents. By appropriate orders, it was declared that they had satisfactorily completed their probation. In the events that have happened, therefore, it is not correct to say, as the Government Pleader has attempted to say that they should still be considered as persons promoted under sub-rule (a) or (b) and are, therefore not entitled to claim as of right to continue as Superintendents. I hold that, by reason of the orders regularising their services, placing them on probation and eventually declaring them to have satisfactorily completed their probation, they must be deemed to be approved probationers in the category of Superintendents within the meaning of sub-rule (3) of Rule 3 of the State and Subordinate Service Rules.

11. It is in the context of the character of the offices that are now held by these three petitioners that the directions in the impugned G O have to be understood. The cases of all the persons, who have been promoted or confirmed since 14-8-1957, are directed to be reviewed. In the combined seniority list the three petitioners are shown only as Typists in the non-technical staff. The subsequent events viz., the regularisation of services of the petitioners and their having become approved probationers in the category of Superintendents within the meaning of sub-rule (3) of Rule 3 have been ignored. This certainly is not a case of reviewing and refixing seniority of persons in the same category of service, as was held by the Madras High Court in the well-known decision in *N. Devasahayam v. State of Madras* AIR 1959 Mad 1. By treating these three petitioners as Typists, they are certainly shown as persons belonging to a lower category of Service than the one to which they became entitled to by the regularisation of their services and the declaration of their having satisfactorily completed their probation. In such a situation the petitioners are justified in complaining that the present G O. affects their vested rights as approved probationers.

12. In *State of Andhra Pradesh v. Chinna Reddy* AIR 1963 Andh Pra 412, a Bench of this Court consisting of Satyanaravana Raju, J (as he then was) and Mohammed Mirza, J had to deal with a case where an approved probationer waiting for appointment as a full member of the service in a particular cadre could not be transferred to his original post without giving him any opportunity of showing cause and though in the garb of a transfer, it amounted to

a reduction in rank. The following passage may be usefully extracted.

"In the present case, the respondent was declared to have satisfactorily completed his probation. He was therefore an approved probationer within the meaning of Rule 2(3) of the State Service Rules. He was awaiting appointment as a full member of the service in which he was declared as an approved probationer. Under R 40 of the Rules, therefore, he can only be transferred to serve in a post borne on the same cadre or class. This is subject to certain exceptions, such as, that the Government servant can be reverted for want of a vacancy. Such is not the case here. It was at no time stated that the respondent was being reverted to his post in the district revenue establishment on the ground of want of a vacancy in the Secretariat service. While it is no doubt true that an approved probationer does not eo instanti acquire the status of a permanent member of the service the fact does remain that he waits appointment as a full member of the service. Their Lordships of the Supreme Court in the *Dhingra* case, 1958 SCJ 217: (AIR 1958 SC 36) have held that the real test would be to find out whether the Government servant suffers loss in emoluments and chances of promotion. That test has been satisfied in this case. It is, no doubt, true that no reasons were given in the order reverting the respondent but the only reasonable inference which could be drawn from the sequence of events mentioned above, is that the order of reversion, though innocuous in its apparent tenor, does really amount to a reduction in rank."

In *P. L. Dhingra v. Union of India*, AIR 1958 SC 36 the Supreme Court observed as follows:

"If the Government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss

of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

13. In *Divisional Personnel Officer, Southern Railway, Mysore v. S Raghavendrachar*, AIR 1966 SC 1529, their Lordships of the Supreme Court have reiterated the principle enunciated in the decision in AIR 1958 SC 36 that, if the order entails the forfeiture of his pay and allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, that circumstance may indicate that although in form the Government had exercised an innocuous right of terminating the employment or reducing the servant to a lower rank under the terms of the contract of employment, in truth and reality, it had been done as a penalty. In other words, if a particular Government servant is entitled to hold a substantive post in a category of service, his demotion to a lower category entailing evil consequences will *prima facie* mean a penalty to which the provisions of Article 311(2) of the Constitution could be attracted.

14. Applying those well settled principles, the G O in so far as it directs the review of the seniority and confirmations of all persons (obviously including the petitioners) from 14-8-1957 carries with it a denial of the rights already accrued to the petitioners and a threat of their forfeiture.

15. Mr. Narasaraaju has contended that, in any view the G O in so far as it provides for a retrospective review of all the cases as from 14-8-1957 is obnoxious to the well settled principle that rights accrued cannot be retrospectively affected. In this connection, strong reliance was placed by him on a recent decision of a Bench of this Court consisting of the learned Chief Justice and Kuppuswami, J in *W P No 1148 of 1965* (AIR 1969 Andh Pra 109) where the learned Judges held that a rule made under Article 309 of the Constitution can have no retrospective operation. In that case, the facts were these. The petitioner, who was a member of the Adi Andhra community, claimed that his name should have been considered for appointment as Assistant Secretary in accordance with Rule 8 of the Andhra Pradesh Special Rules and Rule 22 of the General Rules in preparing a panel for appointment as Assistant Secretaries from

among Section Officers for the year 1964-65. He claimed that he should be included in the panel. The principal contention raised on behalf of the Government was that Rule 8 of the Andhra Pradesh Special Rules was subsequently amended with retrospective effect and that the amendment was in the form of a statutory rule made by the Governor under Article 309 of the Constitution. The learned Chief Justice and Kuppuswami, J, after a review of the legal position with reference to the several decided cases cited before them, held that the Governor has no power to make *ex post facto* or the retrospective rules.

16. On the basis of the above decision, Mr. Narasaraaju has contended that the application of the rule against retrospective operation applies, with even greater force, to an executive fiat like the one contained in the impugned G O. The position cannot seriously be contested that accrued rights cannot be retrospectively taken away.

17. For the reasons stated above, I hold that the petitioners are entitled to continue as approved probationers in the category of Superintendents and that those rights cannot be forfeited by any review of the confirmations and seniority as from 14-8-1957. A writ of mandamus will, therefore, issue to the second respondent, the Chief Engineer, Electricity (Projects and Board) not to enforce the G O in so far as it relates to the petitioners adversely to this right to continue in the category of Superintendents, which they have already secured.

18. The Writ Petition is, therefore, allowed with costs Advocate's fee Rs 100. Writ Petition No 938 of 1967.

19. The petitioners in this writ petition were appointed as Upper Division Clerks in November and December, 1956 in the office of the Chief Engineer, Electricity (Projects and Board). They were subsequently promoted as Superintendents by a common order dated 30-8-1965 issued by the Chief Engineer, Electricity. They were placed on probation. By orders dated 21-4-1966, they were declared to have satisfactorily completed their probation with effect from 21-2-1966, 22-2-66 and 25-2-1966 respectively. They are, therefore, approved probationers in the category of Superintendents.

20. In this Writ Petition they request that a direction in the nature of a Mandamus may be issued to the Second respondent, the Chief Engineer Electricity (Projects and Board) to implement the G O with reference to a correct and up-to-date seniority list.

21. Besides the Government and the Chief Engineer (Respondents 1 and 2), the petitioners have impleaded V. V. Sarma, G. R. Govinda Reddy and M. V. P. C. Mouleswara Rao, the petitioners in

W. P. No 607 of 1967, as respondents 3 to 5.

22. But the main point raised in this Writ Petition seems to be that the implementation of the G. O. strictly with reference to a combined seniority list would show that the three petitioners are seniors to the respondents 3 to 5 (Petitioners in W P No 607/67). The petitioners in the present writ petition would appear to have become Upper Division Clerks earlier than the respondents 3 to 5 (Petitioners in W P. No 607/67). If strictly the rule of seniority is applied for reviewing promotions and confirmations from 14-8-1967, the three present petitioners, Venkateswara Rao, Sreeramamurthy and Vithaleswara Rao, would get an edge over the three petitioners in W. P. No. 607/67. But the fact remains that the respondents 3 to 5 (Petitioners in W. P. No 607/67) had become Superintendents earlier than the petitioners. The rights they had secured may, to some extent, prejudice the chances of the petitioners but that seems to be inevitable as they had become Superintendents earlier. This writ petition is filed merely as a counterblast to the writ petition filed by Sri V. V. Sarma and others. In W P. No. 607/67 I have held that the petitioners therein are entitled to the protection of the rights that they had acquired as approved probationers in the category of Superintendents and that the G. O. in so far as it relates to them should not be adversely implemented. These petitioners are also approved probationers in the category of Superintendents. They cannot, by this device, ask for the implementation of the G. O. to gain seniority over the petitioners in W P. No 607/67 in the category of Superintendents.

23. This writ petition is, therefore, dismissed. But in the circumstances, I make no order as to costs

HGP/D.V.C. Order accordingly.

AIR 1969 ANDHRA PRADESH 124 (V 56 C 35)

VENKATESWARA RAO, J

Special Tahsildar, Land Acquisition, Srungavarapukota, Appellant v Thatikonda Ramalinga Setty, Respondent

Appeal No 523 of 1964 D/- 3-7-1968, against decree of Sub J Visakhapatnam D/- 19-2-1964

Land Acquisition Act (1894), Ss. 9 and 25(2), (3) — Non-statement of claim pursuant to notice under S. 9 — Burden is on claimant to prove sufficient cause for omission — No evidence to explain reason for omission — S. 25(2) is attracted — Court not entitled to enhance award under S. 25(3).

JL/KL/E407/68

Where no claim is preferred by the owner of the land for compensation before the Land Acquisition Officer pursuant to the notice issued to him under Section 9 of the Land Acquisition Act, the burden of proving sufficient cause justifying the omission lies exclusively on the claimant if he wants to avoid the penal consequences which would otherwise be visited on him under Section 25(2) of the Act. In the absence of any evidence to explain the reason why he could not file his statement of claim pursuant to the notice under S. 9 the Court is not justified in condoning the omission and acting under S. 25(3) of the Act for the purpose of enhancing the compensation payable to him. (Para 4)

The discretion of the court to condone the omission and award compensation exceeding the sum allowed by the Referring Officer has to be exercised judiciously and on well-established principles and not arbitrarily or capriciously. The Court has certainly a duty to further the interest of justice but it cannot for this purpose fill up lacunae by mere surmises when the party himself does not choose to take care of his interest. AIR 1959 Andh Pra 139, Rel. on. (Para 5)

Cases Referred: Chronological Paras (1959) AIR 1959 Andh Pra 139 (V 46)=

ILR (1959) Andh Pra 88, N.

Annasatram v. Special Land Acquisition Officer

4

M. V. Nagaramaiah, for 2nd Govt. Pleader, for Appellant; K. V. Subrahmanyam, for Respondent.

JUDGMENT: This Appeal and Cross Objections, which arise out of land acquisition proceedings, are directed against the order of the learned Subordinate Judge, Visakhapatnam, in O P. No. 6/63 on his file. Referring Officer is the appellant and the cross objections are preferred by the claimant

2. Ac. 3-82 cents of land belonging to the claimant and situated in Pandurti was acquired by Government for construction of a store-yard for the D. B. K. Railway project after due notification. No claim for compensation was made by the claimant before the Land Acquisition Officer in response to the notice issued to him under Section 9 of the Land Acquisition Act (hereinafter referred to as the Act) After making the necessary enquiry, the Special Tahsildar, Land Acquisition, Srungavarapukota, made his award on 20-12-62 providing for payment of compensation to the claimant at the rate of Rs. 2,310 per acre. He thereafter referred the matter to Court at the instance of the claimant. The learned Subordinate Judge enhanced the rate of compensation payable to the claimant from Rs. 2,310 to Rs. 2,775 per acre as against his claim at Rs. 4,000 per acre. Neither party is satis-

fied with this decision of the Court below and hence this appeal and cross objections.

3. It is contended for the appellant that the Court below should have simply confirmed the award made by the Land Acquisition Officer having regard to the admitted fact that the respondent did not prefer any claim to compensation before that Officer in response to the notice served on him under Section 9 of the Act but that the learned Subordinate Judge erroneously condoned the omission to file a statement of claim for reasons which do not bear scrutiny; and that even otherwise, the enhancement ordered by the Court below is not warranted by the evidence on record. It is on the other hand urged for the respondent that the learned Subordinate Judge should have awarded him compensation at the rate of Rs 4,000 per acre as claimed.

4. The factum of receipt of notice under Section 9 of the Act and its validity are not contested by the respondent. It is also not disputed that no claim was preferred by him for compensation before the Land Acquisition Officer pursuant to the notice issued to him under Section 9 of the Act. It will be useful to extract Section 25 of the Act in this context having regard to the contention urged for the appellant and that Section reads thus:

"Section 25.(1) When the applicant has made a claim to compensation, pursuant to any notice given under Section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11.

(2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

(3) When the applicant has omitted for a sufficient reason (to be allowed by Judge) to make such claim, the amount awarded to him by the Court shall not be less than, and may exceed, the amount awarded by the Collector."

[Sub-section (2) of Section 25 referred to above lays down that the amount awarded by the Court shall in no case exceed the amount awarded by the Collector when the applicant has refused to make a claim or has omitted without sufficient reason, to make such a claim pursuant to the notice issued to him under Sec. 9 of the Act. Sub-section (3) of Section 25 no doubt, gives discretion to the Court to award compensation in excess of the sum awarded by the Collector provided it is satisfied that the applicant has omitted to make the claim in question for a "sufficient reason". It is contended for the

appellant and rightly too, that there are absolutely no grounds in this case justifying the omission by the respondent to prefer his claim before the Land Acquisition Officer within the time limited by the notice under Section 9 of the Act with which he was admittedly served. The claimant did not say a word in the course of his evidence to explain the reason why he failed to prefer the claim and he simply stated that he did not make any written statement claiming a particular amount before the Referring Officer prior to the passing of the award.

It is for the claimant to explain the reason why he could not prefer his claim for compensation before the Land Acquisition Officer in pursuance of the notice issued to him under Section 9. But when he himself had nothing to say in this regard except confessing that he did not make any claim, it would be incorrect for the Court to suo motu make out a case for him to explain the omission and that too, without any material worth the name on record as was done in this case. The learned Subordinate Judge concedes that the claimant gave out in his examination-in-chief that he did not make any claim for compensation before the Referring Officer but went on to explain what the claimant meant when he stated so, notwithstanding that there is absolutely no ambiguity in his statement that he did not make "any written statement claiming a particular amount before the Referring Officer before the passing of the award" as can be seen from the following observations extracted from his judgment:

"In the first place it should be remembered, as borne out by his testimony, that his brother Nukayya was representing him before the Referring Officer. So, it must be that when he made the aforesaid statement he meant that he never himself personally appeared before the Referring Officer and made the claim before him."

If really this is what the claimant meant when he said that he did not make any statement before the Referring Officer, nothing prevented him from stating that his brother, Nukayya, who was looking after the conduct of the affair made the necessary claim on his behalf but he did not say so either. It is therefore difficult to understand how the learned Judge could infer that the claimant meant that though he did not personally make a claim to the Land Acquisition Officer, his brother would or might have done so. There is further nothing on record to show that even Nookayya, the brother of the claimant, made the required claim for compensation before the Referring Officer. One other reason which appears to have weighed with the learned Judge in condoning the omission to

file the same before the Land Acquisition Officer and in concluding that the default was not wilful is that the respondent is a Government servant and was away at Visakhapatnam at about that time.

I fail to understand how any such surmises are warranted in this case when the claimant himself, who has had the opportunity of explaining the reason why he failed to make the claim before the Referring Officer, did not say a word about it in the course of his evidence. It is further difficult to believe that the respondent who is an educated person, did not find it convenient to forward his claim at least by post or through his brother who is said to have been looking after the affair even if it was not possible for him to go to the Referring Officer personally for delivering his claim. Yet another strange feature about this case is that the learned Subordinate Judge should have commented upon the failure of the appellant to make any suggestion to the claimant in the course of cross-examination that he had omitted to prefer his claim without sufficient reason as if the burden of proving that the respondent was not prevented by sufficient cause from making his claim to the Referring Officer lay on him.

Learned counsel for the respondent made a feeble attempt to support the aforesaid view of the Court below that it is for the Referring Officer to establish that the respondent had no sufficient reason to justify his omission to file the claim and that the omission was deliberate and wilful but this contention is devoid of all substance. It is for the respondent to satisfy the Court, by assigning proper and sufficient reasons, that he was prevented by sufficient cause from making the claim before the Land Acquisition Officer if he wants to avoid the penal consequences which would otherwise be visited on him under Section 25(2) of the Act.

It was held in *N. Annasatram v. Special Land Acquisition Officer*, AIR 1959 Andh Pra 139 that penal as the consequences are, the parties interested are supposed to be aware of the provisions of the statute and that it is not the duty of the Land Acquisition Officer to draw the attention of the claimants to the penal consequences that follow a non-statement of the claim, for the Act does not impose any such obligation upon the Officer. Even otherwise, the burden cannot be placed on the Referring Officer having regard to the provisions of Sections 102 and 106 of the Indian Evidence Act. Section 102 provides that the burden of proof in a suit or proceeding shall lie on that person who would fail if no evidence at all is given on either side. If, in the instant case, no evidence is adduc-

ed on either side to explain the reason why no claim for compensation was preferred before the Land Acquisition Officer pursuant to the notice under Section 9 of the Act, it is the claimant that fails and not the Referring Officer and so, the burden of proving sufficient cause justifying the omission lies on him. Likewise, the reason why he was unable to file his statement of claim before the Land Acquisition Officer is a fact which is especially within his knowledge and not that of the Referring Officer and for this reason also the onus is exclusively on the claimant as Section 106 of the Indian Evidence Act lays down that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. In the absence of even whisper in the evidence of the respondent to explain the reason why he could not file his statement of claim before the Land Acquisition Officer in response to the notice under Section 9 of the Act, it has to be said, as rightly contended for the appellant, that the Court below was not at all justified in condoning the omission and acting under Section 25(3) of the Act for the purpose of enhancing the compensation payable to him.

5. It was argued for the respondent that the Court below had discretion to condone the omission and award compensation exceeding the sum allowed by the Referring Officer but this discretion has to be exercised judiciously and on well-established principles and not arbitrarily or capriciously as was done in this case. The Court has certainly a duty to further the interest of justice but it cannot for this purpose, fill up lacunae by mere surmises when the party himself does not choose to take care of his interest as in this case. I am therefore satisfied that this is a case in which the respondent has omitted without sufficient cause to make a claim before the Land Acquisition Officer and that the Court below had therefore no power to award compensation to him in excess of what was granted by the Land Acquisition Officer.

6. In the view expressed above, it is unnecessary to go into the question as to whether the rate at which compensation was awarded by the Court below represents the market value of the acquired land or not.

7. In the result, therefore, the order of the Court below awarding compensation to the respondent in excess of what was allowed by the Land Acquisition Officer is set aside and the award made by the latter is confirmed. The Appeal is accordingly allowed but without costs in the circumstances of the case. The

cross objections also, which fail for the same reason, are dismissed without costs. GDR/D.V.C. Appeal allowed.

AIR 1969 ANDHRA PRADESH 127
(V 56 C 36)

P. JAGANMOHAN REDDY, C J AND MADHA REDDY, J

Thummalapalli Ramalingeswaraswamy and others, Petitioners v Commercial Tax Officer, Tadepalligudem and others, Respondents.

Writ Petns Nos 774 and 979 of 1965, and 1738 and 1980 of 1966 D/- 11-6-1968

Sales-tax — Andhra Pradesh General Sales Tax Act (6 of 1957), S. 5 — Assessment of dissolved firm is invalid.

There being no provision in the Andhra Pradesh General Sales Tax Act authorising assessment of dissolved firm, such assessment is illegal. AIR 1966 SC 1295, Foll. (Para 3)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 1295 (V 53)=17

STC 326, State of Punjab v.

Jullunder Vegetables Syndicate 2

S Venkata Reddy for O. Audinarayana Reddy (in W. P. Nos. 774 & 979 of 1965) and S Venkata Reddy (in W. P. Nos. 1738 & 1980 of 1966), for Petitioners; Venkatrama Reddy, for Principal Govt. Pleader, for Respondents (in all Petns.)

P. JAGANMOHAN REDDY C. J.: These writ petitions were filed by the different partners of a dissolved partnership firm, which came into existence for running a mill which was taken on lease from a Receiver appointed by the Sub Court, Narasapur in O S No 22 of 1946 for a period of two years viz. 11-8-1956 to 10-8-1958. It is the contention of the petitioners that on 14-8-1958, intimation of coming to an end of the partnership and its dissolution was given to the Commercial Tax Officer, Eluru. Notwithstanding this, it is alleged, an assessment was made on the dissolved firm for the years 1957-58 and 1958-59, under the Andhra Pradesh General Sales Tax Act and the Central Sales Tax Act. One of the partners filed an appeal against the assessment, but since no tax was paid, the appeal was dismissed. In so far as the other partners are concerned, they had no knowledge of the proceedings and they became aware of the assessment against the dissolved firm only when notices under the Revenue Recovery Act were issued to them.

2. Several contentions have been raised before us, namely, that as paddy had suffered tax, rice which has been converted from that paddy cannot be taxed

within the State under the Andhra Pradesh General Sales Tax Act, and since no tax is leviable under that Act, no tax would be leviable under the Central Sales Tax Act in respect of the same commodity sold in an inter-State sale transaction. The assessment is bad on that account. Secondly, there being no provision in the Andhra Pradesh Sales Tax Act or the Central Sales Tax Act for assessing a dissolved firm, no assessment can be made on the dissolved firm, and since the assessment order is invalid and can be treated as non est, no collection can be made thereunder. It is unnecessary to consider the first point, as the writ petition can be disposed of on the second point. Their Lordships of the Supreme Court in State of Punjab v Jullunder Vegetables Syndicate, 17 STC 326=(AIR 1966 SC 1295) have clearly held that where at the relevant time there was no provision expressly empowering the assessing authority to assess a dissolved firm in respect of its turnover before its dissolution the order made on a dissolved firm was bad. In that case, the firm was admittedly dissolved before the date of assessment on 3rd September 1955, and the assessment on the dissolved firm was held on that account to be bad. The reason for so holding was based on the principle that though under the partnership law, a firm is not a legal entity but only consists of individual partners for the time being, for tax law, income-tax as well as sales tax, it is a legal entity, and that on the dissolution of the firm, it ceases to be a legal entity, accordingly, unless there is a specific provision to assess a non-legal entity, such as a dissolved firm, the assessment would be bad. It was further held that there cannot be a distinction on principle between an assessment made on a firm under a proceeding initiated before its dissolution and one made in a proceeding started after the dissolution, and in either case, unless there is an express provision, no assessment can be made on a firm which has lost its character as an assessable entity.

3. In this case also there is no provision authorising assessment on a dissolved firm and consequently, the assessment is bad. Nor has there been an assessment on the individual partners, and therefore the contention that Rule 22 of the A. P. G. S. T. Rules is attracted, also fails. The result is that the Writ Petitions are allowed and the 1st respondent is restrained from collecting the tax under the order of assessment which is bad. There will be no order as to costs.

GGM/D.V.C.

Petitions allowed.

AIR 1969 ANDHRA PRADESH 128
(V 56 C 37)

VENKATESAM AND OBUL REDDI, JJ.

Manuri Rukminamma, Petitioner v. Manuri Ramakrishna Rao and others, Respondents

S C L P No 11 and Civil Misc Petn. No 3823 of 1968, D/- 22-3-1968

Civil P. C. (1908), S. 152 and O. 45 R. 13 — Powers of High Court pending appeal to Supreme Court — Decree can be amended pending application for leave to appeal.

The High Court has jurisdiction and power to pass a decree in terms of the compromise arrived at between the parties after it has rendered its judgment in appeal even though an application for leave to appeal to the Supreme Court is pending (1910) 5 Ind Cas 723 and (1914) 26 Ind Cas 946, Rel on; AIR 1929 Lah 427, Foll (Para 6)

Cases Referred: Chronological Paras (1929) AIR 1929 Lah 427 (V 16)=

30 Pun LR 258, Wazir Chand Trikha v Nathu Ram

(1914) 26 Ind Cas 946=18 Cal WN 772, Brahamdeo Singh v Harmanoge Singh

(1910) 5 Ind Cas 723=11 Cal LJ 155, Aghora Kumar Ganguli v Mohamed Musa

Y G Krishna Murthy, for Petitioner, N Seetharama Sastry, for Respondents (in both Petitions)

VENKATESAM, J.: As a doubt was entertained whether a decree in terms of the compromise could be passed after this Court has rendered its judgment in the appeal, and an application for leave to appeal to Supreme Court is pending, the learned counsel on both sides placed before us the following authorities on this question

2. In Aghora Kumar Ganguli v. I. Mohamed Musa, (1910) 5 Ind Cas 723 an appeal was heard by a Divisional Bench of the Calcutta High Court, and leave had been granted to the plaintiff to appeal to His Majesty-in-Council, and at that stage an application was filed for amendment of the decree in so far as it related to costs. One of the contentions raised was that inasmuch as leave had been granted to appeal to the Privy Council, it was not competent to the High Court to amend the decree Mookerjee and Teunon, JJ., held that that contention was groundless, and that O 45, R 13, C P C does not in any way curtail the powers of the High Court in respect of cases in which leave to appeal to the Privy Council had been granted. It was pointed out that Sec. 152 C P C expressly provides that an order for amendment may be made by the High Court at

any time, and that though leave had been granted the transcript record had not been sent to England. On those grounds it was held that the Court retained jurisdiction to amend the decree

3. The next decision is Brahamdeo Singh v Harmanoge Singh (1914) 26 Ind Cas 946 also of the Calcutta High Court. In that case, it was argued that the High Court became functus officio when an appeal to the Privy Council was lodged, and, therefore, the decree of the High Court could not be amended thereafter. That contention was rejected on the ground that Section 152 C P. C. empowered the Court to amend the decree at any time.

4. These two decisions were followed by a Bench of the Lahore High Court in Wazir Chand Trikha v. Nathu Ram, AIR 1929 Lah 427. The facts in that case were that the appellants obtained leave to appeal to the Privy Council but the transcript record had not been sent to England. At that stage, the parties settled their disputes by a compromise, and they applied to the High Court for amendment of the decree in accordance with the terms of the compromise Shadi Lal C. J., and Skemp, J., followed the above two cases and held that the application for the amendment of the decree even by reason of a compromise arrived at between the parties is competent, and, accordingly, passed a decree in terms of the compromise.

5. There is no rule of the Supreme Court brought to our notice preventing a compromise decree being passed in the circumstances of the instant case.

6. We respectfully follow the decision of the Lahore High Court and hold that this Court has jurisdiction and power to pass a decree in terms of the compromise, even though the application for leave to appeal is still pending consideration of this court, and leave has not yet been granted. As Sri Y G. Krishna Murthy, the learned counsel rightly submits, compared to the facts in the Lahore case, the principle laid down therein should apply a fortiori to the case before us, as in that case leave had been granted by the High Court, though the records had not been sent to the Privy Council, while in the instant case, leave has not yet been granted.

7. A decree will, therefore, issue in terms of the compromise in so far as it relates to the subject-matter of the appeal. It is needless to point out that this decree will be appended to the decree already passed in the appeal

V.B.B.

Petition granted.

AIR 1969 ANDHRA PRADESH 129

(V 56 C 38)

KRISHNA RAO J.

Koppadu Dharma Rao, Appellant v. Kovvuru Satyavathi, Respondent.

Second Appeal No. 796 of 1965, D/- 6-8-1968, against decree of Addl. Dist. J., Rajahmundry.

Transfer of Property Act (1882) S. 53-A — Scope — Transferee obtaining possession of property in pursuance of agreement executed by two vendors — Sale deed executed by one vendor alone in respect of his share only — Transferee conveying his absolute interest to assignee — Assignee obtaining possession of entire property — Plea of part performance not open to assignee against another vendor.

The transferee obtained possession of the property in pursuance of the agreement executed by the plaintiff and his brother. A sale deed was later on executed by plaintiff's brother alone in respect of his share only with a recital therein that a sale deed will be later on executed by plaintiff for his share. By another sale deed the transferee conveyed his absolute interest in the property to the defendant.

Held that defence of part performance was not available to the defendant as against the plaintiff even though he obtained possession of entire property including plaintiff's share from the original transferee. (Para 2)

On a reading of Section 53-A of the Transfer of Property Act, it is not enough if the defendant is somehow or other in possession of the property; it is an essential requisite that such possession must be obtained in pursuance of the agreement. Though it may be said that the original transferee got possession of the plaintiff's share in pursuance of the agreement, the defendant got possession of it only with the permission of the original transferee and not in pursuance of an assignment of the agreement of sale. The defendant would be entitled to rely upon his possession and raise the plea of part performance only if his possession is referable either to the original agreement of sale or to an assignment of the rights under the agreement of sale. Since the original transferee conveyed only his absolute interest and not whatever other rights he had in the property it was not open to the defendant to rely on the doctrine of part performance as a defence to the plaintiff's suit. (Para 2)

N. Ramamohan Rao, for Appellant; A. Gangadhara Rao, for Respondent.

JUDGMENT: The plaintiff, who is the appellant herein, filed the suit O. S. 56 of 1960 in the Court of the District Munsif, Amalapuram, for partition and for sepa-

rate possession of a half share in an extent of Ac. 2.75 cents described in the plaint schedule, for past profits of Rs. 572, for future profits from the date of suit and for delivery of possession, in the following circumstances.

An agreement of sale, Ex. B. 4 was executed with respect to the suit property of Ac. 2.75 cents on 8-1-1952 by two brothers, Venkata Reddi and Audinarayana Murty in favour of one Ramanna for a consideration of Rs. 720. Thereafter, a sale deed, Ex. B. 6 was executed on 15-10-56 in favour of Ramanna by Venkata Reddi alone reciting that as Audinarayana Murty's whereabouts were not known, a proper sale deed would be executed by him after he turns up and that a balance of Rs. 25 will be paid at the time of execution of such sale deed by Audinarayana Murty. But this contingency did not take place. Hence Ramanna sold away the property purchased by him under Exhibit B-6 in favour of the defendant by a sale deed, Ex. B-7 dated 9-4-1957. Subsequently, after Audinarayana Murty came back, he sold his half share of the property in favour of the plaintiff under Ex. A-1 dated 22-10-1958. In fact, the plaintiff wanted to purchase the entire Ac. 2.75 cents belonging to the family of Venkata Reddi as the plaintiff had already purchased the adjoining property belonging to the family of Venkata Reddi. But as Ramanna happened to purchase Venkata Reddi's share under Ex. B-6, the plaintiff purchased only the remaining half share belonging to Audinarayana Murty.

On the basis of the sale deed, Ex. A-1, the plaintiff filed the above suit for partition and recovery of his share. The defendant contested the suit alleging that by virtue of the sale deed, Ex. B-7 executed by Ramanna, he not only acquired the half share of Venkata Reddi, but also obtained possession of the half share belonging to Audinarayana and that he is entitled to resist the plaintiff's suit on the plea of part-performance which was available to his vendor Ramanna. Both the courts below upheld the defence of part-performance and dismissed the plaintiff's suit.

2. The main question for consideration in this Second Appeal, therefore, is whether the defendant is entitled to raise the defence of part-performance as against the plaintiff. There is no dispute that the plaintiff is a person who is claiming under his transferor, namely Audinarayana Murty. Hence if the plea of part-performance is available against Audinarayana Murty, it is equally available as against the plaintiff. It is also not disputed that the original transferee, Ramanna, would have been entitled to raise the defence of part-performance as

he was put in possession of the property under the agreement executed by Venkata Reddi and Audinarayana Murty. It is also not disputed that if the defendant is a person claiming through Ramanna, the original transferee, he is also entitled to raise the defence of part performance. But the main point in controversy is whether the defendant is a person claiming under the original transferee, Ramanna. It is also conceded before me that it is open to a purchaser to assign his rights under an agreement of sale and that in such a case, the assignee is a person claiming under the assignor. Hence the question which falls for consideration is whether the defendant is an assignee from Ramanna of the rights under the agreement of sale, Ex. B. 4 in so far as it related to the share of Audinarayana Murty.

The answer to this question turns upon the true interpretation of Exhibits B. 6 and B. 7. Ex. B. 6 is a sale deed executed by Venkata Reddi who is only one of the vendors under the agreement, Exhibit B. 4, and it is specifically stated therein that a sale deed would be later on executed by Audinarayana Murty for his share. This recital leads to the following conclusions, (i) that Venkata Reddi did not purport to sell the interest of Audinarayana Murty also as a manager of the family for a binding purpose; and (ii) that under Ex. B. 6, Ramanna acquired title only in respect of the half share of Venkata Reddi and nothing more. Coming to Ex. B. 7 dated 9-4-1957 executed by Ramanna in favour of the defendant, the question is what is the interest, which Ramanna conveyed to the defendant. A reading of the document shows that he has simply conveyed his full title in the entire property of Ac. 2.75 cents along with some other lands. When Ramanna conveyed the property under Ex. B. 7, he had admittedly a right to convey the half share belonging to Venkata Reddi which he purchased under Ex. B. 6. Ramanna had also the right to obtain a conveyance from Audinarayana Murty with respect to his half share in pursuance of the original agreement, Exhibit B. 4. In Ex. B. 7 Ramanna does not purport to convey whatever interest he had in the property, but he sold only an absolute title in the property with all the usual covenants of title etc. This clearly indicates that Ramanna conveyed only his absolute interest which he got under Ex. B. 6.

The learned counsel for the defendant-respondent argued that on a liberal interpretation of the sale deed, Ex. B. 7, it should be held that Ramanna must have conveyed his rights under the agreement also by implication. On the other hand, it is contended by the learned counsel

for the appellant-plaintiff that the terms of Ex. B. 7, are clear and unambiguous and that there is no room for holding that Ramanna must be deemed to have conveyed his rights under the agreement by way of implication under the sale deed, Ex. B. 7. I agree with the contention of the learned counsel for the appellant-plaintiff. It is a settled rule of construction that the intention of parties should be gathered only from the contents of the document and it is not permissible for the Court to add to the contents thereof except by way of interpretation. If the sale deed, Ex. B. 7 contained a general clause saying that Ramanna purported to have conveyed whatever other rights he had in the property, it may be possible to construe that he assigned his rights under the agreement, Ex. B. 4. In the absence of any such indication, it has to be held that under Ex. B. 7, Ramanna conveyed only the interest of Venkata Reddi which he obtained under the agreement of sale, Ex. B. 4.

It is however argued on behalf of the respondent-defendant that as Ramanna put him in possession of the entire property, including the share of Audinarayana Murty which he got under the agreement, Ex. B. 4, he is entitled to raise the defence of part-performance. But on a reading of Section 53-A of the Transfer of Property Act, it is not enough if the defendant is somehow or other in possession of the property; it is an essential requisite that such possession must be obtained in pursuance of the agreement. Though it may be said that Ramanna got possession in pursuance of the agreement, the defendant got possession of the property only with the permission of Ramanna but not in pursuance of an assignment of the agreement of sale, Ex. B. 4. The defendant would be entitled to rely upon his possession and raise the plea of part-performance only if his possession is referable either to the original agreement of sale or to an assignment of the rights under the agreement of sale. The contention of the learned counsel for the defendant-respondent is that he stands in the shoes of Ramanna in whose favour the original agreement stands. This contention is obviously untenable for the simple reason that the defendant cannot sue for the specific performance of the agreement as against Audinarayana Murty, for, there is no assignment of the agreement in favour of the defendant. It is therefore not open to the defendant to rely on the doctrine of part-performance as a defence to the plaintiff's suit.

3. The next question is what is the relief which the plaintiff-appellant is entitled to. The trial Court found under issue No. 7, that the plaintiff is entitled to

claim Rs. 572 towards past profits and that this finding is based on sufficient evidence in the case. I do not think there is any ground for interference with this finding, though the appellate court has not given its finding on this point. As regards future profits from the date of the plaint, the plaintiff can file an application for determining the same.

4. For the above reasons, I set aside the judgment of the lower appellate court and decree the plaintiff's suit as prayed for. This second appeal is accordingly allowed with costs throughout.

5. Leave granted.
GDR/D.V.C. Appeal allowed.

AIR 1969 ANDHRA PRADESH 131
(V 56 C 39)

GOPAL RAO EKBOTE, J.

Garuda Satyanarayana, Appellant v. Grandhi Venkatachalapathi Rao and another, Respondents.

Second Appeal No. 1031 of 1962, D/- 7-2-1967.

(A) Easements Act (1882), Ss. 13, 28, 30 — Right to light and air — Partition — Effect — Transferee entitled to easement necessary for enjoyment of transferred property unless partition deed contains specific agreement to curtail such right. (Para 10)

(B) T. P. Act (1882), S. 8 — Deed — Construction of document purporting to extinguish right, title or interest in property — Should be read as a whole — Intention of parties to be taken into account. (Para 12)

(C) Easements Act (1882), S. 4 — Easement is an interest in property — Dominant owner however has no right or title to servient tenement. (Para 11)

(D) Registration Act (1908), S. 17 — Scope — Section ought to be strictly construed — Benefit of doubt goes to party wanting document to go in evidence.

Section 17 being a disabling provision must receive a strict construction and unless a document is clearly brought within its purview its non-registration would be no bar to the admissibility of the document in evidence. If there is any doubt on the matter, the benefit of such doubt must obviously be given to the person who wants the Court to receive the document in evidence. The extinguishment of right or interest in immovable property may be effected by surrender or release or relinquishment of right or interest. It would of course not include a mere abandonment of rights or interest. The words 'which purports or

operates to create etc.' must be taken to mean 'which in themselves purport or operate to create'. These words refer to the immediate intention of the document and not to ultimate consequences or its collateral effects.

The distinction between a mere recital of a fact and something which in itself either creates or extinguishes a right or interest must always be borne in mind. (1896) ILR 20 Bom 704 and (1900) ILR 24 Bom 156 (PC) and AIR 1936 Lah 905, Rel. on. (Paras 13, 14, 16)

Cases Referred: Chronological Paras (1936) AIR 1936 Lah 905 (V 23)=38

Pun LR 1146. Sher Mohammad v. Mt. Mahbub Begum 118
(1932) AIR 1932 PC 55 (V 19)=ILR 11 Pat 272. Bageshwari Charan v. Jagannath Kuari 16
(1900) ILR 24 Bom 156=2 Bom LR 518 (PC), Sultan Nawaz Jung v. Rustomji N. Byramji Jiji Bhoy 17
(1896) ILR 20 Bom 704, Sultan Navaj Jung v. Rustomji Nanabhoy 17
M. S. R. Subrahmanyam, for C. V. Dikshitulu and M. Venkata Rao, for Appellant: Advocate General and D. Satyanarayana for, Respondent No. 1.

JUDGMENT: This second appeal is filed by the 2nd plaintiff, whose suit has been dismissed by both the Courts below.

2. The necessary facts in order to appreciate the contentions raised before me are that the 2nd plaintiff, who purchased the building from the official Receiver, the 1st plaintiff, instituted the present suit firstly for a declaration that the lane marked AKJH in the suit plan is joint; secondly, for a declaration that the landing space and a space of 2 feet beyond the landing space belonged to the 2nd plaintiff; and thirdly for a declaration that he has got right of easement to light and air to all the doors and windows and finally for a mandatory injunction directing the defendant to demolish the wall B H-2 raised unauthorisedly by him. It was alleged inter alia that G. Krishnamurthy was the owner of a house situated in the main road. Anakapalle described in the plan attached to the plaint. It was the ancestral property of the said Krishnamurthy and his brothers. In a partition, the said building fell to the share of G. Krishnamurthy. This Krishnamurthy was adjudged as insolvent in I. P. No. 5 of 1955 by the Subordinate Judge's Court, Visakhapatnam and his properties consequently were vested in the Official Receiver, the 1st plaintiff. The 1st plaintiff brought this building to sale. The second plaintiff purchased it for a sum of Rs. 18,000 on 5-4-1957. Possession of the building was given to the 2nd plaintiff on 5-4-1957 and a formal sale deed was executed and registered by the

Official Receiver in favour of the 2nd plaintiff on 5-4-1958. The 2nd plaintiff, after he got the title and possession of the said building, fixed iron meshes and swing doors to the doors and windows. It was alleged further that on 16-8-1957 the defendant put up a wall adjacent to the doors and windows and thus obstructed the light and air of the rooms whose doors and windows were open on the side where the wall was constructed. The plaintiffs therefore consequently claimed the reliefs mentioned above.

3. The defendant admitted that there was a partition between him and his brother G. Krishnamurthy and that G. Krishnamurthy was adjudged as insolvent. He also did not dispute the fact that the building was purchased by the 2nd plaintiff from the Official Receiver. He however pleaded that under Exhibit B-3 dated 26-3-1953, G. Krishnamurthy permitted the defendant to erect the wall the effect of which may be to close the doors and windows. He also disputed that the lane AKJH jointly belonged to the 2nd plaintiff and the defendant. He claimed exclusive ownership of the said lane.

4. Upon these pleadings, the trial Court framed appropriate issues and after recording the evidence adduced by the parties dismissed the plaintiffs' suit holding that the land AKJH belongs exclusively to the defendant, that Exhibit B-3 is true and genuine and is admissible in evidence. The 2nd plaintiff, who is the successor of the right, title and interest of G. Krishnamurthy cannot object now to the wall which was erected by the defendant.

5. The 2nd plaintiff therefore carried the matter in appeal. The same view was held by the appellate Court.

6. In this appeal, Mr. Subramanyam the learned counsel for the appellant argued that Exhibit B-3 is inadmissible in evidence because it is a document which falls within the ambit of Section 17(1)(b) of the Indian Registration Act & was compulsorily registrable and since it is not registered, it is not admissible in evidence.

7. Before I consider the correctness of this submission, it is necessary to keep in view Exhibit B-3. The relevant portion of Exhibit B-3 is as follows:—

"In our family partition brought about by Sri Thammine Sare Gari Gangaraju Garu, you got for your share the Bungalow and the other sheds therein and open site and I got for my share the building wherein Narayana Iyer as lessee had a coffee club and our brother Ramamurthy got to his share the two remaining shops adjoining my share. Our late father put up windows and doorways on the western and southern sides

of the building that fell to my share and also drainage canal on the southern side in the site allotted to your share. But in our partition it was agreed that I should remove it. But subsequent to our partitions, you asked for its removal from time to time. But I assured you that with a view not to cause any inconvenience to you, I gave 'my building on lease with an arrangement that the doors and windows of my building should not be opened. Even so, lest we should forget the above conditions of our partitions, I execute this agreement agreeing to the following condition. Whenever there is inconvenience to you on account of the doors and windows on the southern and western side of my building or when you build buildings, you can, in site, build wall adjoining the abovesaid walls and build buildings as you like and I shall not raise any objections."

8. A careful reading of this document would disclose that it refers to two things. Firstly it refers to the earlier partitions whereat it was agreed that the windows and door-ways on the western and southern sides of the building would be removed by G. Krishnamurthy; and secondly G. Krishnamurthy permitted the defendant to carry on constructions in his site and build wall adjoining the wall mentioned in the document and carry on the construction as he likes and that the said Krishnamurthy shall not raise any objection. It will thus be plain that the document by itself does not declare, create or extinguish any right, title or interest in any immovable property. It merely refers to the fact of an agreement at the time of partition that the doors and windows would be removed and grants necessary permission to the defendant to carry on construction in whatever manner he likes although the result of it may be the closure of the windows and the doorways. The question which has to be considered is whether this document requires registration under Section 17(1)(b) of the Registration Act.

9. Both the Courts below have found that Exhibit B-3 is true and genuine and was not a brought up document. In view of that finding, which is binding upon me, I have to only consider the admissibility of this document.

10. It need not be doubted that in a partition if the building is allotted to G. Krishnamurthy which had doors and windows overlooking the site allotted to the defendant, unless there is a stipulation to the contrary, if the existence of doors and windows were necessary for the enjoyment of the said building G. Krishnamurthy would continue to have right to air and light coming to his building through these door-ways

and the windows. An easement, apparent, continuous and necessary for enjoying the portion served from the transferor's land or from the other portion of the partitioned land will undoubtedly pass to the transferee or to the sharer to whose lot the property has fallen unless a contrary intention is expressed either in the instrument of transfer of partition or there has been a specific agreement in regard to that at the time of partition. Unless therefore, there was a stipulation to the contrary at the time of the partition, G. Krishnamurthy would be entitled to the same facilities of light and air that used to be attached to the building before it was partitioned. If Exhibit B-3 had not been there, the position would have been that G. Krishnamurthy could have enforced his right of easement to light and air against the defendant or anyone succeeding his title.

11. It cannot likewise be doubted that a right of easement over another man's property is an interest in the property, but it cannot be said that the dominant owner has a right or title to the servient tenement. A right to easement does create an interest in the servient tenement. Such right of easement to light is expressly treated as an immovable property in Section 2(6) of the Indian Registration Act. What must follow is that an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property is a compulsorily registrable document under Section 17(1)(b). What has therefore to be seen is whether Exhibit B-3 extinguishes the right of easement which has accrued to G. Krishnamurthy.

12. The question whether a particular document purports or operates to extinguish any right, title or interest in property must be determined on a construction of such document and in deciding that question one has to take the document as a whole and construe it with reference to its terms. Such construction is to be determined by grammar and logic, the primary tools of interpretation, aided of course by accompanying circumstances which throw light on the meaning and intention of the parties concerned. If on such construction, the document is held as purporting or operating to extinguish the right or interest in immovable property of the value of Rs 100 or upwards, it is compulsorily registerable under the said clause. On the other hand, if it does not purport or operate to extinguish any right or interest, it is evident that it would not be a compulsorily registerable document.

13. It must be remembered that being a disabling provision, Section 17 must receive the strict construction and unless a document is clearly brought within its purview its non-registration would be no bar to the admissibility of the document in evidence. If there is any doubt on the matter, the benefit of such doubt must obviously be given to the person who wants the Court to receive the document in evidence.

14. It cannot be in doubt that the extinguishment of right or interest in immovable property may be effected by surrender or release or relinquishment of right or interest. It would of course not include a mere abandonment of right or interest. The words 'which purports or operates to create etc.' must be taken to mean 'which in themselves purport or operate to create'. These words refer to the immediate intention of the document and not to ultimate consequences or its collateral effects

15. Carefully read, Exhibit B-3 does not, in my view, by itself extinguish any right or interest in immovable property. The document did not purport to operate to extinguish any right or interest in immovable property. The fact that the indirect or ultimate effect of the document as is evidence of certain facts might prevent the plaintiff from prosecuting the suit successfully did not require the deed to be registered. Exhibit B-3 was never intended by the parties to extinguish the interest in immovable property, that is to say, the right of easement by or under the said document. It merely refers to the earlier agreement between the parties at the time of partition that G. Krishnamurthy will have no right of easement in so far as these door-ways and the windows on the two sides of the building are concerned and that the said Krishnamurthy will not enforce any such right nor will object to the construction carried on by the defendant, the effect of which might be to close the windows and door-ways. I do not therefore think that Exhibit B-3 required registration.

16. The distinction between a mere recital of a fact and something which in itself either creates or extinguishes a right or interest must always be borne in mind. The document merely acknowledges the fact that G. Krishnamurthy had agreed at the time of partition not to have the right of easement although he would have been normally entitled to on partition by virtue of Section 13 of the Easements Act. There was therefore no necessity of registering Exhibit B-3. See *Bageshwari Charan v. Jagannath Kuari* AIR 1932 PC 55.

17. In *Sultan Nawaz Jung v. Rustomji Nanabhoy*, ILR 20 Bom 704 at p. 715 it was

held by a Bench of the Bombay High Court in a case where the facts were somewhat similar:

"The document therefore, does not create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immoveable property. Its effect may be to prevent such a right being acquired, but it does not of itself limit or extinguish any such right"

It is relevant to note that this decision went in appeal to the Privy Council and was confirmed: vide *Sultan Nawaz Jung v. Rustomji N. Byramji Jiji Bhoy*, ILR 24 Bom 156 (PC).

18. In *Sher Mohammad v. Mt. Mahbub Begum*, AIR 1936 Lah 905 in a similar case, it was held:—

"In our judgment this document does not require registration. It is an agreement by which Nazar Mohammad gave permission to Ghulam Mohammad, who obtained merely a vacant site, to build a house to be erected on that site in any manner he cared. It is difficult to hold that this is an agreement with respect to immoveable property or to find that the value of the immoveable property involved is more than Rs. 100. It was merely written to clear up the situation as regards building on the vacant site which had already fallen to the share of Ghulam Mohammad. We, therefore, hold that the document does not require registration while in our opinion it must be interpreted to mean that no easement would be acquired by Nazar Mohammad or his representatives-in-interest with respect to the existing openings in that portion of the house which fell to Nazar Mohammad."

19. I am therefore satisfied that Exhibit B-3 does not fall within the ambit of Section 17(1)(b) of the Registration Act and was not a compulsorily registerable document. The lower Courts were therefore right in admitting the document in evidence and relying upon it.

20. Once this document is held to be admissible in evidence, then the plaintiff has no case. Both the Courts below have on appreciation of evidence found that the lane AKJH belongs exclusively to the defendant. It was also found that Exhibit B-3 is a true and genuine document and since it is declared as admissible in evidence the effect of that document is that G. Krishnamurthy, the 2nd plaintiff's predecessor in-title, had agreed at the time of partition not to have the right of easement in regard to light and air through the door-ways and windows on both sides of the building. That apart, he gave permission to the defendant to construct the wall in any manner he liked although its effect may be to diminish the light and air coming through

the windows and door-ways. The 2nd plaintiff therefore could not have acquired any right of easement to his building and since he has no right of easement, his relief in reference to that was rightly rejected by the two Courts below.

21. It was then contended that the defendant had partition lists in his possession and he did not produce them and therefore adverse inference should be drawn from that. I do not think the argument can be effective. The lower Courts on appreciation of evidence have accepted the case of the defendant in so far as AKJH lane is concerned and I do not think I can re-appreciate the evidence sitting as I am in second appeal.

22. It was then contended that the 2nd plaintiff had no notice of Exhibit B-3. He was a bona fide purchaser without notice and therefore Exhibit B-3 is not binding upon him. This plea has not been raised in the plaint by the 2nd plaintiff. There was no issue and consequently there has been no finding of the Courts below on that question. I do not therefore think that I can permit the learned counsel to raise this question for the first time in the second appeal as it is not pure question of law.

23. Since no other argument was advanced, the result is, that the second appeal fails and is dismissed with costs. No leave.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 ANDHRA PRADESH 134
(V 56 C 40)

GOPALRAO EKBOTE J.

Ayyagari Samsamkaram and others,
Petitioners v. Inspector General of Registration and Stamps A. P. Hyderabad,
Respondent.

Writ Petn. No. 1219 of 1965 D/- 5-3-1968.

(A) Registration Act (1908), S. 69(bb) (Andhra) — Rules framed under, R. 210 — Rule is constitutionally valid — (Constitution of India, Arts. 14, 19).

Rule 210 as framed under S. 69(bb) (Andhra) of Registration Act is constitutionally valid. The Registration Act Stamp Act, the Transfer of Property Act and a standard book on conveyance are the minimum requirements of an efficient document writer and if they do not conform with these minimum requirements of an efficient document writer they cannot draft a document. A defectively drafted document has very serious repercussions. Rule prescribing the tests has not overstepped the limit of reasonableness. (Para 5)

DL/FL/B759/68

(B) Registration Act (1908), S. 69(bb) (Andhra) — Rules framed under, R. 199(4) — Rule takes liberal view of those document writers who are already working in the field — Rule does not impose unreasonable restriction on profession of document writers—(Constitution of India, Arts. 14, 19) (Para 6)

(C) Registration Act (1908), S. 69(bb) (Andhra) — Rules framed under, R. 203 — Fee prescribed for grant of licence to document writers and for renewal is not heavy and does not suffer from any vice. (Para 7)

(D) Registration Act (1908), S. 69 (as inserted by Andhra Pradesh Amendment) Act (5 of 1960) — State legislature is competent to amend the section in view of entry No. 6 of concurrent list — (Constitution of India Sch. 7 List III, Entry No. 6). (Para 4)

A Narasimha Rao, for Petitioners; 3rd Govt. Pleader, for Respondent.

ORDER: This is an application for the issue of a writ of mandamus directing the respondent to act according to law by ignoring the amendatory Act V of 1960 and the Rules made thereunder.

2. The relevant facts are: They contend that they are the document writers. They contend that Section 69(bb) of the Act is ultra vires and the rules made thereunder cannot be given effect to. Their further contention is that the petitioners have been carrying on their profession as Document Writers since a long time. They could not have, therefore been subjected to the tests which the rules prescribe. It is also contended that the rules are unreasonable.

3. The petition is resisted by the respondent. Section 69 of the Registration Act has been amended by the Indian Registration (Andhra Pradesh Amendment) Act V of 1960 on 16th February, 1960. The following clause has been added:

“(bb) Providing for the grant of licences to document writers, the revocation of such licences, the terms and conditions subject to which the authority by whom such licences shall be granted the exemption of any class of document writers from the licensing provisions and the conditions subject to which such exemption shall be granted and generally for all purposes connected with the writing of documents to be presented for registration.”

It is under this rule-making provision that some of the rules have been made. R. 210 prescribes the tests for the document writers. It states that they should pass the test in Registration Act, Transfer of Property Act, Stamp Act and a standard book on conveyance. Rule 199(4), however prescribes that any person who proves to the satisfaction of the

licensing authority that he is well conversant with the preparation of deeds of conveyance etc., and has been in continuous practice as a document writer in the territories of the State of Andhra Pradesh for a period of not less than 5 years immediately preceding the date on which these rules come into force subject, however, to the condition that he secures a pass in the “document writers’ licensing test” prescribed in Rule 210(1) within a period of two years from the date of issue of a licence to him. There is a proviso attached to this rule which says that

“The Inspector General of Registration and Stamps may in appropriate cases and on the recommendation of the District Registrar exempt any person or class of persons from the provisions of this rule”. Rule 203 prescribes the fees categorising these document writers into three classes and prescribes the fee of Rs. 50, Rs. 75, and Rs. 100 for the grant of the first licence and Rs. 10, Rs. 15 and Rs. 20 for renewal in the second or any part of the succeeding calendar year. Rule 207 and Rule 214 relate to the maintenance of registration and supervision.

4. In so far as the first contention is concerned that the State Legislature could not have amended Section 69, it was realised by the learned advocate for the petitioners that in view of entry No. 6 of the concurrent list, the State Legislature has necessary powers to make amendments in the Act. Therefore, he has not seriously pursued this point further. It is not, therefore, necessary to consider whether entry No. 26 is also attracted to such a case.

5. The next question that the tests prescribed are unreasonable has very little substance. The document writers ought to know that the Registration Act and Stamp Act and the Transfer of Property Act and a standard book on conveyance are the minimum requirements of an efficient document writer and if they do not conform with these minimum requirements of an efficient document writer I fail to see how they could be able to draft a document. No one can draft a document unless he has the necessary minimum knowledge of these four Acts. A defectively drafted document has very serious repercussions. I do not, therefore, think that Rule 210 in prescribing the tests has overstepped the limit of reasonableness. In fact, apart from these things the up to date knowledge of case law on these laws also may be necessary for these document writers although it is not prescribed. I am not, therefore, impressed with the argument that Rule 210 being unreasonable should be struck down. I am also doubtful on the ground of reasonableness whether Rule 210 could be struck down.

6. It was then contended that Rule 199 also is not reasonable and affect those who are already in the field. Rule 199(4) gives protection to such people only if they are conversant with the order of document writing and they satisfy the licensing authority and give an undertaking that they would complete the "document writers' licensing test" within two years from the date of issue of a licence to them. There is also a provision that the Inspector General of Stamps on the recommendation of the District Registrar exempt any person or class of persons from the provisions of that rule. I, therefore, think that Rule 199 takes a liberal view of those who are already working in the field. If they claim that they are conversant with all these laws, they would certainly be exempted. They may, therefore, approach the authorities concerned and seek exemption. I do not therefore, consider that Rule 199 in any manner imposes an unreasonable restriction upon those who are carrying on the profession of document writers.

7. There is no force also in the contention that the fees prescribed in Rule 203 is a tax and not a fee. It cannot be doubted that in order to regulate this profession and to carry out the supervision some standard would be required and expenditure is involved. The fees prescribed for the grant of licence and for renewal cannot by any stretch of argument be said to be heavy. No data was furnished to say that the fee prescribed is out of proportion with the expenses which are involved in maintaining the registers and supervising the document writers' work. Rule 203, therefore, cannot be said to suffer from any vice.

8. Since no other argument was advanced the petition must fail and is hereby dismissed. In the circumstances of the case I make no order as to costs.
SSG/D.V.C Petition dismissed.

AIR 1969 ANDHRA PRADESH 136
(V 56 C 41)

P. JAGANMOHAN REDDY C. J. AND
CHINNAPPA REDDY, J.

Movva Butchamma, Appellant v. Movva Venkateswararao & others, Respondents.

Letters Patent Appeal No 76 of 1964, D/- 29-8-1967, against decree of High Court in S. A. No 239 of 1960, D/- 21-8-1963

Specific Relief Act (1877), S. 55 — Suit for removal of obstruction to public street and for restraining defendant from interfering with plaintiff's right to use street for passage of cattle, carts etc. — Permanent injunction restraining defen-

dant from interfering with plaintiff's right to use street granted but mandatory injunction refused on ground that notwithstanding obstruction placed by plaintiff street was wide enough to afford passage to cattle and carts and that plaintiff had not proved special damage — Held, right of public to pass and repass extended over every inch of street and plaintiff was entitled to mandatory injunction for removal of obstructions without proof of special damage: S. A. No. 239 of 1960 D/- 21-8-1963 (AP), Reversed; AIR 1928 Mad 810 and AIR 1929 Lah 73, Disting; Case Law Ref.

(Paras 1, 5)

Cases Referred: Chronological Paras (1949) AIR 1949 Mad 634 (V 36)=1949-1

Mad LJ 56, K. Subbamma v. L.

Narayanamurthi 7

(1939) AIR 1939 Mad 691 (V 26)=1939-1

Mad LJ 392, Munuswami Chetty v.

Kuppusami Chetty 10

(1935) AIR 1935 Lah 196 (V 22)=ILR

16 Lah 517, Municipal Committee

Delhi v. Mohammad Ibrahim 9

(1933) AIR 1933 Cal 884 (V 20)=ILR

60 Cal 1003, Mandakinee Debi v.

Basantakumari Debi 8, 9

(1931) AIR 1931 Nag 189 (V 18)=27

Nag LR 213, Sheonarayan v.

Dindayal 9

(1929) AIR 1929 Lah 73 (V 16)=109

Ind Cas 568 Bhagwan Singh v. S.

Hari Singh 6, 11

(1928) AIR 1928 Mad 810 (V 15)=108

Ind Cas 69, Krishnan Pillai v.

Kilasathammal 6, 11

(1925) AIR 1925 PC 36 (V 12)=ILR

47 All 151, Manzur Hasan v.

Muhammad Zaman 8, 9, 10

(1877) ILR 2 Bom 457, Satku Kadir v.

Ibrahim Aga 8, 9

K. Suryanarayana and Y. B. Tata Rao, for Appellant; Smt. J. Sitamahalaaxmi for J. Eswara Prasad, for Respondents.

CHINNAPPA REDDY, J.: The Appellant in this appeal under CL 15 of the Letters Patent filed the suit out of which the appeal arises for a mandatory injunction for removal of certain obstructions placed on plots marked 2(a) and 3(a) in the plan and for a permanent injunction restraining the defendants from interfering in any manner with the right of the plaintiff to use the street A B C D for the passage of men, cattle and carts for reaching plot No. 1 belonging to her. The suit was based on the allegations that A B C D was a public street that the plots marked 2(a) and 3(a) were parts of the public street and that the defendants had encroached upon plots 2(a) and 3(a) and caused certain obstructions to be placed therein which interfered with the right of the plaintiff to the free use of the street for the passage of men, cattle and carts. Both the lower Courts found the facts substantially as alleged by the

plaintiff, namely, that A B C D was a public street, that plots 2(a) and 3(a) were parts of the public street and that the plaintiff had a right to use the street for the passage of her men, cattle and carts. On those findings both the lower Courts as well as our learned brother Kumarayya J. were clearly of the opinion that the plaintiff was entitled to a permanent injunction restraining the defendant from interfering with her right to use the street for the passage of men, cattle and carts. The prayer of the plaintiff for a mandatory injunction for removal of the obstructions placed upon plots 2(a) and 3(a), though granted by the trial Court, was rejected by the lower appellate Court on the ground that notwithstanding the obstructions placed in plots 2(a) and 3(a), the street was wide enough to afford a passage to men, cattle and carts and the plaintiff had not established any special damage entitling her to relief by way of a mandatory injunction. Our learned brother Kumarayya J. agreed with the view of the lower appellate Court that the plaintiff was not entitled to the relief of mandatory injunction.

2. Mr. K. Suryanarayana the learned Counsel for the appellant contended that on the findings arrived at by the lower Courts a mandatory injunction directing the defendants to remove the obstructions should have been granted and the refusal to give this relief of mandatory injunction is inconsistent with the grant of the relief of permanent injunction granted by all the Courts. We find force in the contentions of Mr. Suryanarayana.

3. Before dealing with the contentions of Mr. Suryanarayana we may observe that our learned brother Kumarayya J. repelled a contention that the suit was not maintainable for non-compliance with provisions of Order 1 Rule 6 and Section 91, C. P. C. Kumarayya, J. observed:

"The English rule requiring such proof (i.e., proof of special damage) is not applicable to India. Hence a person can maintain a suit for establishing a public right and for removal of an obstruction which constituted a public nuisance without the sanction of the Advocate General under Section 91, C. P. C. and without proof of special damage".

Our learned brother further observed that proof of special damage was wholly unnecessary in the case of suits for removal of obstruction to village pathways, which he distinguished from public highways. Kumarayya J. held that village pathways being limited to a mere section of the public and not to the public at large, there was no public nuisance and the English doctrine that there can be no private action for a public wrong was wholly inapplicable to such cases. The learned Counsel for the respondent did

not contend before us that the suit was not maintainable.

4. We have already stated earlier that the lower Courts have concurrently found that A B C D is a public street. Explaining the incidents of a public right of way Peacock in his "Law relating to Easements in British India" states: "As already explained, a public right of way, being unconnected with a dominant tenement, is a right in gross and clearly distinguishable from an easement. It is exercised over what is called a 'Highway'" The extent and mode of enjoyment of a highway must be measured by the user as proved, or by the terms of the deed when the right is so granted, but in the absence of evidence to the contrary the public are entitled to the whole width of the way without any such restriction as may be imposed by the owner of the servient tenement in the case of a prescriptive private way. In *Regina v. United Kingdom Electric Telegraph Co., Martin B.*, laid down the proposition which was accepted by the Court on a motion for a new trial: "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences one on each side, the right of passage or way, *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and that public are entitled to the use of the entire of it as the highway and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers".

5. It is therefore clear that once a highway, the whole and every part of it is a highway and the public right of way extends over every inch of the highway. A B C D having been found to be a public street the defendant was not entitled to place any obstructions in plots 2(a) and 3(a) which were part of the public street. The defendant cannot be heard to say that the obstructions placed by him cannot be removed so long as he has left a passage of sufficient width to enable men, cattle and carts to go. As we have said, the right of the public to pass and re-pass extends over every inch of the street and the defendant cannot in any manner restrict the right and compel the plaintiff to confine herself to a part of the street of the choice of the defendant. The plaintiff is clearly entitled to the mandatory injunction for removal of obstruction and as rightly pointed out by Mr. Suryanarayana the permanent injunction granted by the lower Courts cannot have its full effect unless the mandatory injunction is granted too.

6. Kumarayya J. was of the view that the plaintiff was not entitled to the mandatory injunction as she had not proved

any substantial damage. According to our learned brother despite the obstructions placed upon the street by the defendant, the street was broad enough for convenient exercise of the right of the plaintiffs. In his view in the case of a village pathway which he distinguished from a highway proof of special damage was necessary before a mandatory injunction could be granted. Reliance was placed upon *Bhagwan Singh v. S Hari Singh*, AIR 1929 Lah 73 and *Krishnan Pillai v. Kilasathammal*, AIR 1928 Mad 810.

7. We have earlier pointed out that while dealing with question of maintainability of the suit, *Kumarayya J.* had held that proof of special damage was unnecessary, whether the suit was for removal of an obstruction which constituted a public nuisance or for removal of obstruction to a village pathway. Having arrived at that conclusion we are unable to see why in the case of obstruction to a village pathway a mandatory injunction should be refused on the ground of absence of proof of substantial damage. In *K. Subbamma v. L. Narayanamurthi*, 1949-1 Mad LJ 56=(AIR 1949 Mad 634) *Satyanarayana Rao J.* held that a suit for removal of obstruction to a pathway was maintainable without proof of special damage whether the pathway was a highway or a village pathway which could not be 'raised to a dignity of a public highway'. A decree for a mandatory injunction granted by the lower Court was confirmed by the High Court.

8. In *Mandakinee Debi v. Basantakumari Debi*, AIR 1933 Cal 884 a passage, which was a public way, leading to the plaintiffs' house was reduced from 3 feet 6 inches to 2 feet 8 inches in width by the erection of a wall by the defendant. The trial Court had decreed a suit for removal of the encroachment but the lower appellate Court dismissed the suit on the ground that passage of sufficient width was left for the plaintiff. The High Court in second appeal restored the decree of the trial Court observing:

"The Court of first instance rightly found that the plaintiff's right had been affected by the encroachment, as a member of the public she is entitled to the use of the full width of the passage way; and owing to the situation of her house she is peculiarly affected by the encroachment. Therefore though this is not a case in which Order 1, R. 8 is applicable, the plaintiff has every right to claim relief, even if it be held (and this had been strenuously urged for the respondent) that no action can be maintained by a member of the public for obstruction of a highway without proof of special damage. That no proof of special damage is necessary appears to be established on the authority of the case of *Manzur Hasan*

v. Muhammad Zaman, AIR 1925 PC 36 in which their Lordships of the Privy Council overruled the contrary view held in the case of *Satku Kadir v. Ibrahim Aga*, (1877) ILR 2 Bom 457."

9. In *Municipal Committee, Delhi v. Mohammad Ibrahim*, AIR 1935 Lah 193 the Municipal Committee had erected certain structures on a public street in front of the plaintiffs' house. The plaintiff asked for demolition of the structures. The defence was that no special injury was caused to the plaintiff. The Lahore High Court confirmed the decree granting a mandatory injunction observing:

"The question of special damages is very simple. In such cases it is not necessary to prove that any special injury has taken place before a person wronged by the Committee can take action against it. In AIR 1931 Nag 189 it was held that where a plaintiff complains of an invasion of his rights as owner of property the beneficial enjoyment of which is adversely affected, he can sue for the removal of the obstruction of a public way without showing special injury to himself beyond that suffered by any member of the public".

Reference was also made to AIR 1933 Cal 884 and *Manzur Hasan v. Muhammad Zaman*, ILR 47 All 151=(AIR 1925 PC 36). In ILR 47 All 151=(AIR 1925 PC 36), the Privy Council dealt with the case of a right to go in procession without interference but discussed generally the right to file a suit for declaration of such a right without proof of special damage. Their Lordships considered the case of *Satku Kadir v. Ibrahim Aga*, (1877) ILR 2 Bom 457 where the English rule, that the plaintiffs could not maintain a suit in respect of an obstruction to a highway unless they proved some damage to themselves personally in addition to the general inconvenience occasioned to the public has been adopted. Their Lordships pointed out that the judgment in the Bombay case proceeded entirely on English authorities which lay down the difference between proceedings by indictment and by civil action, that such a way of deciding the case was inadmissible and that the distinction between an indictment and action in regard to what is done on the highway is a distinction peculiar to English Law and ought not to be applied in India.

10. In *Munusami Chetty v. P. Kuppusami Chetty*, 1939-1 Mad LJ 392=(AIR 1939 Mad 691) the plaintiff sued for a declaration that there was a public path running between the house of the plaintiff and the house of the defendants and for an injunction requiring the defendant to remove the wall obstructing the alleged path. *Wadsworth J.* held that

proof of special damage was unnecessary and decreed the suit. It was suggested before him that the rule laid down by the Judicial Committee in ILR 47 All 151= (AIR 1925 PC 36) referred only to procession cases and not to other classes of cases. Wadsworth J. repelled the suggestion and observed:

"as I read the judgment of the Privy Council, however, no such distinction is contemplated by their Lordships. They deal generally with the whole class of cases governing the rights of the public to use a public way It seems to me that the decision of the Privy Council in ILR 47 All 151=(AIR 1925 PC 36) must be taken to have established that the English Rule requiring proof of special damage in case in which a member of the public prays for removal of an obstruction to a public way does not apply to India".

11. The two cases relied upon by the learned Counsel for the respondent are easily distinguishable. In AIR 1928 Mad 810 the defendant who owned properties on either side of a lane, a common property of both the plaintiff and the defendant, put up a sort of roof or covering for the lane. The passage itself was not obstructed and could be used to its fullest extent without any hindrance. Srinivasa Iyyengar J. held that balance of convenience did not require that a mandatory injunction should be granted as the plaintiff had not suffered any substantial damage. It will be observed that it was a case of a joint lane owned by both the plaintiff and the defendant and there was no question of any obstruction to public pathway. The question really related to the mode of common enjoyment of joint private property and the fact that the defendant could continue to exercise his right of passage over such property without hindrance was taken into consideration in refusing the relief of mandatory injunction. This case has no application to cases like the present where obstructions are caused to public highways. AIR 1929 Lah 73 was also a case where the constructions were on joint shamilat land and no question of obstruction to a public pathway arose.

12. As a result of the above discussion we hold that the plaintiff was entitled to a mandatory injunction for removal of the obstructions placed on plots 2(a) and 3(a). We accordingly allow the appeal and restore the decree of the learned District Munsif of Muzvid in O. S. No. 96/1955. The appellant is entitled to the costs of this appeal.

JHS/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 139
(V 56 C 42)

CHINNAPPA REDDY, J.

Shah Hastimal Heeraji, Kurnool, Petitioner v. Assistant Collector, Central Excise, Anantapur and others, Respondents.

Writ Petn. No. 260 of 1965 D/-24-1-1968.

Sea Customs Act (1878), Ss. 167(8) and 178-A — Imports (Control) Order No. 17/55, (dated 7-12-55) — Person found in possession of imported watches — Onus to show that they are smuggled lies on the Department — S. 178A does not apply.

The importation of watches is not prohibited but only is restricted. There is no prohibition against the free purchase and sale of imported watches within the country, nor is mere possession made an offence. From the mere failure of the person in possession of foreign-made watches to properly account for such possession, it cannot be legitimately inferred that the watches have been imported in contravention of the Imports (Control) Order. The burden of proving that they were smuggled lies on the Department since the watches are not amongst the articles enumerated under S. 178A. (Para 1)

B. C. Jain, for Petitioner; E. Manohar, for Standing Counsel, for Central Government, for Respondents.

ORDER: On 22-7-1961, 22 new wrist watches were seized by the Deputy Superintendent of Central Excise from the residence of the petitioner at Kurnool. They were found in a tin hidden behind a bag containing charcoal. As the wrist watches were new and as there was a restriction on the import of wrist watches, the Central Excise Authorities, being of the prima facie view that the watches had been imported into the country in contravention of the Government of India, Ministry of Commerce and Industry Imports (Control) Order No. 17/55 dated 7-12-1955, called upon the petitioner to show cause why the watches should not be confiscated in accordance with the provisions of Section 167 (8) of the Sea Customs Act, 1878. The petitioner alleged that he purchased these watches from some merchants at Madras and in support of his statement produced certain bills. The Central Excise Authorities were satisfied that the purchase of 12 out of 22 watches had been satisfactorily established. Regarding the remaining ten watches, it was found that the dealer who was supposed to have sold them did not exist in fact. Thereupon the Authorities brought this fact to the notice of

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the petitioner and gave him further opportunity to offer his explanation. The petitioner's further explanation was found to be unsatisfactory and the Assistant Collector by his order dated 18-6-1962 directed confiscation of the ten watches. The appeal preferred to the Collector of Central Excise, Hyderabad and the Revision preferred to the Central Board of Revenue having proved fruitless, the petitioner has come up with this Application for the issue of a writ of certiorari. The principal submission of Mr. Jain, learned Advocate for the petitioner, is that the burden of proving that the watches were imported in contravention of the Imports Control Order was on the Department and the fact that the petitioner gave an unsatisfactory or even a false explanation for his possession did not establish that the goods were imported in contravention of the order. He submits that the presumption under Section 178A does not apply since the watches are not among the articles mentioned therein. The importation of watches is not prohibited, but is only restricted. There is no prohibition against the free purchase and sale of imported watches within the country even if they be imported; nor is mere possession of imported watches made an offence. In these circumstances, it is clear that from the mere failure of the person in possession of foreign-made watches to properly account for such possession, it cannot be legitimately inferred that the watches have been imported in contravention of the Imports (Control) Order. The Writ Petition is therefore allowed and the Order of the Assistant Collector dated 18-6-1962 as affirmed by the Collector of Central Excise and the Central Board of Revenue is hereby quashed. The Petitioner is entitled to his costs. Advocate's fee Rs 100/-.

V.B.B

Petition allowed.

AIR 1969 ANDHRA PRADESH 140

(V 56 C 43)

NARASIMHAM, J.

Income Tax Officer, Companies Circle, Hyderabad, Petitioner v. Vemulapalli & Sons (P) Ltd. Suryapat and others, Respondents.

Company Petn. No. 7 of 1965, D/- 24-4-1967.

(A) Companies Act (1956), S. 559 (1) — Application under — Income-tax Officer could maintain application as creditor.

The application contemplated under S. 559(1) of the Act is to be by the liquidator of the Company or by any other person who appears to the Court to be

interested. An income-tax officer could maintain the application as creditor because a creditor is a person interested. (1912) 1 Ch D 410, Foll. (Para 8)

(B) Companies Act (1956), S. 559 (1) — Application should be made within two years of date of dissolution — Court can pass order at any time thereafter. (1941) 2 All ER 466, Foll. (Para 10)

(C) Companies Act (1956), S. 559 (1) — Setting aside dissolution — Fraud can be a ground — But fraud must be strictly proved.

One of the accepted grounds for setting aside the dissolution is a fraud. But the fraud must be strictly proved. That is the accepted position though the section itself does not say so. (1878) 8 Ch D 273 and (1879) 11 Ch D 140 and (1891) 2 Ch D 73, Foll. (Para 13)

Cases Referred: Chronological Paras (1941) (1941) 2 All ER 466=110

LJ Ch 204, In re, Scad Ltd. 10

(1912) (1912) 1 Ch D 410=81 LJ Ch

446, In re, Spottiswoode, Dipcon and Hunting Ltd. 8

(1891) 1891-2 Ch D 73=60 LJ Ch 502,

Coxen v. Gorst 13

(1879) 11 Ch D 140=40 LT 666, In re,

London and Caledonian Marine Insurance Co. 13

(1878) 8 Ch D 273=47 LJ Ch 591,

In re, Pinto Silver Mining Co. 13

C. Kondiah, Standing Counsel, for Petitioner; T. Ramachandra Rao and T. V. G. Ramoji Bhanoo, for Respondents Nos. 4 to 6.

ORDER: This is a petition under Section 559 of the Companies Act 1956 (Act I of 1956) seeking a declaration that the dissolution of the company, M/s. Vemulapalli & Sons, (Private) Ltd., Suryapat, Nalgonda, was void.

2. The petitioner is the Income-tax Officer, Companies Circle Hyderabad. The material facts alleged are these: M/s. Vemulapalli & Sons (Private) Ltd. Suryapat, hereinafter to be referred to as the Company, was a private company, which was formed on 25-9-1956 with the object of doing business in iron ore. The shareholders of the company were Sri Vemulapalli Bhaskara Rao, his wife Smt. Sugunamma and their sons Vageshwar Rao & Gopal Rao, each of them holding 50 shares of Rs. 100 each. The total paid-up capital was Rs. 20,000. The first year's accounts were closed on 31-12-1957. The Company was an assessee and as such filed a return of its income for the assessment year 1958-59 on 27-2-1959. Under Section 23-B of the Income-tax Act, 1922 a provisional assessment was made on the basis of the return and assessee made payments aggregating Rs. 6,395-15. The regular assessment for the year 1958-59 was, however, made on 20-3-1963 on the best judgment under Section 23(4) of the

Act on an income of Rs. 80,000 as against the returned income of Rs. 13,753 by the assessee company. A demand was made for the balance of the tax payable on 11-4-1963. But meanwhile it transpired that at a special meeting of the shareholders, a resolution was passed for the voluntary winding up of the company on 16-5-1960. Bhaskara Rao was appointed as Liquidator to wind up the affairs of the Company. The Registrar of Companies intimated the Income-tax Officer, Nalgonda, about the Company being voluntarily liquidated and V. Bhaskara Rao having been appointed a Liquidator. The said intimation was addressed to the Income-tax Officer, Nalgonda by a letter dated 17-12-1960 which is said to have reached the concerned Income-tax Officer on 23-1-1961. The said Bhaskara Rao filed Income-tax returns for the assessment years 1959-60 and 1960-61. For 1959-60 the return pertained to the period prior to the resolution for the winding up of the company, and for the year 1960-61 he filed as Liquidator. The return for 1959-60 showed a loss and in the return 1960-61 he stated that the company did not carry on any mining operations but merely purchased and sold iron ore and that there was a net profit of Rs. 72. Thereafter he filed a final statement of account of the winding up before the Registrar of Companies under Section 509. The Registrar on receiving the account registered it on 15-3-1963. Under Section 509(5) as it read before the amendment of 1965, the company shall be deemed to be dissolved on the expiration of three months from the date of the Registrar registering the account. So, the dissolution came into effect from 15-6-1963.

3. This petition was filed on 14-6-1965 alleging that the company acted fraudulently. The relevant allegations are that with a view to defraud the creditors in general and the applicant-department, i.e., the Income-tax Department in particular, the company went into voluntary liquidation. The Liquidator or the directors had not made any provision for income-tax demand against the company. In para 5 of the petition it is alleged that the evasive and non-co-operative attitude of the Liquidator in respect of the pending assessments and in expediting the steps to have the company dissolved established the mala fide and fraudulent intention. It was further alleged that the Department was deliberately kept in the dark about the proceedings for liquidation. The liquidation proceedings went on behind the back of the department. Unless the dissolution was declared void, the Department stood to suffer hardship and irreparable loss.

4. Bhaskara Rao, the Liquidator, filed a counter-affidavit that the company was

registered on 27-9-1956 as a private limited company and that its main object was to purchase, take on lease or otherwise acquire mines or mining rights and to carry on the business of buying and selling minerals, etc. Within a year of the formation of the company, complications arose not only on account of the litigation regarding the mines, but also by reason of the establishment of the State Trading Corporation. The financial condition of the company began to deteriorate and there was no prospect of any success in the venture for which the company was formed. It was therefore decided at the meetings of the shareholders and the creditors of the company to wind up the company voluntarily and he was appointed as Liquidator. On the date of the winding up, viz. 16-5-1960 he and respondents 4 to 6 were the creditors of the company to the extent of Rs. 70,337-37. The Company had no assets except certain debts due to it of the extent of Rs. 58,558-04. The company had been running at a loss during the accounting years ending with 31-12-1958 and 31-12-1959. As regards the assessment year 1958-59, the company returned a profit of Rs. 13,754 and a tax of Rs. 6,395-15 was paid on the basis of the provisional assessment, under Section 23-B of the Act. The full amount of the tax on the actual income of the company for the assessment year 1958-59 having been paid, it was impossible for the Liquidator to imagine that a fantastic demand of tax would be raised several years later by the Income-tax Department. The Liquidation proceedings took nearly three years to be completed. The notices and the notifications required by the Companies Act to be published in the Official Gazette were duly published. He repudiated the allegations of mala fides and fraudulent intention on the part of the Liquidator or the directors in winding up the company. He questioned the locus standi of the department to present the petition as a creditor. He denied the allegation that the liquidation proceedings went on behind the back of the department. He further questioned the petitioner's right to relief under Section 559 (1) of the Companies Act as more than two years had elapsed from the date of the dissolution.

5. Respondents 3 to 6 adopted the counter of Bhaskara Rao. The 2nd respondent, the Registrar of Companies filed an affidavit stating that the date of incorporation of the company was 17-12-1956. The shareholders of the company were respondents 3 to 6, each holding 50 shares of Rs. 100 each. The paid up capital was Rs. 20,000. The company was taken into creditor's voluntary winding up and a special resolution was passed on 15-5-1960. The record of the company

disclosed that the resolution was passed by the creditors on 16-5-1960. The notice of the appointment of the Liquidator was published in the Andhra Pradesh Gazette dated 16-5-1960. The company filed the statutory returns, viz., special resolution for voluntary winding up, notice of resolution passed by creditors and the notice by the Liquidator of his appointment under Sections 192, 501 and 516 respectively of the Act with the respondent. The department was not shown as a creditor. The fact of taking the company into liquidation was duly intimated to the Income-tax Officer, Nalgonda, by the Registrar of Companies by his letter dated 17-12-1960. The final return with the statement of account filed by the Liquidator was registered on 15-3-1963 and the company was considered to have been dissolved on 15-6-1963 under Section 509 (5) of the Act.

6. The Income-tax Officer filed a reply putting the Liquidator to proof of his allegations and affirming the allegations made in the petition.

7. The points, which arise for consideration, in the application are:

(1) Whether the Department is a creditor and the application is maintainable?

(2) Whether the application for relief under Section 559(1) of the Act is barred by time?

(3) Whether the company was wound up to defraud the creditors in general and the applicant-department in particular?

(4) Whether the Directors have not made any provision for income-tax demand against the company before the Company went into voluntary liquidation?

(5) Whether the Liquidator was evasive and non-co-operative in respect of the pending assessment and acted with a mala fide and fraudulent intention?

(6) Whether the department was deliberately kept in the dark about the liquidation proceedings?

(7) Whether the Department Petitioner is entitled to have the dissolution declared void under Section 559(1) of the Act?

8. Point 1: The application contemplated under Section 559(1) of the Act is to be by the liquidator of the company or by any other person who appears to the Court to be interested. The Income-tax Officer, Companies Circle, is the petitioner. He could maintain the applications as creditor, because a creditor is certainly a person interested. Vide *In re Spotiswoode, Dixon & Hunting Ltd.*, (1912) 1 Ch D 410. The regular assessment order for the assessment year 1958-59 was passed on 20-3-1963. The application was made on 14-6-1965. The application is maintainable.

9. Point 2: The learned counsel relies on the language of the section in support

of the contention that the Court can give relief under Section 559(1) by way of declaring the dissolution to be void only within two years of the date of dissolution and not thereafter. The words of the section may be appropriately read here:

"559. (1) Where a company has been dissolved, whether in pursuance of this part of Section 394 or otherwise, the Court may at any time within two years of the date of the dissolution, on application by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void; and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

10. The section has been interpreted to mean that only the application should be made within two years and that the Court could pass an order at any time thereafter, vide *In re Scad Ltd.*, (1941) 2 All ER 466, 467. In that case the corresponding section of the English Companies Act (Section 294) came up for interpretation. The reasoning of the learned Judge was:

"It appears to me that, if one reads the section against the background on which the Court necessarily acts, and has regard to the fact that neither litigant can control the date at which the Court makes its order, the period of two years referred to is to be decided by taking the period between the date of the dissolution of the company and the date when the application under Section 294 is made. Therefore, I hold that there is jurisdiction to make the order in the case".

11. I adopt the reasoning of the learned Judge and find that the interpretation put by the learned counsel cannot be acceded to. The relief prayed for under Section 559(1) of the Act is therefore not barred by time.

Point 3: The special resolution voluntarily winding up the company dated 16-5-1960 is as follows:

"A special meeting of the shareholders of M/s. Vemulapalli & Sons (Private) Ltd. held on 15th May 1960 at 10 a.m. at the registered office of the Company at Suryapet, resolved to wind up the company voluntarily due to financial position with effect from the above date.

Suryapet. Sd. V. Bhaskar Rao
Managing Director

For Vemulapalli & Sons Private Ltd."

The resolution of Vemulapalli & Sons (Private) Ltd., Suryapet, at a meeting of the creditors dated 5-11-1962 shows the creditors and the debts owing to them and the realisable debts of the company. The amounts owing were shown as Rs. 70,337-37 and the debts realisable

were shown as Rs. 58,558-04. In the counter the debts owing and the debts realisable were also shown as above. It was also stated in the counter that provisional Income-tax of Rs. 6,395-15 was paid under Section 23-B for the year in question, i.e. 1958-59. That payment was made in three instalments prior to the company going into voluntary liquidation. It does not appear that on the date of winding up there was any demand as such for income-tax payable for the year in question. No creditor has complained of the voluntary winding up. It is difficult to find support for the allegation that with a view to defraud the creditors in general and the Income-tax Department in particular the company went into voluntary liquidation. The point is held against the petitioner-department.

Point 4: The regular assessment for the year in question, 1958-59 was made on 20-3-1963 raising a demand of Rs. 34,804-85 giving credit to the tax already paid. Under Section 509 a final account of the winding up was sent by the Liquidator to the Registrar of Companies on 26-11-1962, and the said account was registered by the Registrar on 15-3-1963. These facts are also confirmed by the Registrar in his affidavit.

The learned counsel has not been able to tell me where the omission occurred, i.e. the omission of not noting the Income-tax demand. The question of making provision for the income-tax demand for the relevant year before the Special resolution for voluntary winding up does not therefore arise.

Point No. 5: The only argument pressed before me on behalf of the petitioner is that adjournments were asked for before the Income-tax Officer from time to time and obtained and that inasmuch as the company became dissolved statutorily after the expiry of three months from the date of registration of the final account by the registrar, these adjournments must be deemed to have been asked for and obtained with an ulterior motive to make the demand ineffective. The learned counsel would say that the intention to defraud the income-tax department has to be inferred from the circumstances.

It is difficult to accede to this contention. The Income-tax Officer concerned is presumed to have granted adjournments for good and sufficient reasons. It is not possible to presume that the Income-tax Officer concerned was defrauded every time he had granted an adjournment. The petitioner has not placed before me any particulars of the adjournments granted. It will be seen in the discussion under the appropriate issue that the Income-tax Officer was intimated of these liquidation proceedings. It is brought out clearly that the assessment also was made after the final accounts of

the winding up were registered by the Registrar of Companies. The dissolution followed under the statutory provision after the expiry of three months thereafter. I do not therefore consider that any fraud could be attributed to the Liquidator as alleged by the petitioner.

12. Point No. 6: The Registrar Companies has specifically stated in his affidavit that he intimated the fact of the company going into liquidation to the Income-tax Officer, Nalgonda by letter dated 17-12-1960. The learned counsel for the Department argued that there was no Income-tax Officer at Nalgonda in charge of the Companies and this intimation was therefore ineffective. The letter produced by the Department has been perused by me and it bears the endorsement thereon that it was directed to the concerned office. "The reply of the petitioner is that it reached the concerned office on 23-1-1961". In the face of these facts, it is difficult to accept the petitioner's allegation that the department was deliberately kept in the dark about the liquidation proceedings.

13. Point No. 7: One of the accepted grounds for setting aside the dissolution is fraud. But the fraud alleged has to be strictly proved. That is the accepted position, though, the section itself does not state so. Vide *In re Pinto Silver Mining Company*, (1878) 8 Ch D 273; *In re London and Caledonian Marine Insurance Co.* (1879) 11 Ch D 140 and *Coxon v. Gorst*, (1891) 2 Ch D 73 and inasmuch as the fraud alleged has not been proved as found by me under point 3, the petitioner is not entitled to the relief prayed for.

14. In the result, the petition is dismissed, but, in the circumstances, without costs.

DGB/D.V.C.

Petition dismissed.

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(V 56 C 44)

VENKATESWARA RAO, J.

Tupurani Vodavalli Tayaru, Appellant v. Official Receiver, West Godavari, Sri D. Kodandaramamurthy, Respondent.

Civil Revn. Petn. No. 1996 of 1965, D/- 1-12-1967 from order of Dist. Court, West Godavari at Eluru, D/- 22-4-1965.

Stamp Duty — Stamp Act (1899), S. 24 — Stamp duty — Property sold free of encumbrance — Stamp duty payable only on sale price. AIR 1959 All 655 (SB), Foll. (Para 4)

Cases Referred: Chronological Paras (1959) AIR 1959 All 655 (V 46)=1959 All LJ 428 (SB), Sidhnath v. Board of Revenue

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Mr. N. C. V. Ramanujachari & Mr. C. Srinivasachary, for Appellant.

JUDGMENT: This revision is directed against the judgment of the learned District Judge, West Godavari in A. S. No. 29/65 by which he confirmed the order passed by the Subordinate Judge, Eluru in I. A. 323/64 in I. P. 2/60 on his file.

2. One Kayala Rajayya was adjudged insolvent in I. P. 2/60 on the file of the Subordinate Judge, Eluru. The Official Receiver, West Godavari in whom the properties of the insolvent vested, sold 62 cents of land comprised in R. S. No. 28/6 of Kothalaparru to the petitioner herein for Rs. 103. The petitioner paid the price and also furnished the non-judicial stamp paper to enable the Official Receiver to execute a conveyance and requested him for the same. The Official Receiver thereafter solicited instructions from the Insolvency Court as to whether he should ask the purchaser to furnish non-judicial stamp paper to cover the value of encumbrances, if any, to be ascertained from the purchaser. There is no knowing as to what instructions the Insolvency Court gave. The Petitioner-purchaser thereafter moved the Insolvency Court in I. A. 323/64 to direct the Official Receiver to execute a conveyance for the property purchased by her without reference to any encumbrances thereon or alternatively to direct a refund of the purchase money to her. The learned Subordinate Judge granted the alternative prayer and directed the Official Receiver to refund the purchase money having negatived the petitioner's stand that she is not bound to value the encumbrances if any on the property for the purpose of furnishing non-judicial stamp paper to the Official Receiver. The petitioner carried the matter in appeal to the District Judge, West Godavari who, as already stated, confirmed the order of the Subordinate Judge. Hence this revision.

3. The learned counsel for the petitioner argued and rightly too, that both the Courts below were influenced by the erroneous impression that the property in question was sold by the Official Receiver subject to the encumbrances when in fact that was not the case. The proclamations relating to the sale were called for from the Official Receiver and they disclose that the property was sold without making mention of any encumbrances thereon. The learned counsel for the petitioner, therefore, contends that S. 24 of the Stamp Act has no application to the facts of this case. A reading of S. 24 of the Stamp Act seems to lend support to the contention urged for the petitioner that the encumbrances have to be valued for the purpose of ascertaining the ad valorem duty if only the transfer is

made subject to encumbrances and not otherwise. This view receives support from a Full Bench decision of the Allahabad High Court reported in *Sidhnath v. Board of Revenue*, AIR 1959 All 655 in which it was held that where immovable property, which is encumbered by a charge or mortgage, is sold but not subject to the encumbrance, then the amount of money constituting the charge or mortgage need not be added to the consideration mentioned, in the conveyance as the value of the property sold. It will be useful to extract the relevant passages occurring at page 657 of this decision:

"For the purpose of liability to stamp duty, encumbered property may be transferred either subject to the encumbrance or free from all encumbrances in the sense that the ultimate liability for the encumbrance shall not be of the transferee. If it is transferred subject to the encumbrance the transferee undertakes the liability of satisfying the encumbrance and if the encumbrance is his own its amount is set off towards the price. x x x It is also possible that no reference to the encumbrance may be made in the deed itself and the parties may be left to seek their rights and remedies in respect of it in the usual course. x x x If, however, the property is sold subject to the encumbrance, the real price is the price paid plus the amount of the encumbrance. In such cases therefore S. 24 provides that the amount of encumbrance will have to be added to the price in order to fix the amount on which ad valorem duty will have to be paid.

That being the purpose of the enactment, it becomes difficult to accept the contention that in all cases of transfer of encumbered properties, even if the sale is made free from encumbrances, the amount of the encumbrance should be added to the price paid for the purpose of stamp duty. x x x x x When the main section is applicable only to cases of transfers subject to an encumbrance the explanation too can apply only to such cases. The explanation could not enlarge the ambit of the section. It could only clarify its provision".

It is therefore clear that if the property is sold otherwise than subject to encumbrances, the price for which it is sold alone has to be taken into consideration for the purpose of fixing the value of the general stamp to be furnished by the purchaser for engrossing the conveyance. In this view, it has to be said that the order sought to be revised is not in accordance with law and is liable to be set aside.

4. In the result, the order of the Court below is set aside and the relief No 1 sought in I. A. 323/64 is granted by directing the Official Receiver to execute a conveyance in favour of the petitioner

against the occupant, calling upon him to show cause why he should not be compelled to deliver up the property. Section 43 provides that if the occupant does not appear to show cause, the applicant shall be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant. The explanation to Section 43 says that if the occupant proves that the tenancy was created or permission was granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of the section. Section 46 provided that nothing in Chapter VII shall be deemed to protect any applicant obtaining possession of any property under the chapter from a suit by any person deeming himself aggrieved thereby, when such applicant was not at the time of applying for such order entitled to the possession of the property. The second paragraph of Section 46 provided that when the applicant was not, at the time of applying for an order of possession, entitled to the possession of the property, the application for an order of possession, though no possession is taken thereunder, shall be deemed to be an act of trespass committed by the applicant against the occupant. Section 47 provided that if on an application under Section 41 the occupant bound himself with two sureties to institute a suit in the High Court or the City Civil Court against the applicant for compensation for trespass, the Small Cause Court shall stay the proceeding until the suit is disposed of. It further provided that if the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order, if any, made under Section 43. Section 49 provided that recovery of the possession of any immovable property under Chapter VII shall be no bar to the institution of a suit in the High Court or the City Civil Court for trying the title thereto.

6. Extensive amendments were made to Chapter VII by the Presidency Small Cause Courts (Maharashtra Amendment) Act, 1963 (Act No. 41 of 1963) which came into force on the 28th of November 1963. The first of such amendments was the introduction of a new provision, namely, Section 42A. Stated briefly, Section 42A provides by sub-section (1) that if in an application for possession made to the Small Cause Court, the occupant claims that he is a tenant of the applicant within the meaning of the Bombay Rent Act and such claim is not admitted by the applicant, the question shall be decided by the Small Cause Court as a preliminary issue. Sub-section (2) of Section 42A provides for an appeal against the decision on the preliminary issue to a bench of two Judges of the Small Cause Court.

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By Section 3 of the Amending Act, Sections 45, 46 and 47 were deleted. I have not referred to the provisions contained in Sec. 45 as it is not relevant for the purposes of this appeal. But it may be recalled that Sections 46 and 47 provided that the occupant could file a suit in spite of an order for possession made under Section 43 and that the occupant could, as a matter of right, obtain stay of the proceedings instituted under Section 41 by binding himself to bring an appropriate proceeding in the High Court or the City Civil Court as the case may be. By Section 4 of the Amending Act Section 49 as it originally stood was substituted by a fresh section. The new section provides that an order made for recovery of possession of any immovable property on an application under Section 41 shall bar the institution of a suit in any Court, except a suit in which relief is claimed on the basis of title (other than title as the applicant's tenant within the meaning of the Bombay Rent Act) to such immovable property.

7. The question which arises in the light of these provisions is whether as contended by the defendant the suit filed by the plaintiff in the City Civil Court is barred either by *res judicata* or by principles analogous to *res judicata* by virtue of the decision of the Court of Small Causes in the ejectment application (No. 8/177 E of 1958) filed by the plaintiff under Section 41 of the Presidency Small Cause Courts Act. As to the first part of this question, namely, whether the suit is barred by *res judicata* under Section 11 of the Civil Procedure Code, the position is quite clear, for the matter does not fall within the terms of Section 11 and therefore, the suit cannot be barred by *res judicata* under that section. Under Section 11, an issue can be barred by *res judicata* if it has been directly and substantially in issue in a former 'suit' and since the proceeding taken by the plaintiff under Section 41 of the Presidency Small Cause Courts Act was not a suit but was an application, Section 11 can have no application.

8. It is however urged on behalf of the defendant, and that submission has been accepted by the learned trial Judge, that Section 11 is not exhaustive of the circumstances in which an issue may be barred by *res judicata* and even though Section 11 may not in terms apply, a suit or an issue can be barred on principles analogous to *res judicata*. Now it is well settled that the application of the rule of *res judicata* "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law". It was held by the Privy Council in *Hook v. Administrator General* 48 Ind App 187=(AIR 1921 PC 11) that the plea of *res judicata* still remains apart

from the limited provisions of the Code. The binding force therefore of a judgment depends really not upon whether Section 11 in terms applies or not, but upon the general principle of law, that there should be finality to litigation. In a series of decisions, beginning with *Rajlakshmi v. Banamali*, 1953 SCR 154=(AIR 1953 SC 33) the Supreme Court has reaffirmed this view and has held that the principle underlying Section 11 that there should be finality to litigation is of general application and the principle would apply even if the case does not fall within the strict terms of Section 11.

9. The question for consideration therefore is whether the suit filed by the plaintiff in the City Civil Court is barred by principles analogous to *res judicata* by reason of the decision in the application which was filed by him under Section 41 of the Presidency Small Cause Courts Act. The decision of this question depends on the provisions of Chapter VII of that Act which I have already set out above. Chapter VII provides, as held in *J. Manicka Chettiar v. Kuppuswami Naicker*, AIR 1927 Mad 321 a summary remedy for recovering possession of property and the decision in a summary proceeding cannot create the bar of *res judicata*. My attention has been drawn by Mr. Joseph who appears on behalf of the plaintiff to a decision of the Privy Council in *Babu Bhagwan Din v. Gir Har Saroop*, 67 Ind App 1=(AIR 1940 PC 7) in which a question arose whether the order of the District Judge under the Charitable and Religious Trusts Act, 1920 precluded a person who was party to that proceeding from disputing that the particular temple was the subject of a public religious trust. It was held by Their Lordships that the decision of the District Judge under the Charitable and Religious Trusts Act — a decision from which under Sec. 12 there is no appeal — was a decision in a summary proceeding, that it was not made final by any provision in the Act and the doctrine of *res judicata* would not apply so as to bar a regular suit even in the case of a person who was a party to the proceeding under the Act of 1920. Now, the order of possession passed under Section 43 of the Presidency Small Cause Courts Act on an application under Section 41 was not appealable prior to the amendment introduced by Amending Act No. 41 of 1963 and that is relevant, though not conclusive, on the question whether the order can preclude a substantive suit by the party aggrieved by the order.

10. The several provisions contained in Chapter VII would themselves show that the order passed under Section 43 was not intended to have finality and indeed, the order is expressly made subject to the decision in a regular suit, Sec. 46

which has now been deleted by the Amending Act provided that nothing in Chapter VII shall be deemed to protect any applicant obtaining possession of the property under the chapter from a suit by any person deeming himself aggrieved thereby, if the applicant was not at the time of applying for such order entitled to the possession of the property. The second paragraph of Section 46 created a fiction by providing that if the applicant was not, at the time of applying for an order under Section 43 entitled to the possession of the property, the application for obtaining such order would be deemed to be an act of trespass committed by the applicant against the occupant, even if possession is not taken under the order. Section 47 which has now been deleted, provided that if an application was made for possession under Section 41, the occupant could bind himself to institute a suit in the High Court or the City Civil Court, as the case may be, against the applicant, for compensation for trespass and thereupon the Small Cause Court was required to stay the proceedings before it. The second paragraph of Section 47 provided that if the occupant obtained a decree in any such suit against the applicant, the decree would supersede the order, if any, made under Section 43. Finally, Section 49 which has now been substituted by a fresh section provided that recovery of the possession of any immoveable property under Chapter VII would be no bar to the institution of a suit in the High Court or the City Civil Court, as the case may be, for trying the title thereto.

11. The provisions contained in Sections 46, 47 and 49 which were on the Statute Book at the material time show that a proceeding under Chapter VII is in the nature of a summary inquiry and the Legislature itself contemplated that an order under Section 43 would be subject to a decree passed in a regular suit. The second paragraph of Section 47 expressly provided that the decree in the suit would supersede the order, if any, made under Section 43. Section 49 also in terms saved the right of a party to institute a suit in the High Court or the City Civil Court for trying the title to the property.

12. The provision contained in Section 47 as it stood prior to the amendment also shows that in an application under Section 41, the Small Cause Court was not concerned with the title of either party to the proceeding, to the immoveable property. In other words, in a proceeding under Section 41 the Small Cause Court was not concerned with the several legal rights of the parties before it and the simple issue before it would be whether the tenancy or the licence has been determined or has been withdrawn.

If the applicant established that the tenancy or the licence was determined or withdrawn, the applicant was entitled under Section 43 to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on the appointed day. The explanation to Section 43 which is important on this aspect of the case shows that if the occupant proved that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, the application had to be dismissed and the occupant was to be deemed to have shown good cause within the meaning of Section 43. The explanation shows that the proceedings contemplated by Chapter VII were essentially of a summary nature, the only issue before the Court being whether the applicant was entitled to recover possession of immoveable property on the ground that the tenancy was determined or the licence was withdrawn.

13. The issue which arises in the suit is entirely different and that issue is whether as contended by the plaintiff the defendant is his licensee. If the City Civil Court finds that the defendant is not a licensee and if it incidentally records a finding that the defendant is a sub-tenant of the plaintiff, the suit is liable to be dismissed. In the prior proceeding under Section 41 the narrow issue before the Small Cause Court was whether the plaintiff, who was the applicant in those proceedings was entitled to the possession on the ground that the licence of the occupant was withdrawn. Therefore, apart from the fact that the proceeding under Chapter VII was of a summary nature and no appeal was provided for against an order passed under Section 43, the matter directly and substantially in issue in the two proceedings is different. The suit, therefore, cannot be held to be barred even on principles analogous to *res judicata*.

14. Mr. Joshi, who appears on behalf of the defendant, relies however very strongly on a decision of the Supreme Court in *Gulabchand Chhotatal Parikh v. State of Gujarat*, 67 Bom LR 673 = (AIR 1965 SC 1153). In that case, the Supreme Court was considering the question whether Section 11 of the Civil Procedure Code is exhaustive in regard to the application of the principle of *res judicata* in a suit and whether in a subsequent suit general principles of *res judicata* can bar the consideration of matters directly in issue and identical with those which had been earlier and after full contest, decided on merits by a competent Court in any other proceeding, including proceedings on a writ petition. The appellant therein had filed a writ petition under Article 226 of the Constitution in the High Court and

that petition having been dismissed, he filed a suit for the same reliefs and involving the consideration of a matter which was directly and substantially in issue in the writ petition. After referring to the history of the law of *res judicata*, the several amendments made to Section 11 of the Civil Procedure Code and the various decisions of the Privy Council and the other Courts, the majority held that the principle of *res judicata* is not based on a rule of technicality but is founded on high public policy to bring about an end to litigation by giving finality to judgments *inter partes* and to save a litigant from harassment for the second time. The discussion is summed up by Raghubar Dayal J., who spoke for the majority, at p. 688 (of Bom LR) = (at p. 1167 of AIR) of the report this:

"As a result of the above discussion, we are of opinion that the provisions of Section 11, Civil Procedure Code are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter. The nature of the former proceeding is immaterial."

15. Mr. Joshi relies on this passage and says that the fact that the previous proceeding was an application and not a suit or that the previous proceeding was of a summary nature is wholly immaterial. Now I am prepared to assume for the purposes of argument that under the judgment of the Supreme Court the fact that the previous proceeding in this case was of a summary nature would not make difference to the question whether the suit filed by the plaintiff would be barred by principles analogous to *res judicata*. But even if the nature of the prior proceedings be immaterial, it is still necessary that the previous decision should be on a matter which is now in controversy, for it is then alone, and not otherwise, that principles analogous to *res judicata* would apply. As I have stated above, the simple issue in the summary inquiry under Chapter VII as it existed at the material time was whether the tenancy was determined or the licence was withdrawn and if the applicant established that bare fact, he was entitled to an order under Section 43. The matter which is directly and substantially in issue in the suit is whether the plaintiff is the licensor or

the landlord of the defendant, which is a very much different matter from the one which was involved in the earlier proceeding. That is why the present suit would not be barred by principles analogous to *res judicata*.

16. It is necessary to appreciate that in the case relied upon by Mr. Joshi, their Lordships of the Supreme Court were dealing with a matter of an entirely different nature and the provisions of Chapter VII of the Presidency Small Cause Courts Act were not before them. The argument of the appellant before the Supreme Court was that a decision on a writ petition under Article 226 of the Constitution cannot create the bar of *res judicata* and that an issue decided in the writ petition can be reargued in a regular suit. It is while rejecting this argument that their Lordships said that the nature of the former proceeding is immaterial, that it is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit and that any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their cases, will operate as *res judicata* in a subsequent regular suit.

17. Sections 46 and 49 of the Presidency Small Cause Courts Act in terms contemplated a substantive suit and therefore, the very Statute under which the previous decision was recorded contemplated in a sense the removal of the possible bar of *res judicata*. Such instances are not unknown and one can draw attention to the provision contained in O. 21, R. 103 of the Civil Procedure Code and Section 6 of the Specific Relief Act, 1963. Rule 103 saves the right of a party against whom an order under Rules 98, 99 and 101 is made to institute a suit to establish the right which he claims to the present possession of the property. It can be no answer to such a suit that his claim has already been investigated and that he is trying to agitate the same issue once over again. Similarly sub-section (4) of Section 6 of the Specific Relief Act says that nothing in Section 6 shall bar any person from suing to establish his title to the property and to recover possession thereof. This provision is more to the point, because like the old Section 49 in Chapter VII of the Presidency Small Cause Courts Act it emphasises that what is in issue in the summary proceeding is not the nature of the title of the parties to the property but the mere right of one to recover possession from the other. Just as it is no answer to the suit filed by an unsuccessful party under Section 6(4) of the Specific Relief Act that his right to possession has already been investigated, it can be no answer to the present suit filed by the plaintiff that his right to

obtain possession has already been adjudicated upon in the proceedings under Section 41.

18. There is one more aspect of the matter which also is vital. That aspect arises from the argument of Mr. Joshi that Sections 46 and 49 as they stood prior to their deletion preserved the right of an unsuccessful occupant to bring a suit but not of an unsuccessful applicant to bring such a suit. I am not disposed to accept this construction of the two sections. But even assuming that Mr. Joshi is right, it would, in my opinion, be strange that an unsuccessful occupant could bring a fresh suit to agitate what according to the learned counsel is a matter which was directly and substantially in issue in a previous proceeding but that an unsuccessful applicant can be denied this right on principles analogous to *res judicata*. As observed by the Privy Council and the Supreme Court, Section 11 is founded on a principle of public policy and that principle is that there should be finality to litigation. If the principle has to apply it must apply with equal vigour to all parties to the earlier proceeding and it cannot be enforced so as to deprive only one of the two parties of an opportunity to reargue an issue. Whether it is the terms of Section 11 or the principle underlying it, there must be some reciprocity in the bar which arises by reason of the principle and it cannot be that the principle that a party should not be harassed twice over in respect of the same cause would apply to one party to the proceeding but not to the other. This, of course, is apart from my view that Sections 46 and 49 preserved the right of bringing a subsequent suit, in favour of the unsuccessful occupant as also in favour of the unsuccessful applicant.

19. For these reasons, the appeal is allowed, the decree passed by the learned trial Judge is set aside and the suit is remanded to him for a decision on the other issues.

20. Costs will be costs in the suit.

21. Mr. Joshi says on behalf of the defendant that the defendant agrees to pay a sum of Rs 5000 to the plaintiff towards compensation for use and occupation. This amount shall be paid on account and the payment is without prejudice to the rights and contentions of the parties. Plaintiff agrees to accept the amount as compensation. The amount shall be paid within four weeks from to-day.

CWM/D.V.C.

Appeal allowed.

AIR 1969 BOMBAY 117 (V 56 C 23)

VIMADALAL, J.

Shevaram Thadharam Jaisinghani,
Plaintiff v. Indian Oil Corporation Ltd.,
and another, Defendants.

O. C. J. Suit No. 225 of 1967, D/- 14-11-1967.

(A) Civil P. C. (1908), Ss. 122 and 129, O. 6, R. 5(2) and O. 5, R. 2 (as framed by Bombay under S. 122) — Letters Patent (Bom) Cl. 37 — Rules framed under S. 122 — Applicability to proceedings on original civil side — Power of framing rules for regulating procedure on original Civil side under Ss. 122 and 129 C. P. C. and Cl. 37 of Letters Patent — Scope and extent of.

The provisions of O. 6, R. 5(2) as well as of O. 5, R. 2 as framed under the rule-making power contained in S. 122 are applicable to proceedings on the original Civil side of High Court also. (Para 4)

The expression "High Courts" in S. 122 must be construed to mean High Courts in regard to their entire jurisdiction. In the case of High Courts which have original jurisdiction that expression must, therefore, be held to include that jurisdiction also. It would, of course, be open to the High Court to frame a rule under Section 122 for regulating the procedure of any particular Court or Courts subordinate to it, or of its own original side or Appellate Side only, but, in that event, the High Court must in specific terms restrict the applicability of such a rule in the manner desired. (Para 3)

A careful analysis of the rule-making power contained in Ss. 122 and 129 of C. P. C. and Clause 37 of Letters Patent shows that they overlap to a considerable extent, in respect of rules for regulating the procedure on the Original Civil Side of the High Court. Whilst a rule framed under Section 122 for regulating the procedure on the Original Civil Side of the High Court cannot be inconsistent with the body of the Code, a rule framed under Section 129 of the same Code could be inconsistent therewith. A rule framed under either of those sections can, however, be inconsistent with the rules contained in the First Schedule to the Code of Civil Procedure. As far as the rule-making power contained in Clause 37 of the Letters Patent in regard to the Original Civil Side is concerned, the situation may best be expressed by stating that a rule framed thereunder should not, as far as possible, be inconsistent with the provisions contained in the body of the Code of Civil Procedure, or in the First Schedule thereto. The ambit and extent of the rule-making power contained in each of these provisions is, therefore, different. The mere fact that Sec-

tion 129 of the Code of Civil Procedure expressly confers the power to frame rules for regulating the procedure on the Original Civil Side of the High Court cannot lead to the conclusion that no such rules can be framed under Section 122 of the same Code. (Para 4)

(B) Civil P. C. (1908), O. 6, R. 5(2) and O. 5, R. 2 (Bombay) — Summons, served on defendant, not accompanied by copy of plaint — Chamber Summons taken out by defendant, after returnable date of plaintiff's summons is not barred under O. 6, R. 5(2). (Para 5)

R. P. Bhat, for Defendants; A. N. Mody, for Plaintiff.

ORDER: This is a Chamber Summons taken out by the defendants for further and better particulars under Order 6, Rule 5 of the Code of Civil Procedure.

2. A preliminary objection was raised by Mr. Mody to the maintainability of the Chamber Summons on the ground that it is barred by the provisions of sub-rule (2) of Rule 5 of Order 6 of the Code of Civil Procedure, as framed under the Rules made by the High Court under Section 122 of that Code, in so far as it has not been taken out before the returnable date of the Summons which was the 26th day of June 1967. The answer of Mr. R. P. Bhat on behalf of the defendants to that preliminary objection raised by the plaintiff is two-fold; first, that the Rules framed under Section 122 of the Code of Civil Procedure do not apply to the Original Side of the High Court; and, Secondly, that, if it is held that they do apply to the Original Side of the High Court, there has been no proper service of the Summons on the defendants, in view of the fact that a copy of the plaint was not served along with the Summons, as required by Order 5, Rule 2 C.P.C., as framed under the same rule-making power contained in Section 122 of that Code.

3. The point, undoubtedly, is a very narrow one, but as it raises an important question of practice which is not covered by authority, I had reserved orders on this Chamber Summons. It is not disputed that the present Chamber Summons has not been taken out by the defendants before the returnable date of the Summons which was served upon them in this case. If O. 6, Rule 5 (2), as framed under Section 122 of the Code of Civil Procedure, is held applicable to the Original Side of the High Court, this Chamber Summons must, therefore, be held to be barred as being out of time. That brings me to the first contention of Mr. Bhat. Part X of the Code of Civil Procedure deals with the rule-making power of the High Courts, and it is necessary for me to refer to Sections 122 and 129 which occur in that part. Section 122

confers on High Courts power to make rules regulating their own procedure, as well as the procedure of Courts subordinate to them. The question which arises is whether the power conferred on the High Court by the said section to frame procedural rules for itself should be construed as limited by the context in which it occurs. In other words, the question is whether the reference to subordinate Courts in the said section should be held to indicate that power is conferred on the High Court to make rules for itself, only in relation to subordinate Courts, and not in regard to its Original Side. I am not prepared to read any such limitation into the plain meaning of the expression "High Courts" which, in my opinion, must be construed to mean High Courts in regard to their entire jurisdiction. In the case of High Courts which have Original Jurisdiction, that expression must, therefore, be held to include that jurisdiction also. It would of course, be open to the High Court to frame a rule under Section 122 for regulating the procedure of any particular Court or Courts subordinate to it, or of its own Original Side or Appellate Side only, but in that event, the High Court must in specific terms restrict the applicability of such a rule in the manner desired. The next contention is that, in view of the fact that Section 129 confers an express rule-making power on High Courts in regard to their Original Civil Jurisdiction, Section 122 must be read as applying to all jurisdictions other than Original Civil Jurisdiction, as Section 129 would otherwise be rendered superfluous. I am afraid, there is no substance in that contention, for the simple reason that the ambit and extent of the rule-making power contained in those sections is different. It is expressly stated in Section 122 that the Rules framed by the High Court under that section can annul, alter or add only to the Rules contained in the First Schedule to the Civil Procedure Code. The necessary implication of that provision is that they cannot be inconsistent with the body of that Code. Section 129 of the Code of Civil Procedure, on the other hand, confers on the High Court power to frame rules to regulate the procedure on its Original Civil Side, with only this limitation that they must not be inconsistent with the Letters Patent, or other law, establishing the High Court in question. It must, therefore, follow that they could be inconsistent with everything else, including even the body of the Civil Procedure Code. The third type of rule-making power is to be found in Cl. 37 of the Letters Patent by which this Court was established. Clause 37 confers power on this High Court to make rules for the purpose of regulating all civil proceedings before it, which must, as a matter of plain language, include proceedings both on the

Original Side as well as the Appellate Side of the High Court. The only restriction which clause 37 imposes, if restriction it can be called, is that, in making such rules, the High Court should be "guided", "as far as possible", by the provisions of the Code of Civil Procedure, which having regard to Section 121 of that Code, would mean the body of the Code as well as the Rules contained in the First Schedule thereto.

4. A careful analysis of the rule-making power contained in these three provisions therefore shows that they overlap to a considerable extent, in so far as rules for regulating the procedure on the Original Civil Side of the High Court, which is the question with which I am concerned on the present Chamber Summons, could be framed under Section 122 or under Section 129 of the Code of Civil Procedure, or under Cl. 37 of the Letters Patent. It must not, however, be forgotten that, whilst a rule framed under Section 122 for regulating the procedure on the Original Civil Side of the High Court cannot be inconsistent with the body of the Code, a rule framed under Section 129 of the same Code could be inconsistent therewith. A rule framed under either of those sections can, however, be inconsistent with the rules contained in the First Schedule to the Code of Civil Procedure. As far as the rule-making power contained in Clause 37 of the Letters Patent in regard to the Original Civil Side is concerned, the situation may best be expressed by stating that a rule framed thereunder should not as far as possible, be inconsistent with the provisions contained in the body of the Code of Civil Procedure, or in the First Schedule thereto. The ambit and extent of the rule-making power contained in each of these provisions is, therefore, different. The mere fact that Section 129 of the Code of Civil Procedure expressly confers the power to frame rules for regulating the procedure on the Original Civil Side of the High Courts cannot lead to the conclusion that no such rules can be framed under Section 122 of the same Code. In fact, Order 37 Rule 1, as recently amended and framed under Section 122 of the Code of Civil Procedure, has expressly made the provisions of Order 37 (as amended) applicable to the High Court, which must mean the Original Side of the High Court. That could not possibly have been done if the High Court had no power under Section 122 to make the same applicable to proceedings on its Original Side. In the result, I have come to the conclusion that the provisions of Order 6, Rule 5(2), as well as of Order 5, Rule 2 as framed under the rule-making power contained in Section 122 of the Code of Civil Procedure, are

applicable to proceedings on the Original Civil Side of this Court also.

5. In that view of the matter, it must be held that the Summons in the present case has not been properly served on the defendants, in so far as it was admittedly not accompanied by a copy of the plaint as required by Order 5, Rule 2, as framed under Section 122, Civil Procedure Code. No question of the present Chamber Summons being barred by reason of its not having been filed before the returnable date of the Summons can arise, since the Summons itself has not been properly served, as already stated by me. The preliminary objection raised on behalf of the plaintiff to the present Chamber Summons must, therefore, be rejected.

6. As far as the merits of the Chamber Summons are concerned it is not disputed that most of the particulars sought on the Chamber Summons have been furnished by now, and all that survives of the Chamber Summons are items (c) and (e) in the defendants' attorneys' letter dated the 22nd of July 1967 which is annexed to the Chamber Summons as Schedule "A". I therefore, make the Chamber Summons absolute only in respect of the said items.

7. The plaintiff must pay the defendants costs of this Chamber Summons.

CWM/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 119 (V 56 C 24)

V. S. DESHPANDE, J.

Badrinarayan Ramsukh Rathi, Petitioner v Nihaladas Tejbhandas Sindhi and another, Opponents

Special Civil Applns. Nos. 2203 of 1965 and 116 of 1966 D/- 11-3-1968.

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13(1)(hh), (3A) (a) and (3B) — Proposal to build one new building on demolition of two adjacent buildings, belonging to same landlord — Provision for residential tenements under S. 13(3A)(a) need not necessarily be in the place where such tenements are presently occupied — Word "Premises" occurring in S. 13(1) (hh) includes more than one building.

Having regard to the object with which S. 13 of the Rent Act as a whole and Section 13(1)(hh) in particular, is introduced in the scheme of the Act and having regard to the context in which the word "premises" occurs in Cl. (hh) of Section 13(1) as also sub-sections (3A) and (3B) of Section 13 and subject-matter with which these sub-sections of Section 13

are dealing, the word "premises" cannot be construed to mean merely a tenement in occupation of a particular tenant or the part of a building or building occupied by one or more than one tenant. The word "premises" is wide enough to include in its sweep building or more than one building occupied by a tenant or more than one tenant, by the demolition of which one new building can be sought to be erected by the landlord in accordance with the plan approved by the local authority. (Paras 16, 17)

Where a landlord seeks to erect one new building by demolition of two adjacent buildings belonging to him and if the landlord has provided tenements as required under sub-section (3A)(a) of Section 13 in one part of the proposed new building, the same satisfies the requirements of S. 13(3A) (a), notwithstanding that no residential tenements have been provided in the place of building where the residential tenements are actually standing now, but are provided in the adjacent building. The "premises" on which the tenements are required to be built by the landlord in terms of the scheme under S. 13(1)(hh) need not necessarily be confined to the building occupied at present by the tenants but the word "Premises" covers both the adjacent houses. AIR 1965 SC 414 and AIR 1952 SC 324 and AIR 1958 SC 353, Rel. on.

(Para 17)

(B) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13(1)(hh), Explanation (as added by Maharashtra Amendment Act (13 of 1964)) — Building having loft on top of first floor is not one having more than two floors.

(Para 19)

(C) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13(1)(hh), (3A) and (3B) (b) — Institution of suit for possession under S. 13(1)(hh) — Enclosure of copy of certificate issued under S. 13 (3B) (b) with plaint instead of original certificate — No non-compliance with Section 13(3A). (Para 20)

(D) Constitution of India, Art. 227 — Finding of fact not based on material on record — Interference in revision is proper. (Paras 8, 21)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 414 (V 52)=

(1964) 4 SCR 892, Anand Niwas (P)

Ltd. v. Anandji 16

(1958) AIR 1958 SC 353 (V 45)=

1958 SCR 1156, Workmen D. T. E. v. Management D. T. E. 16

(1952) AIR 1952 SC 324 (V 39)=

1952 Cri LJ 1503, Shamrao v. District Magistrate, Thana 16

S. C. Pratap, for the Petitioner (in both matters); M. L. Pendse, for Opponents (in both matters).

ORDER: The petitioner is the owner of two houses bearing No. 1163 and No. 667 situated at Raviwar peth, Poona. Respondent No. 1 in Special Civil Application No. 2203 of 1965 and Respondent No. 1 in Special Civil Application No. 116 of 1966 are the tenants in house No. 1163. There was one more tenant in house No. 667. The petitioner wanted to demolish the original construction on these two houses and have a fresh one building constructed thereon, in place of the two separate houses. He therefore devised a plan of one full-fledged building and then got the said plan duly sanctioned from the Municipality on or about 30th May 1961. He then approached the Tribunal constituted under Section 13(3B) of the Bombay Rent Act and obtained a certificate from them as required under the said sub-section (3B) of Section 13. He then gave a notice to the three tenants, i.e., two tenants of house No. 1163 and also the tenant of house No. 667, terminating their tenancy alleging that he reasonably and bona fide required the premises in dispute for the immediate purpose of demolishing them and such demolition was to be made for the purpose of erecting new building on the premises sought to be demolished. The tenancy was terminated by the end of October 1962. He then instituted suits under the Bombay Rent Act against all the three tenants claiming possession of the premises from the three tenants under Section 13(1)(hh) of the Bombay Rent Act for the purpose of demolishing and constructing a new building thereon, and as required by sub-sections (3A) and (3B) of Section 13, he gave an undertaking to the Court and also produced the certificates as required under the said sub-sections.

2. His suit against the tenant in house No. 667 has ultimately been decreed and decree has been confirmed by the High Court. I am informed that construction in place of old house No. 667, in terms of the plan has already been completed. The two suits against the present respondents in the two Special Civil Applications occupying house No. 1163, however, passed through chequered career. It appears that the original certificates were filed in the suit against the tenant in house No. 667 and the said certificates or copies thereof were not filed in the suits against these two tenants when the suits were instituted and the suit claims were sought to be defeated by these two tenants on the technical ground that such certificates were not enclosed along with the plaint at the time of institution of the suits. Realising the force of the plea of the defendants, the plaintiff withdrew the suits with the leave of the Court, but the tenants preferred appeals to the District Court against the order permitting

the plaintiff to withdraw the suits. The said appeals were dismissed and then the present two suits were filed by the plaintiff afresh for the same relief. This is why the plaintiff's claim in regard to possession of the house No. 1163 remained pending till this day, even though a part of the construction as contemplated according to the original plan on the plot of house No. 667 has been completed.

3. This claim was resisted by both the tenants by raising several defences. The plaintiff had alleged that these two houses No. 1163 and No. 667, were adjacent to each other and therefore he wanted to have a fresh construction of one building in place of both these houses according to the plan approved by the Municipality. The defendants denied that these two houses were adjacent to each other. It was denied that plaintiff wanted to demolish the two houses with the object of constructing a new building or that the new construction cannot be had without the demolition of the existing construction. It was alleged that the certificate granted by the Tribunal was invalid. It was also alleged that the tenancy was not duly terminated and that the suit was not properly instituted. It was also alleged that copy of the certificate was not valid and the suit was as good as filed without enclosing the certificate of the Tribunal. Plaintiff's claim for bona fide requirements for demolition of the construction was also denied. It was also alleged that the plan as submitted does not satisfy the requirements of Section 13(3A) of the Bombay Rent Act.

4. Issues were framed and after recording the evidence, the learned trial Judge decreed both the suits. Suit No. 4571 of 1962 against Nichaldas was decreed by judgment dated 29th June 1964 while Suit No. 4573 of 1962 was decreed against the tenant Ramchand Surajmal by judgment dated 25th July 1964. A decree for rent also was claimed and allowed but we are not concerned in these Special Civil Applications with the claim for rent.

5. Both the tenants preferred appeals to the District Court. Appeal No. 545 of 1964 was preferred by the tenant Nichaldas against the decree in Suit No. 4571 of 1962, while Appeal No. 618 of 1964 was preferred by the tenant Ramchand Surajmal against the decree in Suit No. 4573 of 1962. Both these appeals were heard by the learned Assistant Judge, Poona, who allowed the appeals by his judgment and decree dated 23rd September 1965, disposing of the two appeals by a common judgment. The plaintiff has therefore preferred the present two Special Civil Applications to this Court challenging the judgment of the Assistant Judge delivered in the above two appeals. As the points aris-

ing in both the cases are common, both the Special Applications are disposed of by a common judgment.

6. The trial Court found that these two houses, No. 1163 and No. 667, are adjacent and proceeded on the basis that a new building was sought to be constructed by demolition of these two houses on the plots where the two houses are situated, on the assumption that the premises covered by these two houses No. 1163 and No. 667, are one premises. The learned Judge held that the evidence in the case produced by the plaintiff was satisfactory to hold that plaintiff wanted the possession of these premises as he reasonably and bona fide required the same for the immediate purpose of demolishing them and such demolition was sought to be made for the purpose of erecting a new building. He also found that the new building was actually intended to be constructed on the premises sought to be demolished. It was urged before the learned Judge that there was one loft on the top of the first floor and as such the construction in house No. 1163 did not consist of only two floors but consisted of more than two floors and as such Section 13(1) (hh) of the Bombay Rent Act was not attracted. This contention was negatived by the learned Judge. The learned Judge decided the reasonableness and bona fides of the plaintiff's requirements from the point of view that one building was being constructed in place of two and he looked at the plan submitted by the plaintiff, as approved by the Municipality, from this point of view to ascertain as to whether any undertaking was given by the landlord in terms of sub-section (3A) of Section 13 and as to whether a certificate was obtained by the landlord in compliance with sub-section (3B) of Section 13 and as to whether plaintiff had given the required undertaking to provide accommodation to the evicted tenants immediately after the construction was over.

7. In appeal, however, the learned Assistant Judge came to the conclusion firstly, that house No. 1163 and house No. 667 were not adjacent. He then found that these two houses constituted two separate entities and he examined the legal position and the requirements of Section 13(1)(hh), Section 13(3A) and S. 13 (3B) of the Bombay Rent Act on the assumption that the application was only for the demolition of the existing structure on house No. 1163 and construction of a building thereon. Admittedly, the plan as conceived by the landlord and submitted to and approved by the Municipality is of construction of only one building in place of the two constructions on house No. 1163 and house No. 667. The plan contemplates all residential tenements only in the place where the structure of

house No. 667 was located. The plan does not provide for any residential tenements in place of the structure now standing in house No. 1163. In the structure standing in house No. 1163 the plan provides a big passage leading from Someshwar Mandir Road to the residential tenements constructed in place of house No. 667 and there is a provision for constructing a shop in the remaining part of house No. 1163. This being the position, as planned in regard to the proposed construction in place of the structure in house No. 1163, the learned Judge found that the requirement of a construction of two times the number of residential tenements and not less than two times the floor area, as ordained in sub-section (3A) (a) of Section 13 of the Bombay Rent Act is not even sought to be complied with in the proposed construction after the demolition of the existing structure in house No. 1163. Consistent with this approach he also found that the requirements of the landlord for demolition of the structure for such purpose was not reasonable or bona fide. Accordingly he allowed the appeal and dismissed the suit.

8. The first point that falls for consideration is as to whether the houses Nos. 1163 and 667 are adjacent or not. The plaintiff's case, as pleaded, is that they are adjacent. The defendants in both the suits have undoubtedly challenged this assertion, but the trial Court has found that these two houses are adjacent. The trial Court relied on the evidence of the plaintiff and also the plan that is submitted at Exhibit 32. This evidence of the plaintiff is really not challenged by the defendants at all. In fact, defendant Ramchand has in terms admitted that these two houses are adjacent, but defendant Nichaidas does not say a word on this point in his evidence. In spite of this factual position, the learned Assistant Judge has held that these two houses are not adjacent. The learned Judge relies on what he describes as admissions of the plaintiff in cross-examination for arriving at this conclusion. This he has considered in paragraphs 10 and 11 of his judgment and the alleged admission of the plaintiff in cross-examination is referred to by him in para. 11 of the judgment. Mr. S. C. Pratap, the learned advocate appearing for the petitioner-plaintiff, urged that this finding of the learned Assistant Judge is the result of misreading of the evidence of the plaintiff. After hearing the learned advocates and after reading the evidence myself, I find that Mr. Pratap's grievance is perfectly justified. I have not been able to find a single sentence or word either in the learned Judge's discussion of this part of the evidence in paragraph 11 of his judgment or in the entire cross-exa-

mination of the plaintiff suggesting that the two plots are not adjacent. This apart, I have examined the plan (Exhibit 32/1) with the assistance of the two advocates and their clients who were present in Court, and there can hardly be any doubt that the two houses, No. 1163 and No. 667, adjoin each other, though the two are accessible from two different roads. The only grievance of Mr. Pendse appearing for the defendants in both the cases was that at present the two houses are not accessible inasmuch as the two houses are separated by an inter-connecting wall. But this wall cannot act as an insurmountable difficulty once the construction is allowed to be made in accordance with the plan approved by the Municipality. Thus, the finding of the Assistant Judge that the two plots are not adjacent is contrary to the unchallenged evidence on record and deserves to be set aside.

9. Now, the facts established in this case are these: The plaintiff is the owner of the two houses, No. 1163 and No. 667. He wants to demolish the entire structure that exists on these two houses. He has conceived a plan for construction of a building covering the plots occupied by the present structures of these two houses. This plan has been approved by the Municipality. It will only be reasonable to infer that the construction proposed by the plaintiff is in no way contrary to the rules and regulations of the Municipality, when the Municipality has accorded its sanction for the construction in accordance with the plan approved by them. The plaintiff wanted the possession of these two houses for the purposes of demolishing and constructing a fresh building thereon in accordance with this plan. He has satisfied the Tribunal as required under Section 13(3B) of the Bombay Rent Act that the plans and estimates for the proposed new building have been properly prepared and the necessary funds for the purpose of the erection of the new building are available with him and that the other conditions imposed by the State Government have also been complied with. He has also given an undertaking as required under clause (a) of sub-section (3A) of Section 13 of the Act that the building sought to be erected shall contain not less than two times the number of residential tenements and not less than two times the floor area contained in the premises sought to be demolished and also given an undertaking in terms of clauses (b) and (c) of sub-section (3A). It is not disputed by Mr. Pendse, the learned advocate appearing for the two defendants, that looking to the plan of the building as a whole, sought to be constructed in place of the two houses, the plan does conceive of residential tenements which are two times

the number as required under sub-section (3A), clause (a), and also two times the floor area contained in the structures on both the two houses prior to demolition. As stated above, the plaintiff succeeded in his suit against the tenant in house No. 667 in getting him evicted and immediately after eviction of the said tenant the landlord has constructed the tenements in place of the old structure in house No. 667 in terms of the plan approved by the Municipality and the certificate granted by the Tribunal. If he has not been able to complete the construction in accordance with the plan in regard to house No. 1163, it was only because the pendency of the present proceedings against the tenants prevented him from doing so.

10. But Mr. Pendse says that in spite of the above factual position, plaintiff cannot succeed in getting the possession of the house in dispute, namely, No. 1163 under Section 13(1)(hh) of the Bombay Rent Act on the ground of his bona fide and reasonable requirements of the same, as he is not erecting a new building on the premises sought to be demolished, as contemplated under sub-section (3A)(a) of the said section. Argument is that the landlord is not permitted to have an integrated plan of one new building for construction by demolition of the existing structures of the houses or buildings on more than one plot. All that Section 13(1)(hh) permits the landlord is to have the premises for the immediate purpose of demolishing them, if he can erect a new building on the premises sought to be demolished. If the new tenements are to be included in a building on some other premises, such as house No. 667 in this case, and no residential tenements are provided in the proposed plan approved by the Municipality on the present structure of house No. 1163, there is not even an attempt to comply with the provisions of Section 13(1)(hh), and as such plaintiff cannot succeed. Answer to this argument depends entirely on the construction of the words "for the purpose of erecting new building on the premises sought to be demolished". Does the word "premises" in clause (hh) of Section 13(1) and particularly in the latter part of the said clause quoted above, mean necessarily a building in which present tenements are located or does the word "premises" also mean the said building or house and, or some other houses belonging to the landlord by the demolition of which one new building is sought to be erected by him after approval of the same from the local authority?

11. Now, S. 12 of the Bombay Rent Act restricts the landlord's right to terminate contractual tenancies and evict his tenant according to the terms of the con-

tract, as long as the tenant is ready and willing to pay the standard rent and observes and performs the other conditions of the tenancy in so far they are consistent with the provisions of the Act. This is undoubtedly a restriction on the rights to hold and enjoy the property belonging to the citizen. However, this restriction is relaxed by providing several contingencies in Section 13 on the happening of which the landlord is entitled to terminate the tenancy and get possession of the leased premises. Clauses (a) to (f) and (i) and (k) of sub-section (1) of Section 13 deal with the acts of the tenant, which disentitle him to the protection of the Act and enables the landlord to terminate his tenancy. Clauses (g), (h), (hh) and (hhh) deal with the contingencies where the landlord reasonably and bona fide requires the premises for certain purposes. Clause (l) then provides for the contingency where the tenant's requirements of the leased premises come to an end because of his acquisition of suitable residential premises somewhere else. We are in this case concerned with the requirements of the landlord under Section 13(1) (hh). This clause enables the landlord to temporarily terminate the tenancy and get possession of the premises for the immediate purpose of demolishing them if the demolition is contemplated for the purpose of erecting new building on the premises sought to be demolished. This requirement must be reasonable and bona fide. Sub-sections (3A) and (3B) of Section 13 provide for certain acts by the landlord to ensure that the alleged requirements of the landlord for demolition and erection of new building are really genuine and the protection afforded to the tenant by the other provisions of the Rent Act is not rendered illusory. Section 17A enables the tenant to get possession of the vacated premises if the work of reconstruction is not started within the time mentioned in Sub-section (3A) of Section 13. Section 17B and Section 17C further ensure that the tenant so evicted gets back the possession of the tenement in the new building on the same terms and conditions on which he occupied it immediately before his eviction.

12. The scheme as laid down in sub-sections (3A) and (3B) of Section 13 of the Bombay Rent Act requires the landlord to obtain a certificate from the duly constituted Tribunal to the effect that the plans and estimates of the new building have been properly prepared and the necessary funds for the reconstruction of the house are available to the landlord and other conditions laid down by the State Government in this behalf are complied with by him. He is also required then to give an undertaking to the Court at the time of the institution of the suit saying that the new proposed

building shall contain not less than two times the number of residential tenements and not less than two times the floor area contained in the premises sought to be demolished.

13. As stated above, all these sub-clauses and clauses of Section 13 in a way seek to relax the restrictions imposed on any landlord in the matter of employment of his own property. The object of Section 13(1) (hh) seems to permit the landlord to have a new construction of his choice in place of the existing structure. But while ensuring the tenant's right to get back the possession of the premises or tenements in lieu of the lost ones on the same terms and conditions in the new building, the Legislature also has imposed a further condition on the landlord so desiring to erect a new building in place of the old, that he should undertake to have not less than two times the number of residential tenements in his contemplated new building and not less than two times the floor area contained in the premises sought to be demolished. The object of these provisions is very clear. In the first instance, the owner of the building is enabled to demolish the old types of structures which may, in some cases, be found to be only unsuitable to modern ideas and modern requirements, subject to the security of the tenants' right to get similar tenements at standard rent. But then the object also seems to be to ensure that in the course of this erection of a new building provision is also made by the landlord for more residential accommodation. The requirements of having not less than two times the number of residential tenements and not less than two times the floor area can have no other object in view.

14. But once the landlord is prepared to comply with these requirements, no other restriction is sought to be placed on his rights. He is enabled to have such type of construction as he wants, subject of course to the tenant's right to get one tenement in the said building. Of course, no Court will consider his requirements to be reasonable and bona fide if the landlord proceeds to construct palatial flats which in the nature of things will be beyond the reach of the present tenants. But that aspect will be relevant to consider as to whether the landlord's requirements are reasonable and bona fide or not. But as long as his requirements are proved to be reasonable and bona fide and as long as he is shown to possess the necessary finances and has got his plans approved from the local authority, the Bombay Rent Act itself does not proceed to impose any further restrictions. Question then is, can any owner or landlord be prevented from having one new building in place of two

or more existing buildings, merely because, the plan of the new building does not provide for residential quarters, in the the identical premises or plans, from which some of the tenants are being evicted, even though he can provide in the new building, accommodation to all the tenants in the existing building in some quarter or the other, and also is in a position to afford not less than two times the number of residential tenements and not less than two times the floor area contained in the two houses by demolishing which he wants to construct one building in accordance with one integrated plan?

15. Of course, the first inherent restriction must flow from the location and situation of such two or more houses. No such one building will be possible if the two or more such houses are not adjacent to each other or are not otherwise connected with each other by any link. In that case, no landlord or no owner can have an integrated plan for one building on two or more of his premises. The second limitation is about his capacity to have the necessary finance. The third limitation is as to whether his plan conforms to the requirements of the rules and regulations of the local authority. But these restrictions have nothing to do with the provisions of the Bombay Rent Act. In case an owner is in a position to cross these limitations and hurdles discussed above and is also in a position to comply with all the requirements of the Bombay Rent Act provided in sub-sections (3A) and (3B) of the Act, and also satisfies the Court that his requirements are reasonable and bona fide, there is nothing in the Act which can prevent the landlord from so planning his construction and so accommodating his tenants, who are housed at present in two or more houses belonging to him and whom he wants to house in only one new building which he proposes to construct in place of the present ones by demolishing them.

16. It is against this background and this context that I have to decide the contention of Mr Pendse, the contention being that the new building contemplated by the landlord and conforming with the requirements of sub-section (3A)(a) of S. 13 of the Act must necessarily be erected on the identical place where the present structure of house No 1163 is located and if the tenements are erected on some other buildings, that will not be "erecting new building on the premises sought to be demolished" within the meaning of clause (hh) of S 13(1). Emphasis is laid on the word "premises" for the demolition of which the tenant is to be evicted on the representation that a new building is going to be erected on the same "premises". Now, the word "pre-

mises" is defined in S. 5(8) of the Act Sub-clause (a) of the said sub-section has no relevance for deciding the controversy in dispute. Sub-clause (b) defines "premises" to mean "any building or part of a building let separately". The wording of rest of the sub-clauses is not material. Then the word "tenement" is defined in S. 5(12) to mean "a room or group of rooms rented or offered for rent as a unit". This definition of "tenement" was added by the Amendment Act, Bom 53 of 1950, and was not originally there when the Act was introduced in the year 1948. Now, if one examines the provisions of S. 12 or the several clauses of Section 13(1) of the Act, dealing with some act or other of the tenant which deprives him of the protection of the Act, the word "premises" used therein seems to have been used with reference to the building or part of the building which is actually in occupation of one tenant. In a given case, it is capable of being construed to mean "tenement". But that does not seem to me to be the position with regard to certain other clauses of S. 13(1), such as clauses (g), (hh) and (hhh), where the landlord is enabled to get the possession of the premises either for his own occupation or for construction of new building. The sense in which the word "premises" is used in all these clauses seems to cover not only one tenement or a part of a building or one building alone, but the word is capable of covering more than one tenement or more than one part of the building or even more than one building occupied by more than one tenant. Take, for example, the case contemplated by clause (g) of Section 13(1). One building may consist of more than one flat or more than one block or even more than one room, and all these may be occupied by more than one tenant. The landlord may reasonably and bona fide require the tenements or rooms or buildings so occupied by more than one tenant, and yet all these buildings may come within the definition of "premises" which are reasonably and bona fide required by the landlord for occupation by himself. The same is the case with clause (h) of Section 13(1), where the landlord requires possession of the premises for repairs, which may have been occupied by more than one tenant, and therefore consisting of more than one tenement or even more than one building, depending of course on the nature of the repairs called for. The same is true of clause (hh) Supposing the premises consist of one tenement or one flat in a big building and supposing the landlord established his bona fide and reasonable requirements for the immediate purpose of its demolition and erecting a new building thereon, surely no landlord can contemplate of erecting

a new building only in place of one tenement or one block or one flat in the whole building. In the very nature of things, the scheme would be of demolishing the entire building and erecting a new building thereon. The word "premises" used in this clause must therefore necessarily mean not only one tenement or part of a building but the entire building. But then sub-section (3A) (a) requires the landlord to increase the number of residential tenements and also the floor area. One way of complying with this requirement will be by adding more floors than are contained in the present structure. But the other way by which this requirement can be complied with can be by extending the area of the plot, if it is possible for the landlord to do so. In that case, necessarily the landlord will have to acquire more open plots or areas on which such added construction can be raised. The word "premises" therefore, in clause (hh) of Section 13(1) not only means one tenement or only a part of a building or, for that matter, even one building but means something more. The sense in which this word is used in this clause is capable of covering the area of more than one building. In fact the word "premises" in this clause means part of a building or a building or more than one building, by the demolition of which the landlord contemplates erecting a new one building. As laid down by the Supreme Court in the case reported in *Anand Niwas (P) Ltd. v. Anandji*, AIR 1965 SC 414 the sense in which the expression in different sections, and even clauses, is used must be ascertained from the context of the scheme of an Act, the language of the provisions and the object intended to be served thereby. The Supreme Court has held in this case that the word "tenant" used in the different clauses of Section 5(11) of the Bombay Rent Act and Sections 13, 14 and 15 covers both a contractual as well as statutory tenant depending on the context in which the said word has been used in the said clauses of sub-section (11), and other sections. In another judgment of the Supreme Court reported in *Shamrao v. District Magistrate, Thana*, AIR 1952 SC 324, at pp. 326-27 it is held that "it is the duty of Courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used, that is to say, if one construction will lead to an absurdity while another will give effect to what commonsense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently". In *Workmen, D. T. E. v. Management, D. T. E.*, AIR 1958 SC 353 the Supreme Court was interpreting the

word "person" used in Section 2(k) of the Industrial Disputes Act, 1947. Their Lordships observed that the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use as in the subject or in the occasion on which they are used, and the object to be attained.

17. Having regard to these principles in regard to the interpretation of a word in a statute, and having regard to the object with which Section 13 of the Bombay Rent Act as a whole and Section 13(1)(hh) in particular, is introduced in the scheme of the Act and having regard to the context in which the word "premises" occurs in clause (hh) of Section 13(1) as also sub-sections (3A) and (3B) of Section 13 and the subject-matter with which these sub-sections of Section 13 are dealing, the word "premises" cannot be construed to mean merely a tenement in occupation of a particular tenant or the part of a building or building occupied by one or more than one tenant. The word "premises" is wide enough to include in its sweep building or more than one building occupied by a tenant or more than one tenant, by the demolition of which one new building is sought to be erected by the landlord in accordance with the plan approved by the local authority. In this view of the matter, the contention of Mr. Pendse fails. The "premises" on which the tenements are required to be built by the landlord in terms of the scheme under Section 13(1)(hh) are not necessarily confined to house No. 1163 occupied at present by the respondents in these two Special Civil Applications as tenants but the word "premises" covers both the houses, House No. 1163 as well as house No. 667, which are adjacent to each other and which belong to the plaintiff owner, by the demolition of which plaintiff seeks to erect one new building. And if the landlord has provided tenements as required under sub-section (3A) (a) in one part of the said building, the same satisfies the requirements of the said sub-section, notwithstanding that the residential tenements are actually located in place of the structure which was standing in house No. 667 and notwithstanding that no residential tenements have been provided in place of the structure now standing in house No. 1163. The finding of the learned Assistant Judge on this point deserves to be set aside.

18. Mr. Pendse, the learned advocate, also argued that the requirements of the landlord can neither be said to be bona

fide or reasonable. The argument is that now all the tenements contemplated under the plan and intended to be set up in place of the old structure in house No. 667 have already been constructed and even an outlet and passage has been provided to the residents of the said tenements from the side of Maide Ali. Mr. Pendse argues that what the landlord now wants to provide in place of the structure in house No. 1163 is only a passage for the residents of house No. 667 for going towards Someshwar Mandir Road and in a part of the said house a shop is being provided by the landlord. The argument is that demolition of the present structure in house No. 1163 is really meant for providing a passage. According to Mr. Pendse, one passage having already been provided on Maide Ali Road, the provision of a further passage from the side of Someshwar Road cannot be said to be reasonable requirement of the landlord. His further argument is that after demolition of the present shop structure existing in house No. 1163 the landlord is trying to construct a new shop which is bound to fetch more rent and which will be beyond the reach of the present tenant and that way the requirements of the landlord are not even bona fide. I do not find any substance in these submissions of Mr. Pendse. The shop and the passage contemplated to be constructed in place of the structure in house No. 1163 is part and parcel of the entire plan that was designed by the landlord when the plan was submitted for approval to the local authority. I do not find any unreasonableness if as a part of the plan of the entire construction one passage is provided for going to Someshwar Mandir Road and other passage is provided for Maide Ali Road. It is an accident in this case that the present proceedings continued to be dragged on and the construction in place of house No. 667 has been completed long ago. It is not proper to consider the reasonableness of the requirement of this passage by relying on the anomalous situation that is the result of dragging of the litigation in the present two cases. In either case there is absolutely no evidence to show that providing for the passage contemplated under the plan is in any manner unreasonable. No material is brought on record to show that the contemplated provision of a shop in place of the present structure in house No. 1163 is mala fide. No material is brought on record to show that the object of it is really to construct the shop in such a manner as to keep it beyond the reach of the present tenant who occupies the said shop. There is accordingly no force in this submission of Mr. Pendse. On the facts established in this case, I do not

find that the requirements of the landlord are either unreasonable or mala fide.

19. Mr. Pendse then argued that the premises in dispute cannot be said to be consisting of not more than two floors as admittedly there is a loft on the first floor. Mr. Pendse particularly argues that clause (hh) of Section 13(1) of the Bombay Rent Act contemplates that the premises should be "of not more than two floors". He says that this clause does not say that the premises must necessarily consist of three floors. According to Mr. Pendse, once the negative test is established by the tenant that there is something more than two floors in the premises, the landlord's right to get his tenants evicted under this clause (hh) stands defeated. I do not find any substance in this submission also of Mr. Pendse. Admittedly there is one loft on the top of the first floor. Both the Courts have taken the view that, that loft cannot be equated with the existence of the floor. I do not find any error with which this concurrent finding can be said to be suffering from. I may also add that the Explanation added to Section 13(1) (hh) of the Act by Maharashtra Amendment Act No. 13 of 1964 goes a long way to answer this point raised by Mr. Pendse.

20. Mr. Pendse also argued that not the original certificate but only a copy of the certificate of the Tribunal was enclosed at the time of the institution of the plaint and this was no compliance with sub-section (3A) of Section 13. I also do not find any substance in this submission, as this point has been fully dealt with by the two Courts below and the point has been negatived.

21. Mr. Pendse lastly argued that this is certainly not a case which warrants interference under Article 227 of the Constitution. Unless some errors apparent on the face of the records are shown, interference in exercise of the extraordinary jurisdiction possessed by this Court under Article 227 is not proper. In my opinion, the learned Assistant Judge has, in the first instance, misread the evidence of the plaintiff in arriving at the conclusion that the two houses, house No. 1163 and house No. 667, were not adjacent. This finding based on the misreading of the evidence led him further to hold that these two houses were separate entities and all his findings thereafter are based on this erroneous approach based on equally erroneous findings. As stated above, fact is that, these two houses are adjacent. Secondly the "premises" contemplated in the several clauses of section 13(1) (hh) and (3A) and (3B) cover not only premises actually rented out to the tenants but also the entire building or the buildings standing on the land or lands owned by

the plaintiff, notwithstanding that they are shown as different units in the records of the Municipality. It must follow that the learned Judge's judgment suffers from several errors apparent on the face of the record, which necessarily calls for interference of this Court in exercise of the powers possessed by it under Article 227 of the Constitution.

22. The result is that the rules in both the Special Civil Applications are made absolute. There will, however, be no order as to costs as far as this Court is concerned in both the applications.

23. This decree not to be executed "in both the cases" for three months from today.

DVT/D.V.C. Rules made absolute.

AIR 1969 BOMBAY 127 (V 56 C 25)
CHITALE AND NAIN, JJ.

Kailas Sizing Works, Appellant v. Municipality of Bhivandi and Nizampur, Respondents.

Appeal No. 102 of 1966, D/- 18-3-1968, against judgment of Civil J. Sr. Dvn. Thanna in Spl. Civil Suit No. 4 of 1964.

(A) Municipalities — Bombay District Municipal Act (3 of 1901), Ss. 167, 167A — Bombay General Clauses Act (1 of 1904) S. 3(20) — Negligence of Municipality or its Officers — Suit for damages — Effect of Ss. 167 and 167A — (Tort — Negligence).

The provisions of Ss. 167 and 167A read together give no absolute immunity to the municipality in respect of acts done negligently. The emphasis is on "good faith" i.e. honestly, and not on negligence. If a municipality acts in discharge of statutory duties, whether enjoined or authorised (permitted), as long as it acts honestly, no action would lie against it even if it acted negligently. But if it did not act honestly, the negligence would be actionable. The plaintiff must in such action establish want of "good-faith" or honestly in addition to the negligence. (Para 7)

Further, every man is presumed to intend and to know the natural and ordinary consequences of his acts. The defendant should be liable for the natural and necessary consequences of his acts, whether he in fact contemplated them or not. On facts, it must therefore be held that the defendant municipality in executing the work in question did not act honestly or in good faith and is not protected in respect of its negligence by Section 167 of the Bombay District Municipal Act and that the suit for damages against it was not barred by Section 167. (Para 27)

(B) Municipalities — Bombay District Municipal Act (3 of 1901), S. 167 — Bombay General Clauses Act (1 of 1904), Section 3(20) — Good faith — What amounts to — Person whether acted in good faith — Depends on facts of the case — (Words and Phrases — Good faith) — (General Clauses Act (1897), S. 3(22)) — (Penal Code (1860), S. 52).

In order to act in good faith, a person must act honestly. A person cannot be said to act honestly unless he acts with fairness and uprightness. A person who acts in a particular manner in the discharge of his duties in spite of the knowledge and consciousness that injury to someone or group of persons is likely to result from his act or omission or acts with wanton or wilful negligence in spite of such knowledge or consciousness cannot be said to act with fairness or uprightness and, therefore, he cannot be said to act with honesty or in good faith. (Para 8)

Good faith implies upright mental attitude and clear conscience. It contemplates an honest effort to ascertain the facts upon which the exercise of the power must rest. It is an honest determination from ascertained facts. Good faith precludes pretence, deceit or lack of fairness and uprightness and also precludes wanton or wilful negligence. AIR 1961 Punj 215, Rel. on. (Para 14)

The definition of the term 'good faith' in the General Clauses Act lays stress on the one aspect of honesty only, irrespective of negligence, but that in the Indian Penal Code lays stress on two aspects, viz., honesty of intention along with due care and attention. Both the definitions retain the real essence of good faith, which is honesty. This is a feature common to both the definitions. (Para 14)

Whether in a particular case a person acted with honesty or not will depend on the facts of each case. (Para 8)

(C) General Clauses Act (1897), S. 3(22) — Acts prior to 1897 — Applicability of definition of good faith — (Contract Act (1872), S. 2) — (T. P. Act (1882), S. 3).

The definition of 'Good faith' in Section 3(22) would naturally not apply to Acts prior to the passing of the General Clauses Act, such as the Indian Contract Act or Transfer of Property Act. To these provisions, the definition of "good faith" as understood generally in civil law would apply, viz., that nothing is said to be done in "good faith" which is done without due care and attention; that is the care and attention expected of a man of ordinary prudence. (Para 9)

(D) Civil P. C. (1908), Pre. — Statement of Objects and Reasons — Use of — (Interpretation of Statutes).

The Statement of Objects and Reasons cannot be used for arriving at a correct

interpretation. The Courts have to interpret the sections as they find them and not by the Statement of Objects and Reasons (Para 9)

(E) Municipalities — Bombay District Municipal Act (3 of 1901), S. 167 — Doing things authorised by Statute — Liability for negligence — When arises — (Tort — Negligence).

If things authorised to be done by a statute are carelessly or negligently done an action is maintainable. Such a breach is known as statutory negligence. The word 'negligence' in such cases means adopting a method which in fact results in damage to a third person except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damages unless it can be shown that, that and that only, was the way in which the duty could be performed. Powers given by a statute must be exercised reasonably, and not to the prejudice of the public. (Para 28)

Held on facts that flood waters had entered the premises of the plaintiff and caused damage to his property and goods because the execution of the work by constructing the nullah and by putting a slab on it, was carried out with wilful and wanton negligence without good faith, that the said damage had been proved at Rs. 54,560 and that the suit was not barred by S. 167 of the Bombay District Municipal Act. (Paras 39, 48)

(F) Evidence Act (1872), S. 114, IIL (c) — Official acts — Presumption as to regularity — Extent of — Absence of negligence in carrying out public works not presumed.

The presumption provided for in Illustration (e) to S. 114 is only a presumption as to procedure that the necessary procedure in doing all official acts has been followed. There is no presumption that in carrying out public works the Government takes necessary precautions to see that no injury is caused by negligence to the public. (Para 40)

(G) Tort — Negligence — Claim for damages — Mitigation of loss — It is duty of plaintiff to mitigate the loss. (Para 45)

(H) Municipality — Bombay District Municipal Act (3 of 1901), S. 167 — Works carried out by Municipality — Negligence of contractors and engineers — Liability of the Municipality as principal — (Contract Act (1872), S. 226) — (Tort — Negligence).

The contention that the municipality had engaged qualified engineers and experienced contractors and therefore could not be held guilty of negligence is not correct. With regard to the contractors, however much experienced, they would merely carry out the work according to the

plans prepared by the Municipality. If the engineers are negligent, the municipality would be liable. The liability of the principal for the wrongful act of his agent rests on the grounds that the principal is a person who has selected the agent and that the principal having delegated the performance of a certain class of acts to the agent, the principal should bear the risk. All that is necessary is that the act should have been committed by the agent in the course of his employment, although the principal did not authorise, or justify, or participate in the act or even if he forbade it or disapproved of it. The liability of the principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them. (Para 47)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 17 (V 52)=(1964)

8 SCR 273, State of Punjab v.

M/s. Modern Cultivators 20

(1965) AIR 1965 All 233 (V 52)=

1965 (1) Cri LJ 539, Kedarnath v.

State 12

(1961) AIR 1961 Punj 215 (V 48)=1961

(1) Cri LJ 710, Harbhajan Singh v.

State of Punjab 13

(1955) AIR 1955 Bom 93 (V 42)=56

Bom LR 597, G. S. Pathak v. S. S.

Nisal 10

(1954) AIR 1954 Orissa 225 (V 41)=

1954 Cri LJ 1625, Babulal Agarwalla

v. Province of Orissa 12

(1940) AIR 1940 Bom 35 (V 27)=41

Bom LR 1227, Emperor v. R. K.

Naik 12

P. P. Khambata and D. S. Parikh with Shamaldas P. Modi, for Appellant; Y. B. Rege with V. B. Rege, for Respondents.

NAIN, J.: This is a plaintiffs' appeal against the judgment and decree of the learned Civil Judge, Senior Division, Thana, dismissing their suit for recovery of Rs. 1,00,012 as damages for loss caused to their property on 5th July 1963 by flood water, filed against the Municipality of Bhivandi and Nizampur. The plaintiffs allege that they have suffered the loss on account of the negligence of the defendants.

2. The plaintiffs occupy a permanent structure on Yacoob Road at Bhivandi wherein they carry on the business of sizing yarn. They had machinery, raw materials and other goods stored in the premises at all material times prior to and during the month of July 1963. There is a gutter about 1½ feet wide running along side Yacoob Road between the said Yacoob Road and their factory premises. On the other side of the road, there is an open nullah running parallel to the road. This nullah is about 40 to 45 feet wide and provides a passage for dirty water and rain water passing to the

creek. The plaintiffs alleged that the defendants covered the said nullah with a slab after narrowing it to a width of 15 feet where the slab was put without providing adequate passage for rain water and during the monsoon of 1963 for water from the catchment area constituting Varala Tank. The Government of Maharashtra at the instance of the defendants demolished a portion of Varala Tank in April 1963. In consequence, the rain water falling in the catchment area of the lake was expected to pass along with the rain water falling in the catchment area of the nullah through this nullah on to the creek. The plaintiffs say that in spite of the partial demolition of the Varala Tank, over a height of six feet from the ground level, the defendants commenced the work of laying the cement slab across the nullah after the demolition of the said part of the said tank and completed the work of the laying of the slab in the second week of June 1963. They further alleged that the centring work to support and settle the slab continued to remain unremoved till about the first week of July 1963. This centring work obstructed the passage of bushes and debris and together they prevented the water from passing. The defendants failed to keep the nullah free of centring bushes and debris for the flow of the water in July 1963. The plaintiffs further alleged that their machinery and goods in the said premises at Yacoob Road were damaged by heavy rain water entering the premises as a result of heavy rains on 5th July 1963. According to them, the nullah overflowed because of the obstruction to the passage of water caused by the narrowing of the nullah, slab, centring and garbage. According to them, the damage sustained by their goods was the direct result of the action of the defendants by reason of their negligence and the defendants were therefore liable to make good to the plaintiffs the loss caused by the damage. The defence of the defendants was that there was no negligence on their part in narrowing or slabbing the nullah or in not removing the centring or allowing garbage to collect. They contended that the damage was due to heavy rain which was an act of God. Their principal defence, however, was that a suit of this nature was barred by the provisions of S. 167 of the Bombay District Municipal Act, 1901.

3. One of the reasons, and in fact the principal reason, for the dismissal of the plaintiffs' suit was that the suit was barred by the provisions of Section 167 of the Bombay District Municipal Act, 1901. Sections 167 and 167A(1) read as under:

"167. No suit shall lie in respect of anything in good faith done or intended to be done under this Act or against any municipality or against any committee

constituted under this Act or against any officer or servant of a Municipality or against any person acting under and in accordance with the directions of any such municipality, committee, officer or servant or of a magistrate".

"167A. (1) No suit shall lie against a municipality or against any officer or servant of a municipality in respect of any act done in pursuance of execution or intended execution of this Act....."

4. Mr. Rege appearing for the defendants contended that Section 167 of the Bombay District Municipal Act, 1901, read with Section 3(20) of the Bombay General Clauses Act, 1904, gave absolute immunity to the defendants in respect of acts done under the Bombay District Municipal Act, even if they were done negligently. He contended that all suits for damages for loss caused by negligence of the defendants were barred, provided that such acts were done in the discharge of duties enjoined or authorised by the said Act. Section 3(20) of the Bombay General Clauses Act, 1904, is a verbatim reproduction of Section 3(22) of the Indian General Clauses Act, 10 of 1897 and reads as under:

"A thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not".

5. The argument of Mr. Rege was that S. 167 of the Bombay District Municipal Act, barred all suits in respect of acts done in "good faith" in discharge of duties enjoined or authorised by the said Act. The expression "done in good faith" has been defined in the Bombay General Clauses Act to mean "done honestly whether done negligently or not". He therefore argued that all suits for recovery of damages for loss caused by the defendants' negligence were barred, and negligence of a District Municipality could never be actionable.

6. We pointed out to Mr. Rege the provisions of S. 167A(1) of the Bombay District Municipal Act which provided that no suit would lie against a municipality in respect of an alleged neglect or default in the execution of the Act, unless the suit was brought after the expiry of the period of statutory notice and within six months of the accrual of the cause of action. We suggested that this contemplated suits against a municipality in respect of acts of negligence, and did not appear to create an absolute bar against such suits. We pointed out that the interpretation suggested by Mr. Rege would be contrary to and do violence to the provisions of S. 167A(1), and would render the words "or in respect of any alleged neglect or default in the execution of this Act" superfluous and meaningless. Therefore, Sections 167 and 167A

must be read together and reconciled and the correct interpretation must not discard or render meaningless any part of either section, but must give meaning to and be consistent with both the sections if such an interpretation is possible.

7. In our view, these two provisions read together give no absolute immunity to the defendants in respect of acts done negligently. The emphasis is on "good faith" i.e. honestly, and not on negligence. If municipality acts in discharge of statutory duties, whether enjoined or authorised (permitted), as long as it acts honestly, no action would lie against it even if it acted negligently. But if it did not act honestly, the negligence would be actionable. The plaintiff must in such action establish want of 'good faith' or honesty in addition to the negligence. This interpretation gives meaning to all the parts of Ss 167 and 167A and is consistent with all the parts. This appears to us to be the correct interpretation.

8. In order to act in good faith, a person must act honestly. A person cannot be said to act honestly unless he acts with fairness and uprightness. A person who acts in a particular manner in the discharge of his duties in spite of the knowledge and consciousness that injury to someone or group of persons is likely to result from his act or omission or acts with wanton or wilful negligence in spite of such knowledge or consciousness cannot be said to act with fairness or uprightness and, therefore, he cannot be said to act with honesty or in good faith. Whether in a particular case a person acted with honesty or not will depend on the facts of each case. If, for example, with a view to construct a road a municipality wishes to blast a rock with dynamite near a town and acts against expert opinion that the town is within the range of harm and the rock should be removed by quarrying it cannot be said to act honestly if it proceeds to blast the rock. It can also not be said to act honestly if it proceeds to blast the rock without taking expert advice. If it refuses to see light and hides its face from the light it would be acting with wanton and wilful negligence and its negligence coupled with want of honesty and good faith would be actionable. In the matter before us it is common ground that in laying the slab complained of, the defendants were carrying out a duty authorised by Section 54(1)(i) of the Act. But if they carried out the said duty with the knowledge of demolition of Varala Dam up to a height of six feet and with such knowledge narrowed the nullah or allowed the centring to remain and to obstruct the passage of bushes and debris, they would not be said to act honestly. In such case, they knew and ought to have known that the

constructed water passage would not be sufficient to carry the water coming from the additional catchment area and the centring would obstruct the passage of bushes and debris brought by the increased velocity of water.

9. The definition of "good faith" in the Indian General Clauses Act, X of 1897, Section 3 (22), would naturally not apply to Acts prior to the passing of the said Act, such as the Indian Contract Act or Transfer of Property Act. To these provisions, the definition of "good faith" as understood generally in civil law would apply, viz., that nothing is said to be done in "good faith" which is done without due care and attention, that is the care and attention expected of a man of ordinary prudence. Nor would the definitions of "good faith" in the Indian Penal Code or the Limitation Act, apply because those definitions are differently worded. In several States in India, the expression "good faith" is differently defined by the local General Clauses Acts in their application to the State Legislation and the interpretations put on the local definitions would only be a guide if the expression is similarly defined. Sections 167 and 167A were substituted for the original S. 167 by the Bombay Act 52 of 1949, and any interpretation of the previous provisions by our own High Court would have no direct application though it may be of some help. Mr. Rege has drawn our attention to the Statement of Objects and Reasons in introducing the amending bill which became Act 52 of 1949. This statement is published in the Bombay Government Gazette, dated 20th August 1949. Part V, page 287, and clause 33 of the Statement pertains to Ss. 167 and 167A. This statement can, however, not be used for arriving at the correct interpretation. After we have arrived at our own interpretations of these sections, clause 33 of the Statement has not helped us to change our mind, because we have to interpret the sections as we find them, and not by the Statement of Objects which reads as under:

"CL 33—It is considered desirable to give the municipalities and their officers and servants protection from suits in respect of the acts done or intended to be done by them in good faith in exercise of the powers conferred on them by the Municipal Acts or in respect of any alleged neglect or default in the execution of these Acts. The Bombay District Municipal Act, 1901, is being amended suitably for the purpose".

10. Mr. Rege has invited our attention to the observations of Chagla C. J. in the case of Govind Sadashiv Pathak v. Sadashiv Shivrao Nisal, 56 Bom LR 597, at p. 606=(AIR 1955 Bom 93 at p 97) where the expression "good faith" in Sec-

tion 14(2) of the Indian Limitation Act, 1908, came up for interpretation. These observations are:

"Therefore, while the Bombay General Clauses Act emphasises "honesty" and ignores the factor of negligence, the Limitation Act emphasises not "honesty", but the fact that due care and attention has been given to the prosecution of the earlier application".

11. We have already stated that in Section 3(20) of the Bombay General Clauses Act, the emphasis is on acting honestly and if a municipality acts honestly, mere negligence would not be actionable.

12. Mr Rege has cited before us the case of *Emperor v R K Naik*, 41 Bom LR 1227=(AIR 1940 Bom 35) which interprets a section of the District Local Boards Act restricting the right to sue a local board. This section is differently worded and is not of any help. Mr Rege has also cited the case of *Kedarnath v. State*, AIR 1965 All 233 which interprets "good faith" in the Indian Penal Code, where also the definition is differently worded and is in context of criminal law. Mr. Rege also cited the case of *Babulal Agarwalla v. Province of Orissa*, AIR 1954 Orissa 225 wherein in interpreting section 3(22) of the General Clauses Act in relation to the Defence of India Act, 1939, Section 17(1), it is observed at page 231 that:

"Hence if from the proved facts of this litigation it can be inferred that the public officials acted honestly even though they might have acted negligently it must be held that they acted in good faith within the meaning of Section 17(1) of the Defence of India Act".

13. A more instructive case cited by Mr. Rege is the case of *Harbhajan Singh v. State of Punjab*, AIR 1961 Punj 215 wherein Mr. Justice Tek Chand after comparing the definitions of "good faith" in Section 52 of the Indian Penal Code and Section 3(22) of the Indian General Clauses Act, observes at pages 222-223 as follows:

"The definition of 'good faith' in the Penal Code is negative one. The term 'good faith' is not attempted to be defined there but all that is stated is that if an act is not done with due care and attention, it would not be said to be done in 'good faith'. This definition comes into conflict with the definition in the General Clauses Act to this extent only that if a thing has been done negligently, though honestly, it would not be deemed to have been done in 'good faith'. The definition of the term in the General Clauses Act lays stress on one aspect only, but, that in the Penal Code places emphasis on two aspects, namely, the honesty of intention along with due care and attention.

Thus Section 52 excludes the element of negligence from the purview of 'good faith'. Both the definitions retain the real essence of 'good faith', which is that a thing is done 'honestly'. This is a feature common to both definitions without which the term 'good faith' will lose its real meaning. 'Good faith' therefore implies, not only an upright mental attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable person. 'Good faith' contemplates an honest effort to ascertain the facts upon which exercise of the power must rest. It must, therefore, be summed up as 'an honest determination from ascertained facts'. 'Good faith' precludes pretence or deceit and also negligence and recklessness. A lack of diligence, which an honest man of ordinary prudence is accustomed to exercise, is, in law, a want of good faith. Once this is shown, good faith does not require a sound judgment".

14. With these observations we are in respectful agreement. The definition of the term in the General Clauses Act lays stress on the one aspect of honesty only irrespective of negligence, but that in the Indian Penal Code lays stress on two aspects, viz, honesty of intention along with due care and attention. Both the definitions retain the real essence of good faith, which is honesty. This is a feature common to both the definitions. Good faith implies upright mental attitude and clear conscience. It contemplates an honest effort to ascertain the facts upon which the exercise of the power must rest. It is an honest determination from ascertained facts. Good faith precludes pretence, deceit or lack of fairness and uprightness and also precludes wanton or wilful negligence. We must therefore see by application of these principles whether the defendants acted honestly.

15. Mr. Khambatta on behalf of the plaintiffs contended that Section 167 must be strictly construed as it takes away a citizen's right to redress against a Municipality in respect of injury done by negligence. This question would arise only if we were faced with a choice of interpretations. The interpretation we have put appears to us to be the only possible interpretation. He has next contended that the definition in Sec. 3(20) of the Bombay General Clauses Act would not apply to Section 167 of the Bombay District Municipal Act, because the words in Section 167A "or in respect of any alleged neglect or default in the execution of this Act" indicate that neglect and default are made actionable by Section 167A and this clearly indicates "something repugnant in the subject or context" — words occurring in the pream-

ble part of Section 3 of the General Clauses Act — so as to exclude the application of Section 3(20) to Section 167 of the Bombay District Municipal Act. We have, however, stated above that we have put an interpretation that reconciles this so-called repugnance. There is nothing repugnant in Section 167 of the Bombay District Municipal Act to the definition of "good faith" in Section 3(20) of the Bombay General Clauses Act, and the said definition applies to Section 167.

16. Mr. Khambatta attempted an extreme definition of Section 167 in submitting that Section 167 is restricted only to such cases as do not arise out of or in respect of any alleged neglect or default in execution of the Act. He contended that for this type of suit, there is no immunity in Section 167 and the only protection or safeguard given to the defendants is under Section 167A, viz., the statutory notice and special period of limitation. We are unable to accept this submission and are of the opinion that only honest acts are protected even if they be negligent. Acts of negligence coupled with dishonesty would however, not be protected. Mr. Khambatta also referred us to the provisions of English Common Law making a distinction between acts enjoined and acts permitted by statute and that permissive acts must be performed in conformity with private rights and such statutory powers must be exercised in a manner that is not harmful to the public. All these are very healthy principles, but we are here concerned with the interpretation of statutory provisions which must be interpreted not in light of principles of English Common Law, but in light of the express words used in the statute and it may well be the intention of the Legislature to make a departure from these principles.

17. We must now proceed to consider whether the defendants acted honestly in exercise of their statutory powers and so in good faith so as to be entitled to the immunity provided in Section 167 of the Bombay District Municipal Act, 1901.

18. Mr. Mohanlal Parsharam Karwa the President of the Bhivandi Municipality from 1961 has given evidence in the lower Court on behalf of the defendants. He stated in his examination-in-chief that the Varala Dam was not within Bhivandi Municipal limits and that the staff working at the dam is paid and controlled by the Health Department of the Government of Maharashtra and that the contract for the re-construction was also given by that department. He has, however, admitted that the expenses incurred for the re-construction are borne by the Municipality. He has also admitted that even before the contract for construction was given by the Government, the estimate of

cost was submitted to the Municipality as the Municipality had to pay the amount although it had no control over the re-construction work. He also admitted that before the monsoon of 1963, about 15 feet in length of the dam above 6 feet from the ground level had in fact been demolished although he stated that no information about the actual demolition work had been received by the defendants. In his cross-examination, he denied that Varala Dam vested in the Municipality, although at the time of the inauguration of the dam a signplate had been put on the dam reading, "Bhivandi-Nazampur Nagarpalika Varala Talao". He also stated that the Municipality had paid Rs. 4,50,000 to the State Govt. for the re-construction of the dam. He admitted that water of the Varala dam was the source of the water supply of the town of Bhivandi, except that in April-May in each year this source is dried up and water has to be taken from the Bombay Municipal Corporation. He admitted that the road from Bhivandi to Varala dam had been constructed by the defendants and that the defendants paid the electric bill for lighting the road. He, however, did not remember who paid the electricity charges in respect of the pump at the dam for lifting water. He did not know whether staff quarters on the dam belonged to the defendants or whether the defendants paid electricity charges for those quarters. He stated that the dam was not owned by the Municipality. He stated that Manerikar the Chief Engineer to the Government of Maharashtra had not informed him that the dam would be demolished before the monsoon of 1963 and reconstructed before April 1964. He admitted that Manerikar had visited the defendants in 1962 and thereafter there had been correspondence between the defendants and Irrigation Department of the Government of Maharashtra. He, however, did not remember whether the defendants had written to the Government about the urgency of the demolition of the dam.

19. At this stage we must mention that during the pendency of the suit, on 5th April 1965 the plaintiffs' Advocate served on the defendants as well as their Advocate a notice to produce documents (Exhibit 74) asking them to produce in Court on 7th April 1965, inter alia, correspondence with the Government of Maharashtra regarding the demolition and reconstruction of Varala dam. The defendants replied on 28th April 1965 (Exhibit 77) stating that the demand was vague and that the defendants would consider the matter if specific letters with sufficient description with dates were asked for. It is pertinent to note that the subject-matter of the correspondence was clearly stated in the plaintiffs' notice as

well as the parties to the correspondence. Dates of letters could only be known to the defendants. The reply obviously was evasive. The defendants did not produce correspondence in Court in spite of the notice.

20. In cross-examination Karwa the defendants' President was put several questions about the correspondence and about its contents, but still the defendants chose not to produce the correspondence. He stated that the defendants had been pressing the Government of Maharashtra to reconstruct the dam soon. He admitted that the defendants had been asking for re-construction due to leakage in the dam. When pressed to answer why the correspondence was not being produced, he replied "I cannot state why the correspondence that took place between us and the Irrigation Department was not produced by us". Needless to say that the correspondence was not produced in the lower Court and has not been produced at all. We would, therefore, be justified in drawing an adverse inference against the defendants that they were aware that the Varala dam had been demolished in April 1963 from its height over 6 feet from the ground level and that had the correspondence been produced, it would have established the negligence of the defendants. It has been observed by the Supreme Court in the case of *State of Punjab v. M/s. Modern Cultivators*, AIR 1965 SC 17 at p. 26 as under:

"The sole ground upon which the liability of the State could be established in this case would be negligence of the State in properly maintaining the banks of the canal. For this purpose it would be relevant to consider whether there were periodical inspections, whether any breaches or the development of cracks were noticed along the banks of the canal and in particular at the place where the breach ultimately occurred or whether any erosion of the banks particularly at the place where one of the banks had been plugged had been noticed and no action or timely action had been taken thereon. There is evidence to show that the canals were being regularly inspected. That, however, is not the end of the matter. Immediately after the breach occurred some reports were made and as pointed out by my brethren in their judgments they were not placed before the Court despite its order requiring their production. When the matter went up before the High Court, it was said that the records had been destroyed in the year 1958 or so and therefore they could not be furnished. This action on the part of the State is manifestly unreasonable and the legitimate inference that could be drawn from it is that if the documents had been produced they would

have gone against the State and would establish its negligence. In these circumstances, I would hold that though the plaintiffs have been enabled to adduce positive evidence of negligence it could legitimately be presumed that the State was negligent inasmuch as it had deliberately suppressed evidence in its possession which could have established negligence. In the circumstances of this case I do not think it appropriate to refer to the rule of evidence *res ipsa loquitur*".

21. As regards the ownership of the Varala dam, the plaintiffs produced an extract from the Village Register showing that Varala lake was situated within the municipal limits of Bhivandi. This was produced with an application dated 19th August 1965 after the arguments were over. Its production was objected to by the defendants. By an order dated 2nd September 1965, the day on which the judgment was delivered the lower Court admitted the extract in evidence. The lower Court has observed that this being an extract from a public document, its genuineness could not be doubted and "in the interest of justice" its production was allowed. We, however, think that this was admitted at too late a stage and the defendants had no opportunity to cross-examine or examine any witness on the extract. We have, therefore, not relied on this piece of evidence.

22. After the floods of 5th July 1963 on the very day, Karwa, the President of the defendants, sent a telegram to the Government (Exhibit 228) stating that due to breakage of Varala Talao water had rushed in the town, followed by the letter of 6th July 1963 (Exhibit 231), stating that before commencing the work of dismantling the old dam, no precautionary steps for the flow of water had been taken by the contractor and the result was that the capacity of the nullah was not sufficient to meet with the flow of water coming from the Talao and it would appear that the position would continue to remain the same till the monsoon was over.

23. But even apart from this extract, taking into consideration that (a) the Varala dam was the principal source of water supply of Bhivandi, (b) due to the leakage in the dam the defendants themselves had asked the Government for its re-construction, (c) pursuant to the request of the defendants, Manerikar, the Government Chief Engineer, had visited the defendants in this connection in 1962, (d) there had been correspondence regarding demolition and re-construction between the defendants and the Government thereafter, (e) even before the contract was given before the demolition an estimate of cost was submitted to the defendants, (f) the defen-

dants paid Rs. 4,50,000 as cost of demolition and re-construction. (g) immediately after the floods on 5th and 6th July 1963, the defendants showed knowledge of the dam having been demolished (Exhibits 228 and 331), (h) Varala dam bore the sign-plate of the defendants, (i) the road to Varala dam had been built by and lit at the cost of the defendants, (j) the defendants had to make arrangement with the Bombay Municipal Corporation for water-supply from the time of the demolition of the dam in April 1963 to April 1964 and they could not have done so unless they had known about demolition, (k) that the defendants who are a public body have suppressed the correspondence between them and the Government on the subject of demolition and re-construction leading to the presumption that they knew about the demolition of the dam in April 1963, and taking into consideration the cumulative effect of all these and all other circumstances, we hold that the defendants had knowledge in April 1963 of the demolition of the Varala dam above a height of 6 feet above ground level.

24. In support of his contention that the defendants had no knowledge of the demolition of the dam before the laying of this slab complained about, Mr Rege took us through the resolution of the defendant Municipality on 28th November 1960 for putting slab between Teen Batti bridge and Habsanali bridge on the south (the slab complained about) and between Teen Batti bridge and Lendi bridge on the north (sketch Exhibit 148). He also took us through notices to contractors dated 6th April 1961 (Exhibits 222 and 223), sanctioning of the work on 1st February 1962 (Exhibit 224), and the agreements with the contractors for the execution of the work on 17th March 1963 (Exhibits 235 and 236). About these facts there is no dispute. They only indicate that the work had been planned much earlier and there was no want of good faith in planning it. The time and manner of execution however stand on a different footing.

25. The real dispute is about the date of the laying of the slab between Teen Batti bridge and Habsanali bridge which caused the damage. Pherwani, a partner of the plaintiffs who gave evidence in the lower Court, stated that the defendants constructed a wall on either side on the nullah and put a slab over it, that the slab was completed in the middle of June 1963 and that till the time of the flood on 5th July 1963, the centring material was not removed from the nullah and that due to the putting of the slab, the width of the slab was narrowed from 40 feet to about 15 feet. This shows that while the dam was demolished in April 1963, the slab was completed in the mid-

dle of June 1963. It may have been commenced 15 to 20 days earlier, as it is the evidence of the defendants that it took about 25 days to complete this slab. It is also a matter of common knowledge that once RCC slabs are started, work goes on continuously and without a break to avoid gaps and cracks.

26. As against this, the defendants relied on a letter (Exhibit 226) alleged to have been addressed by the contractor Madbhavi to the defendants on 9th May 1963, stating that the slabs between Lendi bridge and Teen Batti bridge and between Teen Batti bridge and Habsanali bridge were complete and possession may be taken and payment made. This letter has been produced through the defendants' witness Madbhavi. He states that he delivered this letter personally to the President at his private shop on 9th May 1963. In cross-examination, he was unable to produce either his office copy of this letter or any acknowledgment for its delivery. He admits that he neither informed the architects of the completion, nor obtained or even applied for their certificate of completion to entitle him to payment. He denied the suggestion that this letter was not written by him on 9th May 1963. The defendants President Karwa was cross-examined on this letter and had to admit that he had no knowledge about the completion of the work, that the letter was not initialled by him or by any other officer of the defendants and that it had not been entered in the inward register. In view of these facts, we have no hesitation in rejecting the letter (Exhibit 226) as unreliable. Kini, the defendants' architect, has in his evidence not referred to this letter or alleged that the work was completed by 9th May 1963.

27. We, therefore, hold that the slab complained of was commenced and completed after April 1963 by the defendants with the knowledge of the demolition of the Varala dam. And if we come to the conclusion — and as we have as will appear subsequently — that the defendants narrowed the water-way near Teen Batti bridge to an extent that it was insufficient for discharge of water from the increased catchment area due to the demolition and that the defendants with full knowledge of the consequences narrowed the water passage, put a slab on it and did not remove the centring at Lendi bridge and allowed it to accumulate garbage and debris so as to obstruct the passage of water, we cannot say that the defendants did so with fairness or uprightness or without wilful or wanton negligence. Every man is presumed to intend and to know the natural and ordinary consequences of his acts. The defendants should be liable for the natural and necessary consequences of their acts,

whether they in fact contemplated them or not. We, therefore, hold that the defendants in executing this work did not act honestly or in good faith and are not protected in respect of their negligence by Section 167 of the Bombay District Municipal Act and that the present suit was not barred by Section 167.

28. Coming to the question whether the defendants are guilty of negligence or not, we must first observe that if things authorised to be done by a statute are carelessly or negligently done, an action is maintainable. Such a breach is known as statutory negligence. The word 'negligence' in such cases means adopting a method which in fact results in damage to a third person except in a case where there is no other way of performing the statutory duty. So that it is negligent to carry out work in a manner which results in damages unless it can be shown that that—and that only—was the way in which the duty could be performed. Powers given by a statute must be exercised reasonably, and not to the prejudice of the public.

29. The negligence alleged by the plaintiffs is set out in paragraphs 4 to 8 of the plaint and consists of:

(a) In May 1963 the Varala dam was demolished by the Government of Maharashtra. In consequence of the demolition the rain water falling in the catchment area of the lake was bound to pass through the nullah in front of the plaintiffs' shop. The defendants and its officers prepared plans for narrowing the said nullah without making any provision for the passage of additional rain water from the Varala lake catchment area.

(b) That the defendants and its officers prepared plans for narrowing the said nullah without making any provision for the passage of rain water which normally used to pass through the said nullah during the monsoon season.

(c) The centring work for construction and support to the cement slab put across the nullah continued to remain in its position till the 1st week of July 1963 obstructing the free passage of water in sufficient quantity.

(d) The centring work held up shrubs and debris which the defendants did not clear and the said obstruction obstructed the flow of water.

(e) The cement slab put by the defendants across the nullah itself interfered with the natural state of the nullah and was carried out without making any provision for the passage of normal rain water.

30. The nullah runs from south to north and the water carried by it flows in the creek at northern end of the nullah. There are five bridges over the nullah, viz., Jaitunipura, Habsanali, Teen Batti, Lendi and Panjrapole. The por-

tion of nullah which lies between Habsanali bridge and Lendi bridge was covered with a concrete slab in 1963. It is an admitted fact that due to heavy rain on the night between 4th and 5th July 1963 water accumulated at the southern end of Habsanali bridge and entered the surrounding area. Pherwani has deposed that there was 2 feet deep water within the factory of the plaintiffs on the morning of 5th July and this state of affairs continued for three days. Pawankumar an employee of the plaintiffs and Sikan-der Faki a Panch of the Panchnama made on 6th July 1963 have deposed that water in the plaintiffs' premises was 2 feet deep. Pherwani has stated that on Yacoob Road the water was knee-deep. Jaywantrao has stated that the depth of water over the slab was 5"-6". Pawankumar has stated that water level over the slab was 4". It is stated by these witnesses that the level of Yacoob Road was about 2 feet lower than the slab and that the plinth of the plaintiffs' premises was 2½ feet above the level of Yacoob Road. None of the witnesses took actual measurement of the water level. The defendants themselves put a suggestive question to Pawankumar in his cross-examination that water inside the factory premises was 6" deep. This suggestion itself shows that it was admitted by the defendants that there was considerable amount of water in the plaintiffs' premises. There is, therefore, no doubt that, whether the level of the water in the plaintiffs' premises was 6" or 2 feet or anywhere between 6" and 2 feet, water had entered the plaintiffs' premises. Pherwani has deposed that he took photographs of the flooded conditions of the premises. He has produced these photographs and has not been cross-examined on them. The photographs show that there is water inside the plaintiffs' premises. Karwa the President of the defendants did not state that water had not entered the plaintiffs' premises.

31. The plaintiffs commissioned one N B Malbari a well qualified and Senior Engineer to prepare a report on the flooding in their premises on 5th July 1963 and to give evidence. In his report dated 8th June 1965 (Exhibit 146) he states that he visited and inspected the plaintiffs' premises on 30th March 1965 and 10th April 1965. He stated that he took measurements of cross-section of the nullah at Habsanali bridge and it measured 40 feet x 4 feet and the water-way provided below Habsanali bridge was 2/13 feet-8 feet x 3 feet-8 feet. He took the level of the floor of the plaintiffs' premises and found that it was 6" on the top of the Habsanali bridge and 2'-6" above the old road level which could be seen from the building corner. He also inspected the drawings made by M/s. Shaikh

& Co. and M/s. S. M. Kini & Co., Joint Architects of the defendants for the slab covering the nullah. He found that the water-way width at Habsanali bridge was 2'x11'-3" and it was reduced to only 15'-0" and the height was increased to 5'-0". He found that the increase in height to 5 feet was not effective and for discharging purposes only 3'-8" height was only effective at Teen Batti bridge. Malbari calculated the flood discharge by a number of formulae known to architects, including those in Bombay P. W. D. Handbook. He came to the conclusion that the existing open channel of water before Habsanali bridge, viz. 40'x4', was sufficient for discharge of 1445 cusecs. He found that the previous water-way at Teen Batti and Habsanali bridges was sufficient for discharge of 1425 cusecs, and that the new water-way of 100 sq. ft. provided at Habsanali bridge was sufficient for discharge of 1120 cusecs. He found that the ordinary catchment area of the nullah was 0.6 square miles and with the added catchment area provided by Varala lake which was 0.3 square miles, it made a total of 0.9 square miles. He found that the new water-way provided near Teen Batti bridge was insufficient for discharge even from a catchment area of 0.6 square miles. As per P. W. D. Handbook the water-way required was 104 square feet for catchment area of 0.6 square miles, and the water-way provided near Habsanali bridge and Teen Batti bridge was less than 104 square feet and that the water-way was further reduced by Lendi bridge due to the centring being erected for casting R.C.C. slab, and that due to the centring not being removed, the plants and weeds got entangled with the props further reducing the water-way. He further found that the earthen dam at Varala tank having been demolished, there was added discharge of water through the nullah and that the proposed water-way section ought to have been increased for this added discharge, if the nullah had to be slabbed before the dam was re-constructed. He was also of opinion that due to faulty design and the choking up of water way, the water could not flow through and the water entered in the factory premises of the plaintiffs.

32. Malbari gave evidence in the lower Court in support of his report (Exhibit 146) and stated that his estimate of discharge of 0.6 square miles of catchment area was 1100 cubic feet per second (cusec) and for a catchment area of 0.9 square miles it was 150 cusec. He stated that in his report he had assumed the rain fall at 3" per hour which was according to the P. W. D. Handbook. In cross-examination, he admitted that if the rainfall did not exceed 1½" per hour, the present water-way would have

been sufficient to drain the water. We might here observe that Malbari has not been cross-examined on his conclusions and his evidence appears to have gone unchallenged. Apart from this, we find his evidence to be thorough as well as reliable.

33. Earlier in point of time and made at the instance of the defendants is the report dated 9th July 1963 of V. B. Manerikar, Chief Engineer to the Government of Maharashtra. He states in the report that the heavy rainfall before 5th July 1963 caused afflux on the upstreams side of the nullah whereby water entered the adjacent factory weaving areas and caused damage to yarn and electrical equipment. On removal of the debris the water was said to have subsided. However, another heavy shower of rain on 7th July brought another flood which also caused afflux to the same extent, although this time drain was free from debris. He stated that the flood was not abnormal and was estimated at 1000 cusecs and was such as could reasonably be expected to occur. He stated that there was construction of natural water-way at the bridges. He stated that the catchment area of the nullah was 580 acres of which 190 acres had been intercepted by the old Varala water supply earthen dam which was dismantled before the monsoon as a preliminary to re-construction scheduled to be completed by April 1964. From the total catchment area, a maximum flood of about 1800 cusecs could be expected and that after re-construction of the Varala dam, a maximum could be assumed to be about 1200 cusecs. According to him, with the present constructed water-way in the slab drain, an afflux of about 4 feet should be expected with a flood of 1200 cusecs. This was not desirable as it would affect the adjacent localities and if the water-way in the drain was increased from 75 square feet to 120 square feet the afflux could be brought well within one foot or so which would be permissible. He stated that it was essential to keep the drain openings clear of obstruction throughout the monsoon. In his opinion, the natural water-way of the nullah had been unduly constructed and it was desirable to increase it as early as possible by providing additional openings on either side. Manerikar gave evidence in the lower Court on behalf of the plaintiffs. He states that it had been found desirable to get the dam re-constructed and the work of re-construction had been undertaken by the Irrigation and Power Department on behalf of the Municipality. He stated that the Municipality was to pay the construction expenses. He stated that it was not possible to demolish the old dam and to re-construct a new one between two monsoons, and that the work would not take less than one year

and the demolition work commenced in April 1963. He stated that the catchment area up to the drain area was 0.9 square miles and that out of this 0.3 square miles was intercepted by Varala dam and that in his opinion water-way should have been 120 square feet instead of the existing 75 square feet. He stated that the contract for reconstruction of the dam was given with the concurrence of the Municipality and that the Municipality was aware of the demolition work.

34. As a result of a trunk-call from the defendants, M. N. Shevade, Sub-Divisional Officer to the Government of Maharashtra, visited the site on 5th July 1963, the day of the flood. He has not been examined by any party, but his report appears to have been admitted in evidence without any objection from anybody. In his report (Exhibit 241), he states that as a result of a trunk-call from the President of Bhivandi Municipality on 5th July 1963, he visited the site and inspected the flood caused by the heavy rains and due to demolishing of the Varala lake. He stated that due to demolishing of the Varala lake all water from the catchment area of the lake rushed towards the town as there was no other outlet. He found that the nullah through which the water rushed was not cleaned and drained and thereby all the debris and fallen trees and bushes etc. were carried away by the water and were deposited at the mouth of the newly constructed slab drain thereby causing afflux on the upstream side. He found that the flood subsided after the removal of the choking of the drain. He was of the opinion that the water-way was insufficient for the existing catchment area and that after construction of the dam, there may not be any trouble of flooding due to Varala lake.

35. S. M. Kini is one of the architects who designed and supervised the construction of the slab complained of. He is the architect of the defendants. He was summoned by the defendants on telephone and visited Bhivandi on several days in July 1963. He made two reports (Exhibits 232 and 233). It must be noted that if we come to the conclusion that the work carried out by the defendants was defective or the manner or timing was negligent, Kini would not escape a part of the blame. His report is more of an apology and shows anxiety to defend himself. Apart from this, before these reports, the defendants had been served with a legal notice of the claim of the plaintiffs in this suit. He agrees that on account of the demolition of the dam portion, the entire flood discharge rushed into the city and that water level was 6" over the R. C. C. slab. He found that abnormal rain along with choking up of upstream side of Habsanali bridge and

all water plants and weeds, which also rushed with flood from the catchment area, had caused obstruction to the passage of water. He states that Municipality had removed 15 lorries of these plants from the nullah and that there were about 15 to 20 lorries still to be removed. In his opinion, the passage of water was sufficient for a catchment area of 0.6 square miles. He gave evidence in Court and stated that 75 square feet passage was sufficient for Bhivandi catchment. He admitted that he had not taken into consideration the rain of 3" per hour. In his examination-in-chief, he said that this was not laid down in any book anywhere, but in cross-examination he admitted that he considered the P. W. D. Handbook to be an authority and had relied upon the observations made in the book on pages 709 to 722. He admitted that the water-way provided between Habsanali and Teen Batti bridges was not enough if the rain was 3" per hour.

36. We might here observe that the P. W. D. Handbook, Vol. II, page 717, gives formula for designing drainage works over nullahs with catchments up to one square mile. At page 818, it states that provision should be made for rainfall at 3" per hour for catchment areas up to one square mile. This passage has been followed by Malbari in his report. This book is accepted by Kini as authority in his evidence, but admittedly not followed by him.

37. Pherwani, in his deposition, has stated that about 80 lorry-loads of debris were removed. The defendants suggested to him in cross-examination that about 20 lorry-loads had been removed. Karwa in his evidence has stated that about 30 to 35 truck-load of debris had been removed and that the work was going on for two days.

38. K. H. Thanawalla from the office of Mamlatdar has given evidence about the figures of rain fall maintained in his office and states that on 5th July 1963 there was a rainfall of about 4" and on 6th about 6" and on 7th about 2 inches. Karwa has admitted that the defendants had not maintained any record of rain fall.

39. On the above evidence, we are of the opinion and we so hold that the narrowing of the water-way and putting a slab on it at Habsanali bridge was ill-timed. This work should have been commenced after the Varala dam was re-constructed. If for any reason, the defendants wanted to proceed with this work before the re-construction of the dam, sufficient water-way should have been provided for passage of water from a catchment area of 0.9 square miles providing for a rainfall of 3" per hour. In

addition, the centring work should have been removed before the monsoon and, in any case, no trees, bushes, debris or garbage should have been allowed to be collected at the centring or the slab so as to obstruct the free passage of water. We are of the view that although the retention of the centring and the negligence in not clearing the passage of debris was the principal cause of the flood on 5th July 1963 the construction of the passage way, the slabbing of it and the demolition of Varala dam were all contributory to it.

40. Turning to the defence of the defendants on the question of negligence, their first contention is that the dam is demolished by the Government and the defendants were not liable for acts of third parties. Although in their written statement the defendants had pleaded that the damage was due to an act of God, since evidence had been led, we did not desire to hold the defendants to technicalities and permitted them to argue that the damage was caused by an act of the Government of Maharashtra. We, however, find on evidence that the Varala dam was demolished and was being reconstructed at the request and with the knowledge and consent of the defendants. Mr. Rege next contended that the defendants were entitled to assume that the Government took necessary precautions to prevent the flood. We cannot accept this contention, because the defendants cannot shut their eyes to surrounding circumstances and to commence or continue their work by shutting their eyes to light. Mr. Rege next contended that official acts should be presumed to be done properly. Now, this presumption provided for in illustration (e) to Section 114 of the Evidence Act is only a presumption as to procedure that the necessary procedure in doing all official acts has been followed. There is no presumption that in carrying out public works the Government takes necessary precautions to see that no injury is caused by negligence to the public. The constricted passage way constructed by the defendants was not sufficient even for passage of normal rain water and in addition, they allowed centring to remain and garbage to collect. They cannot absolve themselves of their negligence by throwing the blame on the Government.

41. Coming to the quantum of damages, we find that on 5th July 1963, the plaintiffs through their Advocate served a notice on the defendants and several of their officers, including Karwa their President (Exhibit 79) stating that water had entered their factory premises on Yacoob Road on account of the flood and damaged their goods and that as the damage caused was considerable and the

plaintiffs were holding the defendants responsible for the cause of the damage and intended to recover damages from them, they desired to make a Panchnama assessing the damage done. They stated that they intended to call experienced persons to assess the damage and to make a Panchnama and as the defendants were vitally concerned with the assessment of damage, they were requested to remain present at the plaintiffs' premises on Saturday 6-7-1963 at 1-00 P. M. or to depute someone to represent them. The plaintiffs also offered that in case the time given in the notice did not suit the defendants, they could suggest any other time and the plaintiffs would accommodate them, although it was not desirable to postpone the making of a Panchnama beyond Saturday the 6th July 1963. They also made an offer that this Panchnama should be prepared without prejudice to the defendants' contention of denial of liability. The defendants replied by their letter of 6th July 1963 (Exhibit 68) cryptically stating that they were too busy to attend. We might here observe that if they were too busy to attend, they could have (a) asked for a postponement of the making of the Panchnama to a time suitable to them, (b) they could have deputed an officer of the Municipality, (c) they could have requested that the premises be sealed and surveyed at a later time, and (d) they could have asked for a survey of the damage by a competent surveyor. The defendants did none of these things.

42. The plaintiffs made a Panchnama (Exhibit 89) dated 6th July 1963 in the presence of 5 Panchas, one of whom Sikandar Faki has given evidence in support of it. The Panchnama describes the level of water, the goods lying in the premises, the nature of damage to them, and the amount at which the damage was assessed. Some of the Panchas were themselves in similar business and were competent to assess and value the loss.

43. In that suit, the plaintiffs claimed a sum of Rs 1,00,012 as damages for loss suffered by them:

(1) 20 cases of Art Silk Yarn weighing 4,000 lbs. and worth Rs. 27,875, damage 70 per cent.=loss Rs 19,512.

(2) Yarn on loose cones weighing 12,000 lbs.=value Rs. 80,000 damage 70 per cent.=Loss Rs. 56,000

(3) 23 beams of yarn weighing 190 lbs. value Rs 12,500, damage 100 per cent. = loss Rs. 12,000

(4) Electric Motors damages, cost of re-winding Rs. 1,000.

(5) Damage to electric wiring Rs 3,000.

(6) Damage to chemicals Rs 2,000

(7) Damage to beam papers=Rs 2,000.

(8) Total loss of business from 5th July

to 9th July and partial loss of business for 15 days thereafter=Rs. 4,000.

TotalRs. 1,00,012.

After examining the evidence, the lower Court allowed the plaintiffs a sum of Rs. 49,560 for item No. 2, a sum of Rs. 2,000 for item No. 6, a sum of Rupees 2,000 for item No. 7, and a sum of Rupees 1,000 for item No. 8, aggregating in all to Rs. 54,560. The lower Court disallowed the remaining part of the claim. Mr Khambatta on behalf of the plaintiffs made an attempt to argue that the remaining part of the claim had been wrongly disallowed. Ultimately, however, he confined the claim in the appeal to the sum of Rs. 54,560 allowed by the lower Court.

44. Sikandar M. Faki, one of the Panchas, who is in a similar business, gave evidence in support of the statements contained in the Panchanama. Pherwani, a partner of the plaintiffs has given evidence to prove the extent of damage and the value thereof. He has produced account books in support of the items. Three extracts prepared from the account books were produced. Exhibit 73 is an extract from the account books regarding goods of third parties lying in the plaintiffs' premises for processing and damaged by the flood. Exhibit 76 is an extract from account books in respect of chemicals damaged and their value. Exhibit 247 is an extract from account books in respect of yarn damaged. Pherwani has not been cross-examined materially on the evidence pertaining to loss and damage or in respect of account books or in respect of the assessment of damage and its value in respect of the yarn, the plaintiffs assessed the damage at 70 per cent. of the value. Pawankumar has deposed that the cone yarn was completely damaged. Pherwani deposed that all the yarn was damaged, weighing in all about 6,608 lbs. On evidence, the lower Court came to the conclusion that 6,608 pounds of yarn were damaged due to flood waters and on the statement of Sikandar Faki, and on the price varying from Rs 6 25 to Rs. 9 per pound, the learned Judge found an average price of Rs 7 50 per pound and valued the yarn at Rs. 49,560. With regard to the damage to the chemicals and beam paper, relying upon the evidence of Pherwani, the learned Judge allowed a sum of Rs. 2,000 in respect of each of these items. With regard to loss of business although the plaintiffs had claimed Rs. 4,000, by the rule of thumb the learned Judge allowed a sum of Rs. 1,000. There may be a degree of arbitrariness in his assessing this part of the claim. But we are of the view that the amount allowed is not at all excessive.

We have, therefore, no hesitation in coming to the conclusion that the lower Court has rightly allowed a sum of Rs. 54,560 to the plaintiffs.

45. In a claim of damages, it is always the duty of the person who has suffered the loss to mitigate the loss. We therefore, particularly questioned Mr. Khambatta appearing on behalf of the plaintiffs as to what measures the plaintiffs adopted to mitigate the loss. He drew our attention to the evidence of Pavankumar an employee of the plaintiffs who was sleeping in the premises on the night of 4th July 1963. He stated that at about 4-00 a. m. the watchman woke him up and on getting up, he saw water entering into the factory premises through the main gate, and that at that time the water was about 2 feet deep inside the factory. He stated that after half an hour, the electric lights were off. He therefore left for Bombay by 5-45 a. m. State Transport Bus saw Pherwani, a partner of the plaintiffs, and told him about the loss. They returned together to Bhivandi at about 9-30 a. m. and by that time loss had already been caused.

46. According to a certificate given by Karwa, the Municipal President, to the witness Sheshmal, who has given evidence in the lower Court, on account of excessive rains on 4th and 5th July 1½ feet or 2 feet water had accumulated in the surrounding area at Bhivandi. We have examined the photographs taken by the plaintiffs. Photographs Nos. 9 and 14 clearly show water in the premises of the plaintiffs, but the level of water cannot be ascertained. It may have been anywhere between 6" to 2 feet. We have, however, no doubt about the extent of the loss caused to the plaintiffs according to the evidence given in the lower Court. Pherwani has hardly been cross-examined on the photographs also.

47. The defendants contended that they had engaged qualified engineers and experienced contractors and, therefore, they could not be guilty of negligence. With regard to the contractors however much experienced, they would merely carry out the work according to the plans prepared by the Municipality. If the engineers are negligent, the defendants would be liable. The liability of principal for the wrongful act of his agent rests on the grounds that the principal is a person who has selected the agent and that the principal having delegated the performance of a certain class of acts to the agents, the principal should bear the risk. All that is necessary is that the act should have been committed by the agent in the course of his employment, although the principal did not authorise, or justify, or participate in the act or even if he forbade it or disapproved of it. The liability of the

principal for the wrongs of his agent is a joint and several liability with the agent. The injured party may sue either or both of them.

48. We hold that on 5th July 1963, flood water entered the premises of the plaintiffs. The execution of the work by constricting the nullah and by putting a slab on it, was carried out with wilful and wanton negligence without good faith causing damage to the plaintiffs' property. The said damage has been proved at Rs 54,560. The suit is not barred by S 167 of the Bombay District Municipal Act. In the result, we set aside the decree of the lower Court dismissing the plaintiffs' suit and pass a decree in favour of the plaintiffs against the defendants for Rs. 54,560 with interest thereon at 6 per cent per annum from the date of the decree of the trial Court till payment. The defendants will also pay the plaintiffs proportionate costs throughout. Defendants will bear their own costs in both the Courts.

D.R.R.

Appeal allowed.

AIR 1969 BOMBAY 140 (V 56 C 26)

PALEKAR, J.

Popat Namdeo Sodanvor minor by his guardian mother Sundarbai, Appellant v. Jagu Pandu Govekar, Respondent.

A. F. A. D. No. 36 of 1961, D/- 14-2-1968, against decision of Dist. J., Satara, in Appeal No. 259 of 1958.

(A) Hindu Law — Guardianship — Contract by guardian on behalf of minor — Enforcement — Principles. (1912) ILR 39 Cal 232 (PC) held no longer good law.

A contract to purchase immovable property by a competent guardian acting within his authority on behalf of a minor is specifically enforceable by or against the minor. (Para 20)

The principles in this regard may be stated thus:

(1) A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian, therefore, steps in to supplement the minor's defective capacity;

(2) Capacity is the creation of law, whereas authority is derived from (nature of) the act of parties;

(3) The limit and extent of the guardian's capacity (authority) are conditioned by Hindu law. They can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor,

(4) Even the personal liability arising out of the guardian's contract is a liability of the minor's estate only;

(5) Since the guardian under the Hindu law has the legal competency to enter into a contract on behalf of the minor for necessity or for the benefit of the estate, the contract is valid from the time of its inception, and since either party can enforce the contract, the test of mutuality is satisfied;

(6) There cannot be any essential distinction between a contract of sale and contract of purchase. The difference is only one of degree. There is no difference in principle between the case of purchase by a guardian and that of a case of a sale by a guardian, because both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law.

(7) An agreement to convey or purchase is only a preliminary step in completing a transaction of sale or purchase as the case may be. Without negotiations and without any agreement, oral or in writing, rarely is a sale-deed executed and registered. To hold that guardian can execute a sale-deed in respect of a specific property but he cannot legally enter into an agreement to convey or purchase the same is incongruous and illogical;

(8) Contracts to sell or purchase property are transactions closely connected with dealings in immoveable property by a guardian giving rise to obligations annexed to that property. They cannot be equated with contracts of loans imposing personal obligations on the minor. (1912) ILR 39 Cal 232 (PC), Held no longer good law. AIR 1948 PC 95, Foll. (Para 19)

(B) Hindu Law — Guardianship — De facto and de jure guardian — Mother cannot be de jure guardian when father is living — Father living but reducing the family to extreme poverty by addiction to drink — Mother taking help of her father to avoid sale of property by revenue authorities—Held that the mother was a de facto guardian of the minor, and in that capacity she was competent to act on her son's behalf as if she was the infant's de jure guardian. (Para 5)

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T. N. Walawalkar, for Appellant; Y. S. Chitale, for Respondent.

JUDGMENT: This is an appeal on behalf of a minor whose suit for specific performance of a contract to purchase immoveable property has been dismissed by both the courts. Survey No. 40/A in village Koregaon belonged to one Namdev. On 20th April 1954, Namdev sold six acres out of this survey number to the defendant Jagu Pandu Govekar for a consideration of Rs. 1500. The plaintiff is the minor son of Namdev and he filed the present suit against the defendant for a declaration that the sale-deed in respect of the six acres in favour of the defendant was obtained by the defendant by fraud and without adequate consideration. It was also alleged that advantage was taken of Namdev as he was vicious and given to drink. When the guardian-mother came to know of the transaction, she gathered panchas in whose presence the defendant expressed regrets about the transaction and agreed to return the land. Accordingly on 24th December 1954, the defendant gave a writing to the plaintiff represented by his mother agreeing to reconvey the land on payment of Rs. 1500. That document is Ex. 50. On these allegations, the plaintiff

wanted the sale-deed to be set aside, or, in the alternative, specific performance of the contract dated 24th December 1954.

2. The trial Judge held against the plaintiff on the issues of fraud and inadequacy of consideration. He also held relying upon the Privy Council decision in *Mir Sarwarjan v. Fakhruddin Mohomed Chowdhuri*, (1912) ILR 39 Cal. 232, that the minor's contract to purchase the property could not be specifically enforced. Consequently, he dismissed the suit. In appeal to the District Court, the contentions with regard to fraud and inadequacy of consideration were given up and the principal point which survived was with regard to specific performance. The learned District Judge after discussing the various rulings on the point agreed with the view taken by the trial court that the minor's contract for purchase of land was not capable of being specifically enforced. The appeal was, therefore, dismissed.

3. The plaintiff has now come in second appeal, and, it is contended on behalf of the plaintiff by Mr. Walawalkar that both the courts were in error in holding that the contract could not be enforced. The view of the lower courts was supported by Mr. Chitale on behalf of the respondent-defendant. He further argued that the plaintiff's guardian-mother could not be deemed to be either the *de jure* or *de facto* guardian of the minor since the minor's father was living, and hence for that reason also the suit was not competent.

4. I will take the second point first. The minor is about ten years old and he is represented in the suit by his mother who is styled as his guardian and next friend. The contract to sell (Ex. 50) dated 24-12-1954 is between her as the guardian of the minor and the defendant. This agreement is a short one taking the form of a writing passed by the defendant in favour of the guardian-mother. He says therein that he had purchased the land for the sum of Rs. 1500 from Namdev on 20-4-1954 but that he was prepared to reconvey the same in favour of the minor plaintiff if he was paid back Rs. 1500. He further stated that it was always his desire that the minor should not suffer, and there was an oral understanding with regard to the reconveyance of the property. The writing is clearly an agreement to sell, and there is no dispute about it before me.

5. Under the Hindu Law, which applied to the present case, the father is the natural guardian of the person and of the separate property of his minor children, and next to him, the mother. The plaintiff-minor's father Namdev is living. The contention, therefore, is that as long as Namdev was living and capable of entering into a contract on behalf of the minor, the mother was not

entitled to take an agreement on behalf of the minor. It is obvious that the mother cannot be the *de jure* guardian of the minor when the father is living. But the contention of Mr. Walawalkar is that she is a *de facto* guardian of the minor, and, as his *de facto* guardian, she has the same power over the property of her ward as the *de jure* guardian. The learned District Judge has observed that there is nothing on record to show that the mother is the *de facto* guardian of the property as well as the person of the minor. But it seems to me the learned Judge is in error. Namdev, it would appear from the evidence, was addicted to drink and had disposed of all his lands which were about 24 acres in extent. The last two transactions were in 1954, and both these transactions were in favour of the present defendant. These two transactions relate to Survey No 40 which was about 12 acres in extent. By the sale deed dated 20th April 1954 Namdev sold six acres to the defendant, and with regard to the remaining six acres he entered into a contract for sale in favour of the defendant on 14-11-54. Thus by these two documents he exhausted all his properties. Under the agreement to sell possession was also delivered to the defendant. Namdev had a house at Koregaon, and he used to live there with his wife and son. But after the alienations of his properties, his wife and son went away to Lonand to live there with the wife's father. They are being looked after by Namdev's father-in-law who appears to be a substantial agriculturist. The minor plaintiff lives with his mother at Lonand and goes to school at Lonand. It is obvious that mother and son went away to live at Lonand, because Namdev had no landed property now left and was unable to maintain them. According to the mother Sundrabai, Namdev had reduced the family to this extremity by his addiction to drink. Now, a *de facto* guardian is a person who not being an *ad hoc* guardian manages the affairs of the infant in the same way as a *de jure* guardian does, though he may not be a natural guardian or a guardian appointed by the court. I have little doubt in my mind that after the separation between Namdev and his wife, the affairs of the infant are now being managed by his mother Sundrabai, and, therefore, she should be regarded as his *de facto* guardian. There is one particular fact which sheds a flood of light on this issue. It appears that under the sale-deed referred to above, a sum of Rs. 500 had been paid to Namdev, and it was agreed that that amount should be paid to the revenue authorities against a taquai loan received from the Government. Namdev did not pay the taquai loan, and hence there was a charge for about Rs 500 on the properties sold to the defendant. The defendant was not able to

get anything out of Namdev, and the evidence shows that on the very day he passed the agreement to reconvey in favour of the plaintiff, that is, on 24-12-1954, the defendant accompanied by two others went to Lonand to see Sundrabai in this connection. The defendant asked Sundrabai to pay the taquai dues. She appears to have agreed to borrow the money from her father and pay the taquai dues on condition that the defendant agreed to reconvey the property on payment of Rupees 1500. The defendant agreed to this and the same day, the taquai dues of Rs 492 were paid off by Sundrabai. This incident would go to show that even the defendant felt that he could get nothing out of Namdev and that it was necessary, therefore, to meet the plaintiff's guardian Sundrabai. It is obvious that Sundrabai wanted to preserve the ancestral property for her son and actually paid a large sum of money to free the property from the charge of the Government for taquai. All these acts performed by Sundrabai for the benefit of the minor would clearly go to show that she was the *de facto* guardian of the minor and in that capacity she was competent to act on her son's behalf as if she was the infant's *de jure* guardian.

6. That brings us to the more important question as to whether the contract to purchase the land with the infant's guardian-mother was capable of being specifically enforced. The law governing this question for many years was the decision of the Privy Council in (1912) ILR 39 Cal 232 (PC). It was a suit for the specific performance by a minor of an agreement for the purchase by him of certain immoveable property entered into by the manager of the minor's estate and his guardian on his behalf. It was held by the Judicial Committee that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immoveable property; that as the minor was not bound by the contract, there was no mutuality, and that consequently the minor could not obtain specific performance of the contract. This decision held the field for many years. But, according to Mr. Walawalkar, its principle, so far as it applies to a Hindu minor must now be regarded as discarded by the Privy Council in *S Subrahmanyam v. K. Subba Rao*, 75 Ind App 115=(AIR 1948 PC 95). He further argued that the doctrine of mutuality was not applicable in a case where a competent guardian on behalf of the minor enters into a contract to sell or purchase immoveable property. It was true that under the Contract Act, a minor has no capacity to enter into a contract, but in his submission, once that capacity is supplied by the minor being represented by his guardian under the

Hindu Law the contract on behalf of the minor for the sale or purchase of immoveable property for legal necessity or the benefit of the estate was a contract capable of specific performance.

7. The law on the subject has been summarised by Pollock and Mulla in their Indian Contract and Specific Relief Acts, Eighth Edition, at page 81. It is as follows:

"Specific performance.—A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Privy Council. The guardian of a minor unless competent to do so has no power to bind the minor by a contract for the purchase or sale of immoveable property, and the minor therefore is not entitled to specific performance of the contract: so held by the Privy Council in (1912) ILR 39 Cal 232 (PC). In the course of the Judgment their Lordships said: 'They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract'. It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate, where the guardian or manager, as under Hindu Law, is competent to alienate property. (Mulla's Hindu Law 11th Ed. p. 617). In such a case it has been held by the Privy Council that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor, 75 Ind App 115=(AIR 1948 PC 95). But if either of these two conditions is wanting, the contract cannot be specifically enforced at all, Venkatachalam Pillai v. Sethuram Rao, ILR 56 Mad 433=(AIR 1933 Mad 322) (FB)". With respect, I am in substantial agreement with this statement of the law. There is a plethora of reported decisions on this point all of which are not uniform. There is, therefore, no need to consider them all. I would, however, like to give a brief outline with a view to explain the various propositions made in the paragraph quoted above.

8. Four landmarks were provided by four decisions of the Privy Council in the development of the law bearing upon

specific performance of a minor's contract entered into by his guardian for the sale or purchase of immovable property. The first case in point of time was the well-known case of Hunoomanpersaud Panday v. Mt. Babooee Mundraj Koonwaree, (1854-57) 6 Moo Ind App 393 (PC)

9. The case is important as it shows what were the powers of a guardian of an infant heir under the Hindu Law to alienate ancestral property. That decision recognised the power of a manager or a guardian of an infant heir to charge ancestral estate by loan or mortgage, provided the power was exercised rightly by the manager or the guardian in a case of need or for the benefit of the estate. That decision did not relate to the specific performance of any contract. But it must be noted that it had become such an important part of Hindu Law that even without referring to it, the Madras High Court observed in *Krishnasami v. Sundarappayyar*, (1895) ILR 18 Mad 415 that a guardian of a minor had the power to represent him and enter into contracts on his behalf either beneficial or necessary to the minor. On that basis, it was held that a contract for the sale of land entered into by the mother and guardian of a Hindu minor was binding on the minor and was liable to be specifically enforced against him.

10. The next Privy Council decision in point of time is the case of *Mohori Bibee v. Dharmodas Ghose*, (1903) ILR 30 Cal 539=30 Ind App 114 (PC). It was finally decided for the first time by the Privy Council that a minor's contract is void under Section 11 of the Contract Act. Before that decision, the Indian High Courts used to follow English authorities, and there was no uniformity of decisions with regard to the minor's contract being capable of specific performance. Since the minor's agreement was void, there was no agreement to be specifically enforced. The only question which thereafter remained was how far a contract entered into by his guardian was capable of specific performance.

11. That point was decided by the Privy Council in (1912) ILR 39 Cal 232 (PC) referred to above in 1911. Reference was made to the case of (1903) ILR 30 Cal 539=30 Ind App 114 (PC) and their Lordships stated as follows:

"Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion

that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract".

It will be clear from this decision that their Lordships of the Judicial Committee made a general proposition that a guardian of a minor was not competent to bind the minor or the minor's estate by a contract for the purchase of immoveable property. It is to be noted that no reference was made either in the arguments or the judgment to Hunoomanpersaud's case, (1854-57) 6 Moo Ind App 393 (PC) which had dealt with the competence of a manager or a guardian to alienate immoveable property within certain limits. After 1911, *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) became the law for the whole of India and was applied without question to all contracts for purchase or sale in which the minor was interested, irrespective of whether the minor was governed by Hindu Law or not. The case specifically dealt with the guardian's power to bind the minor by a contract for the purchase of immoveable property. But the principle was extended even to contracts where the guardian of the Hindu infant agreed to alienate or sell the minor's property See for example *Abdul Haq v. Yehia Khan*, AIR 1924 Pat 81 where it was observed that no distinction could be drawn between an agreement to purchase and an agreement to sell and that the latter agreement could not be enforced against the minor. That was also the view of the Calcutta High Court in *Srinath Bhattacharjee v. Jotindra Mohan*, AIR 1926 Cal 445. That court held that no distinction could be drawn between the case of a covenant binding a minor to purchase a property and a covenant binding him to sell his property, and the latter covenant should be held not binding on the minor on the principle declared in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC). It must, however, be pointed out that sometimes a different view was also taken. (See *Brahamdeo Sao v. Haro Singh*, AIR 1935 Pat 237) In that case, *Wort, J.* held that a contract for sale of immoveable property entered into by the guardian or manager on behalf of a minor and the legal necessity of which has been proved, can be specifically enforced. It is necessary to note here that the learned Judge having noted *Mir Sarwarjan's case* harked back to *Hunoomanpersaud's case*, (1854-57) 6 Moo Ind App 393 (PC) and observed as follows

"To state the proposition broadly, that is to say, that a contract on behalf of a minor can in no way be enforced, would be stating a proposition which obviously cannot be supported in its entirety. The leading case of (1854-57) 6 Moo Ind App 393 (PC) prevents the assertion of such a

proposition. It is quite clear in one form or another that contract on behalf of an infant for the benefit of his estate or for legal necessity is enforceable."

The learned Judge accordingly held that the decision in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) must be limited to only those cases where the contract was for the purchase of the property on behalf of the minor.

12. The state of law was not very uniform though most of the High Courts applied the principle in *Mir Sarwarjan's case*, (1912) ILR 39 Cal 232 (PC) to contracts both of sales and purchases on behalf of the Hindu minor by his guardian. And then the Judicial Committee of the Privy Council delivered the weighty judgment in 75 Ind App 115=(AIR 1948 PC 95) in 1948. This is the fourth and the last landmark so far as the Privy Council is concerned. That was a case in which a minor brought a suit represented by his mother guardian claiming possession of land contracted to be sold by his guardian mother by an agreement in writing. The purchase price was agreed to be applied in discharge of debts owing to the defendant and another by the plaintiff minor's deceased father. The agreement to sell was, therefore, justified by necessity. Under the Indian law an agreement to sell does not create any interest in the property in favour of the purchaser and hence the plaintiff-minor could say that in the absence of a registered sale-deed in favour of the defendant, the title to the property still vested in the plaintiff, and, therefore, he was entitled to sue for possession on his title. The defence was based on Section 53-A of the Transfer of Property Act which dealt with part performance. It reads as under:

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part-performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor, or any person claiming under him shall be debarred from enforcing against the transferee and

AIR 1969 CALCUTTA 161 (V 56 C 29)

R. N. DUTT AND N. C.
TALUKDAR, JJ.

Akshoy Kumar Roy, Petitioner v. Lal Mohan Mazumder, Opposite Party.

Criminal Revn. No. 316 of 1964, D/-29-2-1968.

(A) Criminal P. C. (1898), S. 195 (2) — 'Competent Authority' under Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951, is not 'Court' within meaning of S. 195 (2).

The 'Competent Authority' under the Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951 is not a 'Court' within meaning of S. 195 (2) Criminal P. C. An essential feature of all Courts is that the Tribunal in question must be one in which justice is judicially administered and which is empowered to arrive at an independent judicial decision on legal evidence. The Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951 was enacted to provide for the rehabilitation of displaced persons and eviction of persons in unauthorised occupation of land and for certain other matters connected therewith. This Act was enacted in the wake of the communal disturbances during which many such unauthorised occupation took place. The competent authority was set up as an unit of the Revenue Department of Government for the purpose of eviction of the persons in unauthorised occupation and for resettlement of the original occupation. It was not set up as an independent Judicial Tribunal for the purpose of administering justice according to ordinary judicial principle but for the purpose of putting into effect the policy of a department of Government. The purpose was to oust the jurisdiction of the Courts which exist for determination of civil matters in accordance with ordinary legal rights of the parties concerned. It must, therefore, be regarded as an agent of the State Government vested with certain legal powers for a definite purpose and it cannot be regarded as a 'Court' within the meaning of S. 195 (2) of the Criminal P. C. AIR 1940 Cal 286 & AIR 1963 SC 416, Rel. on. (Para 4)

(B) Criminal P. C. (1898), Ss. 437, 209 (1) — Order of discharge under S. 209 (1) set aside by Sessions Judge and Magistrate directed to make commitment — Magistrate is not required to follow procedure laid down in Ss. 211, 212 and 213.

Where an accused is discharged by the Magistrate under S. 209 (1) of the Code and the Sessions Judge directs the Magis-

trate to make a commitment under S. 437 of the Code, the Magistrate is not required to follow the procedure laid down under Ss. 211, 212 and 213 of the Code. An order directing commitment under S. 437 of the Code is a direction for commitment on the matters already on record. There is therefore no further scope for the play of magisterial discretion to let in fresh matter or evidence. Sections 211, 212 and 213 of the Code are to be followed by the Magistrate when the commitment is under his orders. When a superior Court, empowered to direct commitment applies its mind to the materials on record and directs the Magistrate to make the commitment under S. 437 of the Code there is no longer any question of following the subsequent stages of the procedure which has been laid down for the Magistrate when he is himself to decide whether to commit or not. ILR (1957) 2 Cal 742. Foll.; AIR 1925 Rang 82, Disting.

(C) Criminal P. C. (1898), Ss. 436, 437 — Scope — Order of discharge — Power of Sessions Judge to direct further enquiry and order commitment. AIR 1941 Oudh 409, Dissent. from. (Para 5)

Section 436 of the Code covers all orders of discharge, be it under Ss. 203, 204, 253, 209 or under 213 (2) Under S. 436 the Sessions Judge has the power to direct further enquiry in such matters. But if the case is one which is exclusively triable by the Court of Session, the Sessions Judge has been given under S. 437, a further power, namely, the Sessions Judge can order the accused to be committed for trial instead of directing a fresh enquiry. AIR 1941 Oudh 409, Dissent. from. (Para 5)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 416 (V 50)=	
1963 (1) Cri LJ 330, Jagannath Prasad v. State of Uttar Pradesh	4
(1957) ILR (1957) 2 Cal 742, Radha Kanta Roy v State	5
(1941) AIR 1941 Oudh 409 (V 28)=	
42 Cri LJ 536, Nasimullah v. Emperor	5
(1940) AIR 1940 Cal 286 (V 27)=	
41 Cri LJ 662, Hari Charan Kundu v. Kaushi Charan Dey	4
(1925) AIR 1925 Rang 82 (V 12)=	
26 Cri LJ 1106, Nga Myaing v. Emperor	5

S. S. Mukherjee, Nirmal Kumar Ganguly, for Petitioner; Chintaharan Roy and Arun Kishore Das Gupta, for Opposite Party; Sisir Kumar Basu, for the State.

R. N. DUTT, J.:— On the complaint of the Opposite Party, the petitioner was summoned under Sections 467 and 471 of the Indian Penal Code. There was an enquiry under Chapter XVIII of the Code

of Criminal Procedure and the Magistrate holding the enquiry, discharged the petitioner under Section 209 (1) of the Code of Criminal Procedure. The opposite party moved the Sessions Judge against this order of discharge and an Additional Sessions Judge set aside the order of discharge and directed the Magistrate to commit the petitioner to the Court of Session to stand his trial under Sections 467 and 471 of the Indian Penal Code. The petitioner has obtained this rule against this order of the learned Additional Sessions Judge.

2. The allegations made by the opposite party in the petition of complaint are as follows: The petitioner forged a Kobala purported to have been executed in his favour by one Jaynal Abedin and got it registered and thereafter used it in a proceeding before the 'competent authority' under the Rehabilitation of Displaced Persons and Eviction of Persons in unauthorised Occupation of Land Act, 1951.

3. The opposite party examined 7 witnesses on his behalf and the Magistrate holding the enquiry examined one witness as a Court witness. The Magistrate, thereafter, as we have said, discharged the petitioner under Sec. 209(1) of the Code. The learned Additional Sessions Judge has said that the committing Magistrate usurped the functions of the Sessions Court and in that view of the matter, set aside the order of discharge and directed the Magistrate to commit the petitioner for trial. It appears that the learned Magistrate did not take into consideration all the relevant materials on record before coming to his finding that there was no sufficient ground for commitment. We have looked into the relevant materials on record. It is not desirable for us to consider the materials in details at this stage but we are satisfied that there are sufficient grounds for committing the petitioner for trial.

4. But Mr. Mukherjee has raised two important points of law. Firstly he has urged that the 'competent authority' under the Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951 is a 'Court' within the meaning of Section 195 (2) of the Code of Criminal Procedure and since there is no complaint made by the 'competent authority' — the allegation being that a forged document was used in a proceeding before it — the cognizance taken on the basis of the complaint made by the opposite party was not legal and the subsequent proceedings were all invalid. The answer to this contention turns on the question as to whether the 'competent authority' under the said Act is a 'Court' or not.

'Competent Authority' has been defined in the Act as follows:

"Competent Authority means a judicial officer not below the rank of a District Judge appointed by the State Government in consultation with the High Court by notification in the Official Gazette, to perform the functions of a Competent Authority under this Act * * *."

Mr. Mukherjee has argued that the Competent Authority is a Judicial Officer. Mr. Mukherjee has further argued that there is a provision for appeals against the orders of the Competent Authority and the appeal lies to a Tribunal appointed by the State Government consisting of three persons including a Chairman, who shall be a person who is or has been or is eligible to be a Judge of a High Court. Mr. Mukherjee has submitted that under the Rules framed under the Act the Competent Authority has been empowered to exercise some of the powers exercisable by a Court under the Code of Civil Procedure. He has, therefore, contended that the 'Competent Authority' is a Court within the meaning of Section 195 (2) of the Code. We are unable to accept this contention. An essential feature of all Courts is that the Tribunal in question must be one in which justice is judicially administered and which is empowered to arrive at an independent judicial decision on legal evidence. The Rehabilitation of Displaced Persons and Eviction of Persons in Unauthorised Occupation of Land Act, 1951 was enacted to provide for the rehabilitation of displaced persons and eviction of persons in unauthorised occupation of land and for certain other matters connected therewith. This Act was enacted in the wake of the communal disturbances during which many such unauthorised occupation took place. The competent authority was set up as a unit of the Revenue Department of Government for the purpose of eviction of the persons in unauthorised occupation and for re-settlement of the original occupation. It was not set up as an independent Judicial Tribunal for the purpose of administering justice according to ordinary judicial principle but for the purpose of putting into effect the policy of a department of Government. The purpose was to oust the jurisdiction of the Courts which exist for determination of civil matters in accordance with ordinary legal rights of the parties concerned. It must, therefore, be regarded as an agent of the State Government vested with certain legal powers for a definite purpose and it cannot be regarded as a 'Court' within the meaning of Section 195 (2) of the Code of Criminal Procedure. This view finds support in *Hari Charan Kundu v. Kaushi Charan Dey*, reported in 41 CrLJ 662=(AIR

1940 Cal 286). This view also finds support in the Supreme Court decision in *Jagannath Prasad v State of Uttar Pradesh*, reported in AIR 1963 SC 416, where the Supreme Court held that a Sales Tax Officer is not a 'Court' within the meaning of Section 195 (2) of the Code.

5. Mr. Mukherjee's other point is that under Section 437 of the Code of Criminal Procedure the Sessions Judge cannot direct the Magistrate to straightway commit the accused to the Court of Sessions. He has referred to Sections 211, 212 and 213 of the Code and has argued that even after the order of the Sessions Judge, the Magistrate is to frame a charge under Section 210 of the Code and then follow the procedure under Sections 211, 212 and 213 of the Code. If the Sessions Judge directs the Magistrate to straightway commit the accused to the Court of Sessions, the accused will be deprived of his rights under Sections 211, 212 and 213 of the Code. Mr Mukherjee has particularly, referred to Sections 212 and 213 (2) of the Code. He has submitted that even after a charge is framed under Section 210, the accused has the right to have his witnesses examined and the Magistrate, may under Section 213 (2) even cancel the charge and discharge the accused. But if the Sessions Judge directs the Magistrate to straightway commit the accused to the Court of Sessions, the accused will be deprived of this right. He has referred to the decision in *Nga Myaing v. Emperor*, reported in 26 Cri LJ 1106=(AIR 1925 Rang 82), where the Rangoon High Court said that the Committing Magistrate was to follow the provisions of Sections 211, 212 and 213 of the Code even when the High Court directs the accused to be committed to the Court of Sessions. There in that case the accused was convicted by a Magistrate but the conviction was set aside by the High Court, which directed the accused to be committed to the Court of Sessions. The Magistrate thereupon followed the procedure of Chapter XVIII of the Code over again but the High Court held that this was not necessary; what the Magistrate should have done was to frame a charge and explain to the accused requiring him to give in his list of witnesses and examine, if he thought fit any of those witnesses who had not already been examined and then write a short formal order of commitment. There in that case there was no order under Section 437 of the Code directing the Magistrate to commit the accused and there was no proceeding under Chapter XVIII of the Code. The Rangoon case, therefore, does not assist as much in the present case. We have a Single Bench decision of our own Court specifically on this point *Radha Kanta Roy v. State*,

reported in ILR (1957) 2 Cal 742. There in that case as in this case the accused was discharged under Section 209 (1) of the Code but the Sessions Judge set aside that order and directed commitment of the accused under Sections 437 of the Code. It was urged before *Debabrata Mookerjee, J.* that the direction of the Sessions Judge involved a fresh recourse to the procedure prescribed under Chapter XVIII of the Code from the point reached by Sec. 210 of the Code. *Debabrata Mookerjee, J.* however, held that when a Sessions Judge directs the Magistrate to make a commitment under Section 437 of the Code the Magistrate is not required to follow the procedure laid down under Sections 211, 212 and 213 of the Code. His Lordship said that an order directing commitment under Section 437 of the Code is a direction for commitment on the matters already on record. There is therefore no further scope for the play of magisterial discretion to let in fresh matter or evidence. His Lordship further pointed out that if the Magistrate is even after this direction required to follow Sections 211, 212 and 213 of the Code that would result in leaving the order of commitment made by the Judge in a fluid or rather precarious state, it would then be liable to be revised by the Magistrate which may in some cases, even lead to reversal of the order made by the Judge. Such a consequence could never have been contemplated by the Legislature. With these reasons we respectfully agree. Mr Mukherjee has however argued that in that case Sections 211, 212 and 213 would become nugatory. We should however point out that Sections 211, 212 and 213 of the Code are there in the Code to be followed by the Magistrate when the commitment is under his orders but when a superior Court, empowered to direct commitment applies his mind to the materials on record and directs the Magistrate to make the commitment under Section 437 of the Code there is no longer any question of following the subsequent stages of the procedure which has been laid down for the Magistrate when he is himself to decide whether to commit or not. Section 437 of the Code empowers the Sessions Judge to do either of two things, to direct further enquiry or order the accused to be committed for his trial. Mr Mukherjee has referred to the decision of *Yorke, J.*, in *Nasimullah v. Emperor*, reported in 42 Cri LJ 536=(AIR 1941 Oudh 409) where *Yorke, J.*, has said that Section 436 of the Code covers 'discharge' under Sections 203, 204, 253 or under Section 209. But Section 437 covers discharge under Section 213 (2) of the Code. We regret, we cannot agree with this limitation of the scope of Section 437

of the Code. Section 436 of the Code covers all orders of discharge, be it under Sections 203, 204, 253, 209 or under S. 213(2). Under Section 436 the Sessions Judge has the power to direct further enquiry in such matters. But if the case is one which is exclusively triable by the Court of Session, the Sessions Judge has been given a further power namely, the Sessions Judge can order the accused to be committed for trial instead of directing a fresh enquiry. The use of the words 'instead of' definitely has reference to the power given to the Sessions Judge under Section 436 of the Code to direct further enquiry. Thus we hold that Section 436 of the Code covers all types of discharge and the Sessions Judge has power to direct further enquiry in such matters. But when the case is exclusively triable by a Court of Sessions, the Sessions Judge has an additional power, that is, he can order the accused to be committed for trial. Moreover the facts of Nasimullah's case are also different. There the Magistrate was holding the trial under the warrant procedure. He framed certain charges; the Sessions Judge was moved for additional charges which would make it triable exclusively by the Court of Session and the Sessions Judge straightway directed commitment for trial under Section 437 of the Code. Yorke, J., held that that was not the proper stage for the Sessions Judge to interfere and so set aside that order. Thus that was a case where the Magistrate did not follow the procedure under Chapter XVIII of the Code. Then again, Yorke, J., has not said in that case that when a Sessions Judge directs the Magistrate to commit the accused for trial, the Magistrate is even then required to follow the procedure under Sections 211, 212 and 213 of the Code. We are therefore, unable to accept Mr. Mukherjee's contentions.

6. In the result, the Rule is discharged. Let the records be sent down at once. Let the trial be expedited as far as possible.

7. N. C. TALUKDAR, J.:— I agree.
JHS/D.V.C. Rule discharged.

AIR 1969 CALCUTTA 164 (V 56 C 30)
D. BASU, J.

Kalipada Ghosh, Petitioner v. Sub-Divisional Officer, Vishnupur and others, Respondents.

Civil Revn. No 521 (W) of 1964, D/-6-6-1963

(A) Constitution of India, Art. 226 — Other remedy — Breach of service agree-

HL/IL/D530/68

ment with Govt. remediable under general law — No writ will lie. (Para 4)

(B) Constitution of India, Arts. 226, 311 — Civil Services — Bengal Subordinate Service (Discipline and Appeal) Rules, R. 10 — Service under contract — One clause providing for removal from service, for negligence, inefficiency or unsatisfactory work, without notice — Removal from service on charges of misappropriation and tampering of record — Contractual clause does not cover the case and Art. 311 (2) comes into operation.

An appointment of a Tahsildar was made temporarily under a contract which provided removal of the Tahsildar from his job without notice if he was found negligent or inefficient or if his work was unsatisfactory. He was however discharged without any enquiry or notice on charges of misappropriation and of tampering with record. On a question if the removal was valid,

Held, the discharge was bad under Art. 311 (2) and the case did not come under the contract clause. Article 311(2) applied equally to permanent and temporary employees. The form of the order or the language employed therein e. g., the use of the word "dismissal", was not conclusive on the question whether it constituted 'removal' or 'dismissal', so as to attract Art. 311 (2) and that in order to solve this question, the Court was entitled to look into the facts antecedent to the order as well as its contents and substance. If the order entailed penal consequences in addition to termination of the service, it was obviously a case of dismissal. The same conclusion must be arrived at where the order of discharge added a stigma e.g., that the employee had been found to be undesirable to be retained in Government service. In this case the stigma was serious and that therefore the impugned order was one of dismissal in substance and Art. 311 of the Constitution must, therefore, be complied with. AIR 1968 SC 158 & AIR 1964 SC 449 & AIR 1961 SC 177, Rel. on. (Paras 10, 12)

(C) Constitution of India, Arts. 226 and 311 (2) — Delay — Dismissal of Civil servant — Charges serious, legal position difficult, legal advice necessary — Delay in filing writ petition was excusable — Civil Services. (Para 14)

(D) Constitution of India, Arts. 226, 311 — Scope — No legal right in existence when writ is applied for — Writ of mandamus cannot be issued — Expiry of period for licence before obtaining rule or before pronouncement of judgment — Writ of mandamus must be refused — Temporary service based on contract — Service ter-

minated against principles of natural justice — Application for writ of certiorari — Contract expiring afterwards — Writ can still be issued — Civil Services. (1914) 1 KB 608 & (1954) 1 All ER 197, Ref. (Para 15)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 158 (V 55)=
 (1967) 3 SCR 848, State of U. P.
 v. Sharma 9
 (1964) AIR 1964 SC 449 (V 51)=
 1964 SCD 75, Jagdish v. Union of
 India 10, 12
 (1961) AIR 1961 SC 177 (V 48)=
 (1961) 1 SCR 506, State of Orissa
 v. Ramnarayan 10
 (1954) 1 All ER 197=(1954)
 1 WLR 203, R. v. Brighton JJ. 15
 (1914) 1 KB 608=83 LJKB
 528, R. v. Williams 15
 M. C. Chakrabarty and Kalyanbrata
 Roy, for Petitioner; P. K. Banerjee, for
 Respondents.

ORDER:— The petitioner was appointed Tahsildar, by the agreement at Annexure 'A' to the petition, executed by the Additional District Magistrate, Burdwan, on behalf of the Governor and he was discharged by the order at Annexure 'C', with effect from the date of the order, i.e., the 31st January, 1962, "for mis-appropriating Government money and tampering with official records".

2. The only point pressed on behalf of the petitioner at the hearing is that the impugned order at Annexure 'C' is bad because of contravention of Art. 311 (2) of the Constitution as well as the provisions of the Bengal Subordinate Services (Discipline and Appeal) Rules, which were attracted by CL 4 (e) of the Agreement. Admittedly, no opportunity was given to the petitioner to show cause before the impugned order was made nor any notice given.

3. Though the Agreement at Annexure 'A' was for the period from the 1st June 1957 and the 1st August, 1957, it is both parties' case that this was renewed till the date of the impugned order and that the question at issue is to be decided on the terms of the Agreement.

4. It is patent law that no proceeding under Art. 226 of the Constitution lies for the breach of an agreement for which there is remedy under the general law. But the petitioner seeks to avoid it by invoking clause 4 (e) of the Agreement itself. The Agreement was one of an appointment for a specified term, on the condition (cl. 2) that it was terminable earlier, by one month's notice on either side; clause 4 then lays down certain additional terms:

5. Sub-clause (a) provides that the Tahsildar would be entitled to engage in

'other work' provided Government consented.

6. Sub-clauses (c)—(d) provide that for leave and travelling allowance, the petitioner would be governed by the relevant rules in the West Bengal Service Rules relating to Grade III employees. Then comes sub-clause (e):

"Save and except the provisions in clause 4 (a) hereof, the employee shall during the period of his employment under these presents as a Tahsildar be governed by the Government Servants' Conduct Rules, and he shall also be governed by the Subordinate Services (Discipline and Appeal) Rules."

7. Another provision of the Agreement, referred to at the hearing is Clause 11 which says—

"That the Government shall have the right and be entitled to discharge the employee or terminate this Agreement without any previous notice if the employee commits any breach of any of the terms and conditions herein contained or if he is found to be otherwise negligent or inefficient or his work is found to be otherwise unsatisfactory and the decision of the Government in this respect shall be final and binding."

8. The resultant of the foregoing provisions of the Agreement is that—

(i) The Agreement was terminable with one month's notice on either side;

(ii) But the employee would not be entitled to any notice if he was negligent or inefficient or his work was unsatisfactory.

(iii) In other respects, he would be governed by the Government Services (Discipline and Appeal) Rules.

9. It has been rightly argued on behalf of the petitioner that clause 11 of the Agreement was not attracted to the facts of the instant case inasmuch as that clause referred to negligence or inefficiency in the execution of the employee's duties and not a serious misconduct such as misappropriation or tampering with official records. In this interpretation, the petitioner is fortified by the observations of the Supreme Court in State of U. P. v. Sharma, AIR 1968 SC 158, where similar provisions in sub-rules (1) and (2) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, were construed. If this construction be correct, the only conclusion that emerges is that the validity of the impugned order is to be tested by the provisions of Article 311 (2) of the Constitution and Rule 10 of the Bengal Subordinate Service Rules.

10. It is needless to go into the Rules inasmuch as I am satisfied that this case falls under Article 311 (2), which applies equally to permanent and temporary employees. Once it is held that the im-

pugned order is not covered by clause 11 of the Agreement, the provisions of Article 311 (2) would be attracted, provided the order constitutes 'removal' or 'dismissal'. It has been repeatedly held by the Supreme Court that in such cases, the form of the order or the language employed therein e. g., the use of the word 'dismissal' as in the instant case, is not conclusive on the question whether it constitutes 'removal' or 'dismissal', so as to attract Article 311 (2). *State of Orissa v. Ramnarayan*, AIR 1961 SC 177; *Jagdish v. Union of India*, AIR 1964 SC 449, and that in order to solve this question, the Court is entitled to look into the facts antecedent to the order as well as its contents and 'substance' (ibid). If the order entails penal consequences in addition to termination of the service, it is obviously a case of dismissal, according to the principles laid down in *Purshotam's case*. The same conclusion must be arrived at where the order of discharge adds a stigma, e. g., that the employee has been found "to be undesirable to be retained in Government service" as in *Jagdish's case*, AIR 1964 SC 449. The reason is that in such a case—

"..... anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge.

The test in such cases must be: Does the order cast aspersion or attach stigma to the Officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance to amount to dismissal." AIR 1964 SC 449 (457).

11. The punishment involved in such a case is that nobody who reads such order would consider the employee fit for re-employment anywhere.

12. In the impugned order before me, it is expressly stated that the petitioner was being discharged on the ground that he had been guilty of misappropriation and tampering with records. This stigma is even serious than what it was in the case of *Jagdish* AIR 1964 SC 449. It must therefore be concluded that the impugned order was one of dismissal in substance and Art. 311 (2) of the Constitution must, therefore, be complied with. The impugned order must, accordingly, be struck down as invalid.

13. It was contended on behalf of the respondents that the petition should be rejected on the ground of delay. It is true that the petitioner came to Court on 16-4-64, to quash an order of 31-1-62. But the order was communicated to the petitioner only on 1-2-62 (Annexure 'C') and he made a representation to the Collector on 12-6-63 (Annexure 'D') which was not heeded to and that is why he served a demand notice through his lawyer on 12-3-64, and after the lapse of a reasonable time, presented this petition on 5-5-1964. I must say that the petitioner should have been prompter in his steps but it cannot be overlooked that

(a) the charges involved in the stigma were serious enough; and (b) the legal position was somewhat difficult owing to the existence of the contract, so that it was not possible for the petitioner to appreciate his legal rights without taking legal advice.

14. In the circumstances, I do not think it would be proper to discharge the Rule on the ground of delay, without giving the petitioner an opportunity to controvert the serious allegations made against him.

15. Another point taken on behalf of the respondents was that since the extended terms of the petitioner expired before the Rule was obtained he had no locus standi to maintain the Rule. It is true that when a petitioner comes to Court under Article 226 of the Constitution praying for mandamus to enforce a legal right which had no existence at the date of the petition the Court cannot entertain the petition because the petitioner had no legal right or interest to enforce. On this principle petitions under Article 226 have been refused not only where the period of statutory licence for the same had expired before the Rule was obtained but also where it had expired before the judgment was going to be pronounced. This principle can hardly apply in the case of certiorari where the Court simply quashes a quasi-judicial order which is without jurisdiction or offends the requirements of natural justice or the like and considers necessary to interfere even at the instance of strangers *R. v. Williams*, (1914) 1 KB 608 (613-4) *R. v. Brighton, JJ.*, (1954) 1 All ER 197 (200). In this case the footing on which the petitioner has sought for relief and has been granted by this judgment is not his alleged right founded on the agreement which had expired but his constitutional right, founded on public policy, arising out of Article 311 (2). Once it is held that the protection under Article 311 (2) extends equally to temporary employees as the permanent employees, the relief under Art. 226 would be meaningless if it is held that it would not be available where the contract on

which the temporary employment is based or the term for which the temporary appointment was made had expired before the petitioner comes to Court for relief, because in most cases of temporary employment, if not all, the term would be a short one which would lapse before the petitioner can reach the Court or the Court is in a position to pronounce its judgment. The infringement of the constitutional right under Article 311 (2) per se gives a cause of action to the individual even though his employment might have terminated otherwise on the date of the petition. On the records it appears that though the petitioner was initially appointed for a short term it was extended as a matter of course year by year and if the impugned order of discharge had not been made with an imputation it may reasonably be expected that the renewal or extension would have taken place as a matter of course, as before. Once the impugned order is out of his way, the petitioner would be placed in the same position as he was on the date of the impugned order subject, of course, to the right of the respondents to proceed against him afresh in compliance with the requirements under Article 311 (2). The preliminary objection thus raised on behalf of the respondents is rejected.

16. In the result, the Rule is made absolute, but without any order as to costs. The impugned order be quashed, with liberty to the respondents to proceed against the petitioner according to law.

17. On the prayer of Mr. Banerjee, on behalf of the respondents the operation of this order will remain stayed for a period of six weeks from this date.

BDB/D.V.C. Rule made absolute.

AIR 1969 CALCUTTA 167 (V 56 C 31)

P. N. MOOKERJEE AND

A. K. DUTT, JJ.

Smt. Shovana Bhowmick, Petitioner v. Birendra Kumar Bhowmick, Opposite Party.

Civil Revn. Case No. 3357 of 1966, D/- 9-5-1968.

(A) Arbitration Act (1940), Sch. I, Para 3 read with S. 3 — Point of limitation — Where no effective step could be taken by arbitrators in matter of arbitration before final or effective notice was issued limitation, for the making of award cannot, start prior to the date of effective notice. Case law Ref.: (1941) 1 KB 396 & AIR 1951 Cal 78, Disting. and Dissented.

(Para 9)

(B) Arbitration Act (1940), S. 2 (e), 2 (a) — Agreement in writing for refer-

ence to arbitration — Requirements — Terms, agreed upon, must be in writing and for that purpose signatures of parties are not necessary — A's will making provision in writing for reference to arbitration in cases of disputes between B and C — B making written application for probate and acting upon it — C agreeing to grant of probate — Held, it was case of agreement in writing for reference to arbitration: AIR 1965 Cal 628, Disting.; AIR 1955 SC 812 & AIR 1963 SC 1417, Rel. on. (Paras 14 and 15)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 Cal 628 (V 52)= | 69 Cal WN 309, Bijoy Ballav Kundu v. Tapati Ranjan Kundu | 15 |
| (1963) AIR 1963 SC 1417 (V 50)= | (1963) Supp 2 SCR 760, Banarsi Das v. Cane Commr, U. P. | 15 |
| (1963) AIR 1963 Madh Pra 143 (V 53)=1963 MPLJ 121, Ramsahai Sheduram v. Harishchandra Dhulichandji | | 10 |
| (1957) AIR 1957 Pat 395 (V 44)= | ILR 36 Pat 773, Soneylal Thakur v. Lachhminarain Thakur | 10 |
| (1956) AIR 1956 Bom 146 (V 43)= | 58 Bom LR 917, Dr. Babubhai Vanmalidas Mehta v. Prabhod Pranshankar Joshi | 10 |
| (1955) AIR 1955 SC 812 (V 42)= | (1955) 2 SCR 857, Jugal Kishore Ramshwardas v. Mrs Goolbai Hormusji | 15 |
| (1951) AIR 1951 Cal 78 (V 38)= | 55 Cal WN 147, Bairanglal Laduram v. Ganesh Commercial Co., Ltd. | 11 |
| (1950) AIR 1950 Lah 174 (V 37)= | Pak LR 1950 Lah 323, Abdul Majid v. Ch. Bahawal Baksh | 10 |
| (1943) AIR 1943 Cal 255 (V 30)= | ILR (1943) 2 Cal 431, Nand Kishore Goswami v. Bally Co-op. Credit Society Ltd | 10 |
| (1941) 1941-1 KB 396=110 LJKB 54, Issiofoglou v. Coumantaros | | 11 |
| (1931) AIR 1931 All 136 (1) (V 18)= | ILR 53 All 427, Chandi Prasad Misir v. Balaji Misir | 15 |
| (1929) AIR 1929 Cal 97 (V 15)= | 32 Cal WN 1101, Radha Kanta Das v. Baerlieu Brothers Ltd. | 15 |
| (1922) AIR 1922 All 106 (V 9)= | ILR 44 All 432, Sardarmal Hardat Rai v. Sheo Baksh Rai Sri Narain | 10 |
| (1867) LR 2 QB 523=36 LJQB 236, Baker v. Stephens | | 10 |

A C Bhabra and M. L. Tambi, for Petitioner, Syamacharan Mitter and Syamaprosanna Roychowdhury, for Opposite Party.

P. N. MOOKERJEE, J.:— This Rule arises out of a suit on an arbitrator's award. The award was filed by the arbitrators in Court under Section 14 of the Indian Arbitration Act and, eventually,

a decree was made by the learned trial Judge on the said award under the relevant Section 17 of the Act. This decision, however, was eventually reversed by the learned Additional District Judge on appeal and the petitioner's suit was dismissed, primarily, upon the view that the award was invalid, as there was no proper reference to arbitration under the law, there not being, in the circumstances, the requisite agreement in writing for reference to arbitration.

2. For appreciating the real position, a reference to the material facts will be necessary. Those material facts lie within a short compass and may be set out as follows:

3. One Haripada Bhowmick, who was the predecessor-in-interest of the parties and to whom the disputed properties belonged, executed a Will on May 25, 1953. The relevant provision in the said Will, so far as we are concerned, is as follows:-

"I hope that after my life time my son Birendra Kumar Bhowmick will live in peace and amity with my daughter-in-law Sovana Bhowmick, widow of my deceased son Prafulla Kumar Bhowmick, and that he will show her greatest consideration and tender her all possible assistance in her difficulties, if any. I also hope that there will be no cause of misunderstanding between them. If, however, unfortunately, for any reason, they are unable to live together in peace and harmony, then I direct, by this Will, that Sovana Bhowmick will have the right of maintenance, as Hindu widow, out of the income of my properties, and residence, during her life time, in one of the rooms of my two houses, commensurate with her status and dignity as the widow of my late son Prafulla Kumar Bhowmick, so long as no necessity arises to let out or otherwise to dispose of the houses. If it ever becomes absolutely necessary to let out or dispose of the houses, suitable accommodation should be arranged, by my son Birendra Kumar Bhowmick, for her, out of the income of my properties. All questions regarding the income to be set apart for her maintenance and the room she should be allowed to occupy will be settled by arbitration by my 5 sons-in-law viz., (1) Prafulla Chandra Mukherjee of the Indian Credit Department, (2) Dr. Prafulla Kumar Banerjee, M.B. D.Ph., (3) Sri Ram Ranjan Chatterjee, Textile Engineer, (4) Dr. Rabindra Nath Mukherjee, M.B. and (5) Sri Himangshu Kumar Banerjee, Advocate, High Court, Patna, and those, among them, who will be alive at the time, and their majority verdict will be binding on Birendra Kumar Bhowmick and Sovana Bhowmick. Any other dispute that may arise between them will be settled by arbitration as above."

4. Haripada Bhowmick died on April 28, 1959. On April 7, 1960, Birendra applied for probate of the above Will. On September 1, 1960, the probate appears to have been granted on consent. On November 7, 1962, Sovana Bhowmick made a reference for her monthly maintenance and for provision for her residence. The arbitrators, however, for reasons beyond their control, could not take any effective steps in the matter until May 7, 1964, when, on receipt of a further complaint from Sovana on or about May 6, 1964, they gave the effective notice, received by Birendra on or about May 7, 1964, fixing June 27, 1964, for hearing. On June 27, 1964, the arbitrators met at a meeting and, on August 23, 1964, the disputed award was made. On the same day, the arbitrators wrote to the parties, informing them that they had met and signed their award on August 23, 1964. A copy of the award appears to have been sent to Birendra on September 12, 1964. On September 15, 1964, Sovana applied for the filing of the award and for the passing of a decree thereon. On October 3, 1964, Birendra filed his petition of objection. On November 11, 1964, the award was sent for registration and, on December 11, 1964, the award was registered. Thereafter, there were certain interlocutory proceedings, in which, by consent, Birendra was appointed Receiver in respect of one of the properties with certain directions and eventually, on March 16, 1966, the learned Subordinate Judge, Second Court, Alipore, before whom the above proceeding was pending, directed the award to be filed and a decree to be made on the same.

5. Birendra appealed from the above decree of the learned Subordinate Judge and this appeal was, eventually, allowed by the learned Additional District Judge, Fourth Court, Alipore, on August 23, 1966, and, thereafter, the present Rule was obtained by Sovana from this Court on October, 3, 1966, against the aforesaid decision of the learned Additional District Judge.

6. The principal points, which arise for consideration in this Rule, are three in number. Firstly, whether the learned Additional District Judge was right in taking the view that, in the instant case, there was not the requisite agreement in writing for the validity of the award in question and, in refusing, upon that view, to affirm the decree, passed by the learned Subordinate Judge. The second question, which would arise, would be whether the arbitrators exceed their jurisdiction in making the award beyond the time, contemplated for the same (vide, in this connection, Schedule I, Para 3 of the Arbitration Act, read with Section 3); or, in other words, whether

the making of the disputed award would be hit by the law of limitation. The third point would be whether the arbitrators' award suffers from an error, apparent on the face of the records, in so far as they allotted more than one room to Sovana, and gave direction for the letting out, either by Birendra or by Sovana, of a part of the disputed properties for securing her (Sovana's) maintenance, which, according to Birendra, would be in excess of the provision under the Will of Haripada and contrary to the said Will.

7. The point of limitation has been overruled by both the Courts below. They have taken the view, that the arbitrators entered on the reference, only on June 27, 1964, and the award was actually made on August 23, 1964. Obviously, if the time be counted from the above date June 27, 1964, the making of the award on August 23, 1964, would be well within time.

8. The opposite party Birendra, however, contended that the arbitrators must be held to have entered on the reference long ago, that is, from the moment, they accepted their appointment as arbitrators and indicated their desire to decide the disputes between the parties, if any. We do not accept this submission.

9. It is clear from what we have stated above that no effective step could be taken by the arbitrators in the matter of arbitration before, at any rate, May 7, 1964, when the final or effective notice was issued by them, and, accordingly, limitation, so far as the making of the disputed award is concerned, could not, in any event, start prior to that date, which was well within four months from the date of the said award, namely, August 23, 1964. No point of limitation, therefore, does really arise in the instant case.

10. In support of our above view, it is not necessary to go to the extreme on the above point, as envisaged in *Baker v. Stephens*, (1867) 2 QB 523, *Sardar Mal Hardat Rai v. Sheo Baksh Rai Sri Narain*, ILR 44 All 432=(AIR 1922 All 106), and *Abdul Majid v. Ch. Bahawal Baksh*, AIR 1950 Lah 174—See also *Nanda Kishore Goswami v. Bally Co-operative Credit Society Ltd.*, ILR (1943) 2 Cal 431 at pp 434-5=(AIR 1943 Cal 255 at p. 257). It is enough for the purpose to refer to *Soneylal Thakur v. Lachhminarain Thakur*, AIR 1957 Pat 395 at p 397 and *Ramsahai Sheduram v. Harishchandra Dulichandji*, AIR 1963 Madh Pra 143, which support the said line of approach and, further, emphasise inter alia that the relevant point of time, namely, when the arbitrators enter upon the reference, is a question of fact, depending on the facts of the particular case before the

Court. See also *Dr. Babubhai Vanmalidas Mehta v. Prabodh Pranshankar Joshi*, AIR 1956 Bom 146.

11. Our above view will not also be opposed to the apparently contrary decisions, reported in *Iossifoglu v. Coumantaros*, (1941) 1 KB 396, and *Bajranglal Laduram v. Ganesh Commercial Co. Ltd.*, 55 Cal WN 147=(AIR 1951 Cal 78), as explained in the above two cases, and the said two apparently contrary decisions would also be distinguishable on their own facts and observations.

12. We would, accordingly, agree with the two Courts below in overruling the opposite party's objection on the point and reject his plea of limitation.

13. More debatable, of course, is the first question, namely, whether there was the requisite agreement in writing in the instant case for the validity of the disputed award. That there was a provision in writing in the Will of Haripada for a reference to arbitration is admitted. Admittedly, also, Birendra applied for probate of the said Will, which may very well be taken as his consent to accept the relevant arbitration clause. That Sovana appeared in the said proceeding and, eventually, probate was granted by consent is also an admitted fact. In the above circumstances, unless the Court be too technical or hyper-technical on this particular aspect and, if the substance of the matter be looked into, the requisite agreement in writing must be found in favour of the petitioner.

14. The above Will clearly provided for reference to arbitration in cases of disputes, like the present, between Sovana and Birendra. That provision was in writing. It was accepted by the parties (Sovana and Birendra) by consenting to the probate of the said Will and adopting the same without reservation. Birendra's consent was given by inter alia his written application for probate and his ultimate acceptance of the same and acting upon it; Sovana's by her agreeing to the grant of the said probate and by her acceptance of the same by inter alia her written correspondence and in her letters in writing, preceding the reference to arbitration. It was thus clearly a case of agreement in writing for reference to arbitration, at least on the footing that the term agreed upon or the term of the agreement in question was in writing. We do not think anything more was necessary for the purpose of an agreement in writing to provide the basis of a valid reference to arbitration, although, in the instant case, there was also acceptance of the said term or agreement in writing, as sufficiently indicated above.

15. That, for an agreement in writing for reference to arbitration, it is enough if the term or terms, agreed upon, be in

writing is now well settled. That, for the above purpose, signature or signatures of the parties are not necessary is also clear on the authorities, including the decision of this Court, reported in *Bijoy Ballav Kundu v. Tapati Ranjan Kundu*, 69 Cal WN 309=(AIR 1965 Cal 628), on which strong reliance was placed on behalf of the contesting opposite party (Vide, in this connection, *Radha Kanta Das v. Baerlieu Brothers Ltd.*, 32 Cal WN 1101=(AIR 1929 Cal 97), *Chandi Prasad Misir v. Balaji Misir*, AIR 1931 All 136 (1), *Jugal Kishore Rameshwardas v. Mrs Goolbai Hormusji*, AIR 1955 SC 812 and *Banarsi Das v. Cane Commissioner, Uttar Pradesh*, AIR 1963 SC 1417. It is true that, in 69 Cal WN 309=(AIR 1965 Cal 628) (supra), this Court (Sinha, J., as he then was, and R. N. Dutt, J.) did not accept the provision for reference to arbitration, contained in a Trust Deed, accepted by all the parties, as sufficient for the purpose, but that was done on reasons, which are wholly inapplicable here. The said case, therefore, is clearly distinguishable, although we must make it clear, with all respect to the learned Judges (Sinha, J., as he then was, and R. N. Dutt, J.), that their ultimate conclusion in that case that the Trust Deed provision there did not constitute an agreement in writing for reference to arbitration would not be acceptable to us. That provision, which provided for reference to arbitration, was in writing in the Trust Deed in question and it was accepted by all the parties concerned, and, in the circumstances, it was, in our opinion, an agreement in writing for reference to arbitration, sufficiently for purposes of the relevant law on the point (Section 2 (e) of the Indian Arbitration Act) As, however, as already said, the said decision is distinguishable, we need not pursue this matter further, and we would end this part of our discussion by quoting the very useful and pertinent observations of the Supreme Court on the point in AIR 1955 SC 812, (supra), at p. 815, which laid down the law on the subject in the following terms:

"It is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties and that it is sufficient if the terms are reduced into writing and the agreement of the parties thereto is established." (See also AIR 1963 SC 1417 (supra), at p. 1425 where the above observations are quoted with approval)

16. We would only add that the above authorities put the matter beyond all possible doubt and no clear words and no reference to any other source or authority would be necessary to conclude the point.

17. In the above context and in the light of what has been set out above, the relevant clause in Haripada's Will, in the instant case, providing, in writing, for reference to arbitration, having been accepted by both parties, — and accepted as binding on them, — would, in our opinion, constitute the requisite agreement in writing for reference to arbitration. We conclude accordingly and hold in favour of the petitioner on the point.

18. We would, in the above view, hold that there was, in the instant case, the requisite agreement in writing for the validity of the disputed award and the view of the learned Additional District Judge to the contrary cannot be supported.

19. *Prima facie*, therefore, the petitioner would be entitled to have a decree on the said award, as made by the learned Subordinate Judge, but, here a further question arises. As quoted above, the relevant provision in Haripada's Will expressly stated that Sovana will have

"the right of residence, during her lifetime, in one of the rooms of my two houses, commensurate with her status and dignity as the widow of my late son Prafulla Kumar Bhowmick."

In the disputed award, the arbitrators have made an allotment in her favour, which has given her two rooms and also another half room with other appurtenances and amenities, necessary for enjoyment of the same. This appears to have been done, apparently, without full appreciation of the above provision in the Will. The predominant intention of the testator was, no doubt, to provide residence or accommodation for his daughter-in-law Sovana, but, at the same time, he also made a categorical provision that such residence should be in "one of the rooms of my two houses", followed, of course, by the words "commensurate with her status and dignity as the widow of my late son Prafulla Kumar Bhowmick." It is a question of some nicety and some importance, whether both the above expressions can be given full effect; if not, which of the said two expressions would have preference or predominance, when both cannot be applied in full. In other words, if one room be found sufficient for her residence, commensurate with her status and dignity, as above, and if that be practicable, whether the arbitrators would have jurisdiction to make any provision beyond the same, except, of course, provisions for usual amenities and appurtenances, necessary for its enjoyment; and, if circumstances do not permit that allotment, what will be the scope and extent of the arbitrators' powers in the matter.

20. It is true that the learned Subordinate Judge held in favour of the peti-

tioner on the point upon the construction of the above provision in the Will but he appears to have been too much influenced by the expression "commensurate with her status and dignity" in dealing with the matter. In the circumstances, we feel that this aspect of the matter should be reconsidered by the arbitrators and, if it is found by them that provision may be made, in accordance with the wishes of the testator, for the accommodation of the petitioner for her residence in one of the rooms of his two houses commensurate with her status and dignity, as above, such provision should be made by them in the award on the point. If, however, that be not possible from the practical point of view, they will give effect to the testator's predominant intention, which, as it appears to us, was to provide suitable accommodation for residence of the daughter-in-law, namely, the petitioner.

21. The arbitrators would also reconsider whether they had power to direct letting out, either by Birendra or by Sovana, of a portion of the testator's properties, for securing her (Sovana's) maintenance.

22. The above aspects, suffer, on the face of the records, from want of full and proper consideration on the part of the arbitrators and they should reconsider the same and re-examine the matter.

23. In the above view, we would make this Rule absolute, set aside the order of the learned Additional District Judge and also of the learned Subordinate Judge and send the matter back to the learned Subordinate Judge for remitting the disputed award to the arbitrators concerned for fresh and further consideration in the light of the observations, made in this judgment. The learned Subordinate Judge will, of course, fix a suitable time limit in accordance with law, within which the said arbitrators will submit their final award after further consideration as indicated hereinbefore.

24. There will be no order for costs in this Rule.

25. A. K. DUTT, J.:— I agree.

MBR/D.V.C. Rule made absolute.

AIR 1969 CALCUTTA 171 (V 56 C 32)
S. P. MITRA AND P. CHATTERJEE, JJ.
Commissioner of Income-tax, Applicant
v. Calcutta Landing and Shipping Co.
Ltd., Respondent.

Income-tax Reference No. 16 of 1965.
D/- 21-6-1968.

Income-tax Act (1922), S. 10 (2) (xv)
— For the purpose of the business — Ex-

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penses incurred for conducting proceedings before Income-tax Authorities — Expenses are incurred for saving, preserving or protecting portion of income arising out of assessee's business enabling assessee to make its legitimate profits and they are, therefore, laid out wholly and exclusively for assessee's business — It is admissible deduction under S. 10 (2) (xv). (1929) 30 Tax Cas 267 (284, 297 Views of Viscount Simon and Lord Oaksey), Foll. AIR 1964 SC 1722 & AIR 1967 SC 444, Rel. on; AIR 1966 SC 1250, Ref. (1965) 58 ITR 84 (Cal) & AIR 1960 Pat 31, Disting. (Paras 25, 30, 31)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 444 (V 54)=
(1967) 63 ITR 207, Sree Minakshi Mills Ltd. v. Commr. of I. T. Madras 24
(1966) AIR 1966 SC 1250 (V 53)=
(1966) 60 ITR 277, Travancore Titanium Product Ltd. v. Commr. of I. T. Kerala 26, 28
(1965) 1965-58 ITR 84 (Cal), Mannalal Ratanlal v. Commr. of I. T. Calcutta 30
(1964) AIR 1964 SC 1722 (V 51)=
(1964) 53 ITR 140, Commr. of I. T. Kerala v. Malayalam Plantations Ltd. 23
(1963) AIR 1963 Madh Pra 223 (V 50)=(1963) 48 ITR 548, Binodiram Balchand v. Commr. of I. T. 8
(1960) AIR 1960 Pat 31 (V 47)=
(1961) 42 ITR 774, Kameshwar Singh v. Commr. of I. T. 30
(1906) 1906 AC 488=5 TC 215, Strong & Co. of Romsey v. Woodfield 19
(1929) 30 Tax Cas 267=1948 AC 508, Smith's Potato Estates Ltd. v. Commr. of Inland Revenue 11, 17
S. Mukherjee with B. Gupta, for Applicant; Dr. D. Pal with Miss M. Seal, for Respondent.

S. P. MITRA, J.:— In this Reference under Section 66(1) of the Indian Income-tax Act, 1922 the assessee is a limited company, whose main business is transport of cargo from ships berthed at the Calcutta Port. The assessment year is 1961-62. The relevant previous year ended on the 31st October, 1960 Messrs K. C. Bose & Co., a firm of Chartered Accountants, were the assessee's tax consultants. The assessments for the years 1948-49 to 1952-53 were reopened under Section 34 (1) (a) of the Indian Income-tax Act, 1922. At that time the original assessments for the years 1953-54 to 1959-60 were also pending. The assessee agreed to pay Messrs. K. C. Bose & Co consolidated fees at the rate of Rs. 2,000 for each assessment year for these twelve years for settling each year's assessment irrespective of the fact whether there was any appeal or not in respect of a particular year.

2. Out of the sum of Rs. 24,000, a sum of Rs. 8,000 was paid in the preceding year and was allowed by the Income-tax Officer as a deduction for the assessment years 1961-62; the assessee paid the balance of Rs. 16,000 and claimed the amount as a deduction under Section 10 (2) (xv) of the Act.

3. In respect of the assessments for the years 1948-49 to 1953-54 Messrs K. C. Bose & Co., conducted the cases on behalf of the assessee before the Income-tax Officer, while the appeals before the Appellate Assistant Commissioner and the Tribunal were conducted by an Advocate of this Court to whom separate fees were paid.

4. For the assessment years 1954-55 to 1956-57 Messrs. K. C. Bose & Co., appeared before the Income-tax Officer and also conducted the appeals filed on behalf of the assessee before the Appellate Assistant Commissioner but there were no further appeals to the Tribunal.

5. With regard to the assessment years 1957-58 to 1959-60 Messrs. K. C. Bose & Co. conducted the cases before the Income-tax Officer and also the appeals before the Appellate Assistant Commissioner and the Tribunal.

6. The Income-tax Officer held that as Messrs. K. C. Bose & Co. had not only appeared before the Income-Tax Officer but also appealed to the Appellate Assistant Commissioner and the Tribunal an amount of Rs. 8,000 could be estimated as apportionable to fees payable for appearing in the appeal proceedings. He held that this amount of Rs. 8,000 was not allowable as a deduction and added the amount back.

7. The Appellate Assistant Commissioner agreed with the Income-Tax Officer and did not interfere with his decision.

8. Before the Tribunal it was urged on behalf of the assessee that there was no justification for treating the fees paid for services rendered by the tax consultants before the Income-Tax Officer and those before the appellate authorities on different footing. As per terms of the agreement, a consolidated fee of Rs. 2,000 for each year had to be paid irrespective of the fact whether there was any appeal or not and whether such appeals were to be conducted by the tax consultants or by separate Advocates. Relying on the decision of the Madhya Pradesh High Court in *Binodiram Balchand v. Commissioner of Income-tax, M. P.*, (1963) 48 ITR 548= (AIR 1963 Madh. Pra. 223) the Tribunal held that the agreement for the payment of consolidated fees of Rs. 2,000 for each assessment year irrespective of whether there was any appeal or not was entered into by the assessee on grounds of commercial expediency. The Tribunal agreed

with the assessee's contention that it was immaterial whether the fees were paid for attending the proceedings before the Income-tax Officer or before the Appellate Assistant Commissioner or before the Tribunal. Accordingly, the Tribunal held that the entire amount of Rs. 16,000 claimed by the assessee was an admissible deduction under Section 10 (2) (xv).

9. The following question of law arising out of the Tribunal's order has been referred to this Court:—

"Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the sum of Rs. 16,000 paid by the assessee as professional fees to its Tax Consultants for their services at the consolidated rate of Rs. 2,000 per assessment year for settling each year's assessment irrespective of the fact whether there were any appeals or not, was an admissible deduction under Section 10 (2) (xv) of the Indian Income-tax Act, 1922?"

10. In this Court the case has been argued by learned Counsel for both the parties from a broader point of view. Numerous authorities were cited before us. But for the purpose of the present reference we shall restrict ourselves only to a few which appear to be strictly relevant.

11. In *Smith's Potato Estates Ltd. v. Commissioners of Inland Revenue*, (1929) 30 Tax Cases 267 at p. 277, the company was a subsidiary company of *Smith's Potato Crisps (1929) Ltd.* The parent company was assessable to excess profits tax in respect of the profits of its subsidiary. The Commissioners of Inland Revenue, acting under Section 32 of the Finance Act, 1940, disallowed in the computation of profits of the subsidiary company for the period ending March 31, 1941, the excess over £ 3500 of the remuneration paid to one Mr. Young, the General Manager of the subsidiary company. Both companies appealed to the Board of Referees and were successful in getting the sum of £ 3,500 increased to £ 5,800. The subsidiary company incurred legal and accountancy costs in the preparation and prosecution of that appeal and claimed to deduct them in computing its profits for Income-tax purposes. The claim of the subsidiary company as well as claim by the parent company to deduct the said costs in computing the profits of the subsidiary company for purposes of Excess Profits Tax came on appeal ultimately to the House of Lords. There were differences of opinion between the Learned Law Lords which we shall presently discuss.

12. But before we do so, it would be useful to quote the English Rule 3 (a) and compare the provisions thereof with the relevant provisions of our Statute.

The English Rule 3 (a) under Schedule D was as follows:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements of expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

13. In our Income-tax Act, 1922, Section 10 (2) (xv) as it stood upto 1939 was as follows:—

Section 10 (a). "Such profits or gains shall be computed after making the following allowances, namely:—

.....
 (xv) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

14. By Act 7 of 1939, these provisions were amended and the new provisions stood as follows:—

"any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession, or vocation."

15. It is to be observed that for the expression "for the purpose of earning such profits or gains" the legislature chose to use the expression "laid out or expended wholly and exclusively for the purpose of such business, profession or vocation." We shall notice later the significance of these alterations.

16. Then there was a further amendment by Act 25 of 1953 and the latest provision stood thus:—

"any expenditure not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive and not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

17. Now coming back to the case of *Smith's Potato Estates, Ltd.*, (1929) 30 TC 267, Lord Green, M. R., was the principal exponent of the majority view that the expenses incurred by the assessee were not deductible expenses under Rule 3 (a) of Schedule D. At p. 282, Lord Green has said:—

"..... costs incurred in ascertaining the correct amount of tax are incurred by a tax-payer partly if not mainly in his capacity as a tax-payer, and for the purpose of securing that his liability as tax-payer is assessed at the correct amount, and cannot be said to be wholly and exclusively laid out for the purposes of his trade."

18. Viscount Simon and Lord Oaksey did not agree with this view. Viscount Simon has stated at page 284:—

"It seems to me that it is essential for the proper carrying on of a trade that the trader should know what portion of his profits in a given year is left to him after the Revenue has taken its share by taxation. If, therefore, he considers that the Revenue seeks to take too large a share and to leave him with too little, the expenditure which the trader incurs in endeavouring to correct this mistake is a disbursement laid out for the purposes of his trade. If he succeeds he will have more money with which to earn profits next year. It is true that the result of his success is to reduce the tax he has to pay — alternatively, one may say that the result is to show that the profit of the year's trading left to him after paying tax is greater than the Revenue was willing to admit but to my mind the purpose was a trading purpose and nothing else. The trade is not to be regarded as extending over twelve months and no more; indeed, as I have already pointed out, Excess Profits Tax is liable to be adjusted in the light of subsequent trading results, and assessment for Income Tax is arrived at on figures of the previous year.

With all respect to those who think otherwise, I regard it as fallacious to argue that the trader's expenditure in fighting the Revenue's assessment is not "wholly and exclusively" incurred for the purposes of the trade, because the expenditure would not be incurred if there was no tax to pay. If there was no tax to pay the benefit realised by the trader from carrying on the trade would not be reduced by taxation, and it is the purpose of trade (at any rate under private enterprise) to make its legitimate profit.

Viewed in this light I do not see why the expenditure here in question is not wholly and exclusively laid out for the purposes of the trade; if it had not been incurred, the trade would be less profitable. Lord Lavey's gloss on the words of the statute in *Strong and Company of Romsey, Ltd. v. Woodfield*, (1906) AC 488 is well known, but I think it is better to concentrate on the statutory words themselves. Rightly understood, however, I do not find that Lord Lavey's words contradict the view that I am disposed to take. *Strong and Co. v. Woodfield* was a case in which the tax-payer sought to deduct a loss not connected with or arising out of his trade. Lord Loreburn, L. C., said, at page 452: "I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself." Lord Lavey's test was that the purpose of the expenditure must be "the purpose of enabling a person to carry on and earn profits in the trade" (page 453). Here the expenditure was, in my view,

incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax does increase the fund in the trader's hands after tax is paid and so promotes the carrying on of the trade and the earning of trading profits. The incidental consequence that the trader is not taxed so heavily in respect of his profits from trade does not, as it seems to me, alter the fact that the litigation was wholly and exclusively undertaken for the purpose of the trade

19. There are also a few weighty observations of Lord Oaksey. He has said at p 297:—

"..... But it is the character of the expense which must be considered. The expense in this case was not a capital investment, it was incurred not to distribute but to increase and in that sense to earn the profits. On the other hand, if it is to be held that such expenses are not deductible, what is to be said of the costs of audit which the Companies Acts make necessary, or of that part of the cost of book-keeping which is used in the preparation of such an audit, or of accounts for taxation? They are not incurred for the purpose of earning the profits of the trade in the limited sense contended for by the Crown."

20. It is clear, therefore, that one point of view is that expenses incurred in conducting proceedings connected with the assessment of tax are not deductible expenses inasmuch as such expenses are incurred by the assessee not wholly and exclusively for the purpose of his trade but partly, if not mainly, as a tax-payer. And the other point of view is that this expenditure is incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax increases the fund in the trader's hands after tax is paid and promotes the carrying on of his trade and the earning of his trading profits.

21. We have given our most anxious consideration to both the points of view and have reached the conclusion that the view expressed by Viscount Simon with whom Lord Oaksey had concurred should be accepted by us. In this conclusion we derive some support from certain observations of our Supreme Court which may, at this stage, be fruitfully referred to.

22. In the earlier part of this judgment the difference, so far as Section 10 (2) (xv) is concerned between its provisions up to 1939 and the provisions subsequent thereto has been noted. We have seen that previously what was expenditure "incurred solely for purpose of earning such profits or gains" is now an expenditure "laid out or expended wholly

and exclusively for purpose of such business, profession or vocation."

23. Our Supreme Court in Commissioner of Income-tax Kerala v. Malayalam Plantations Ltd., 53 ITR 140=(AIR 1964 SC 1722) has said that the expression "for the purpose of business" is wider in scope than the expression "for purposes of earning profits". The Supreme Court says further that the purpose shall be for the purpose of the business that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business.

24. Then in Sree Meenakshi Mills Ltd. v. Commissioner of Income-tax, Madras, 63 ITR 207=(AIR 1967 SC 444), their Lordships of the Supreme Court have said that the expenditure incurred not with a view to direct and immediate benefit for the purposes of commercial expediency and in order indirectly to facilitate the carrying on of business is an expenditure laid out wholly and exclusively for purposes of the trade. In this case the Supreme Court also said that expenditure on civil litigation commenced or carried on by an assessee for protecting the business is an admissible expenditure under Section 10 (2) (xv), provided other conditions are fulfilled, even though the expenditure does not directly relate to the earning of the income.

25. Applying these principles laid down by the Supreme Court to the facts of the instant reference, it seems to us that expenses incurred for conducting proceedings before the Income-tax authorities may not be apparently related to the assessee's trading activities but may be justifiably necessary for increasing the assessee's net profits or for the carrying on of the business with larger funds at the disposal of the assessee. From this point of view these expenses are expenses 'for the purpose of the business' in the wider sense the Supreme Court has understood this expression.

26. We have, however, to consider the Supreme Court's decision in Travancore Titanium Product Ltd. v. Commissioner of Income-tax, Kerala, 60 ITR 277=(AIR 1966 SC 1250). In this case the question arose as to whether the amount of Wealth-tax paid by an assessee was business expenditure deductible under Section 10 (2) (xv) of the Wealth-tax Act, 1957. The Supreme Court expresses the view that the nature of the expenditure or outgoing must be adjudged in the light of accepted commercial practice and trading principles, the expenditure must be incidental to the business and must be necessitated or justified by commercial expediency; it must be directly and

intimately connected with the business and must be laid out by the tax-payer in his character as a trader; and to be a permissible deduction, there must be direct and intimate connection between the expenditure and the business, i. e., between the expenditure and the character of the assessee as a trader, and not as owner of assets, even if they are assets of the business.

27. Mr. Mukherjee, learned Counsel for the Commissioner, contends that this judgment of the Supreme Court ought to be considered as an authority for the proposition that taxes are paid by an assessee not in his capacity as a trader but in his character as a tax-payer. Mr. Mukherjee further contends that the principles applicable to Wealth-tax equally apply to Income-tax.

28. We are unable to support these contentions. The reason for the Supreme Court's decision has been pointed out in the last but one paragraph of its judgment in *Travancore Titanium Products Ltd's case*, (1966) 60 ITR 277 = (AIR 1966 SC 1250). The paragraph runs thus:—

"In the light of the principles the amount of tax paid on the net wealth of an assessee under the Wealth-tax Act is not a permissible deduction under Section 10 (2)(xv) of the Indian Income-tax Act in his assessment to income-tax, for tax is imposed under the Wealth-tax Act on the owner of assets and not on any commercial activity. The charge of the tax is the same, whether the assets are part of or used in the trading organisation of the owner or are merely owned by him. The assets of the tax-payer, incorporated or not, become chargeable to tax because they are owned by him, and not because they are used by him in the business."

29. To our mind these observations of their Lordships of the Supreme Court constitute a complete answer to the contentions of learned Counsel for the Commissioner. In our view, as income-tax is levied on the amount of profits earned, the expenses incurred for ascertaining the correct amount of income-tax payable by an assessee are expenses deductible under Section 10 (2) (xv) of the Act of 1922.

30. In *Mannalal Ratanlal v. Commissioner of Income-tax, Calcutta* (1965) 58 ITR 84 (Cal), this Court following the judgment of the Patna High Court in *Maharajadhiraj Sir Kameswar Singh v. Commissioner of Income-tax*, 42 ITR 774 = (AIR 1960 Pat 31), has held that the interest which an assessee had paid on the amount borrowed for payment of Income-tax, is not deductible from the assessee's net income. The principal reason for the decision was that payment of Income-tax was not an expenditure for

the purpose of earning profits; it was, on the contrary, a case of application of profits after they had been earned and not an expenditure necessary to earn such profits. From this point of view interest on money borrowed for payment of tax was not considered to be a legitimate deduction in computing business profits. Here, the facts are different. The deduction that is claimed, is neither of the amount paid as Income-tax nor of the interest paid on any amount borrowed for payment of Income-tax. Here the expenses were incurred for saving, preserving or protecting a portion of the income arising out of the assessee's business. In other words, these expenses enabled the assessee to make its legitimate profits. They, were, therefore, laid out wholly and exclusively for the assessee's business.

31. For reasons stated in this judgment our answer to the question framed is that the Tribunal was correct in holding that the sum of Rs 16,000 paid by the assessee as professional fees to its tax consultants was an admissible deduction under Section 10 (2) (xv) of the Indian Income-tax Act, 1922. There would be no order as to costs.

32. CHATTERJEE, J.:— I agree.
RSK/D.V.C. Reference answered.

AIR 1969 CALCUTTA 175 (V 56 C 33)
D. N. SINHA, C. J. AND A. N. SEN, J.

State of West Bengal and others, Appellants v. Biswanath Banerjee and others, Respondents.

A. F. O. O. No 185 of 1967, D/- 23-7-1968, from decision of D. Basu, J., reported in 71 Cal WN 415.

(A) Education — W. B. Board of Secondary Education Act (37 of 1963), S. 45 (1) and (2) (f) — W. B. Board of Secondary Education (Appointment of Secretary) Rules (1963), R. 8 — Validity of R. 8 — Rule comes within scope of S. 45 (1) and is perfectly valid and *intra vires*.

The part of R. 8 of the W. B. Board of Secondary Education (Appointment of Secretary) Rules, 1963 which enables services of the Secretary to be terminated merely upon notice or the payment of compensation, does not come within the purview of clause (f) of sub-section (2) of S 45. Under that provision, what can be prescribed are the terms and conditions of appointment, the scale of pay and rule of discipline relating to the Secretary of the Board. Mere termination of service does not come under any of these headings. The powers enumerated in sub-section (2) are, however,

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merely illustrative. In other words, they are illustrations of the exercise of the general powers contained in sub-sec. (1) of S. 45. Rule 8 comes within the scope of sub-section (1) and is perfectly valid and intra vires. (Para 5)

(B) Education — W. B. Board of Secondary Education Act (37 of 1963), Ss. 45 (1) and 46 — W. B. Board of Secondary Education (Appointment of Secretary) Rules (1963), R. 8 — R appointed by Board of Secondary Education established under W. B. Secondary Education Act, 1950 and his post of Secretary continued under 1963 Act — Order of State Government under R. 8 dispensing with his services on payment of three months' salary — Held, R was employee of the new Board — Powers had been specifically given under 1963 Act to State Government to make rules for Secretary and power under R. 8 was validly exercised: (1967) 71 Cal WN 415, Reversed; AIR 1967 SC 459, Disting.

(Para 7)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 459 (V 54) =

(1967) 1 SCR 499, State of Assam
v. Kripanath Sarma 5. 6

Gouri Mitter and Harashit Chakrabarty, for Appellants; R Chaudhury, P. K. Banerjee, Narendra Nath Saha, for Respondent No. 1; G. P. Kar, S. K. Ray and A. Lahiri, for Respondents Nos 2 to 4.

SINHA, C. J.:— The facts in this case are briefly as follows: The respondent Biswanath Banerjee, was in 1951, appointed as Office Superintendent of the Board of Secondary Education, a statutory corporation set up by the West Bengal Secondary Education Act, 1950 (hereinafter referred to as the "Act of 1950"). He had several promotions. In 1954 came to be passed the West Bengal Secondary Education (Temporary Provisions) Act, 1954 (hereinafter referred to as the "Act of 1954"). By this Act, the Board created by the Act of 1950 was superseded and its powers came to be exercised by an Administrator appointed by the State Government. On 8th August, 1962 the said respondent was appointed Secretary of the Board, on probation, by the then Administrator. On 20th February, 1963 came to be passed the West Bengal Board of Secondary Education Act 1963 (hereinafter referred to as the "Act of 1963"). On 24th of August 1963 the said respondent was confirmed as a Secretary of the Board. The Act of 1963 was published in the Official Gazette on the 20th February 1963 Under Section 1 (3) thereof, it is provided that it shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint. The appointed date, when the Act was extended to the whole

of West Bengal, is 1st of January, 1964. Under Section 45 of the Act of 1963, the State Government has been given powers to make rules for the purpose of the said Act. Sub-section (1) of Section 45 is the general power and sub-section (2) sets out certain specific powers which are only illustrative of the general power. In exercise of this power, rules were framed by the State Government, called the West Bengal Board of Secondary Education (Appointment of Secretary) Rules, 1963. Curiously enough, the rules were published on the 24th December, 1963, even before the Act came into force. However, it is conceded that by virtue of Section 23 of the Bengal General Clauses Act, the rules are valid but are only operative from the date when the Act came into force. On the 7th November, 1966, the said respondent was served with a letter dated 5th November, 1966, purporting to be an order of the Governor. The relevant part of the order is as follows:—

"In exercise of the power conferred by Rule 8 of the West Bengal Board of Secondary Education (Appointment of Secretary) Rules, 1963, the Governor is pleased to dispense with the services of Shri Biswanath Banerjee Secretary of the West Bengal Board of Secondary Education with immediate effect on payment of three months' salary in lieu of notice."

On the 10th of November, 1966, the said respondent moved an application in this Court under Article 226 of the Constitution challenging the validity of the said order dated 5th November, 1966 and a Rule Nisi was issued. This Rule came up for hearing before Basu, J., on the 22nd February, 1967 and succeeded. The Rule was made absolute and the appellant was restrained from giving effect to the impugned order. It is against this order that this appeal arises. Before us, only one point is argued and that is as follows. The position taken up is that the said respondent was appointed by the "Board" meaning thereby the Board of Secondary Education established under the Act of 1950 Under sub-sections (1) and (2) (c) of Section 46 of the Act of 1963, his appointment was continued under the West Bengal Board of Secondary Education established under the Act of 1963, and that Rule 8 of the said Rules did not apply to him and the State Government had no jurisdiction to make any order terminating his services. It is this point which succeeded in the Court below, but is challenged before us.

2. In order to examine this argument, it will be necessary to consider certain provisions of the Act of 1963 as well as the said Rules. I have already mentioned that a "Board" known as the "Board of Secondary Education" was established

under the Act of 1950. The Act of 1954 did not abolish the Board, but enabled an Administrator to carry on its duty. Under the Act of 1963, a new Board was created known as the "West Bengal Board of Secondary Education". The definition of the word "Board" is contained in clause (b) of Section 2 and means the West Bengal Board of Secondary Education established under the Act. Section 3 (1) provides that the State Government shall, as soon as after the Act came into force, establish a Board named the West Bengal Board of Secondary Education. Actually the Board came into existence by notification dated 20th February, 1963, being the same date on which the Act of 1963 was gazetted. Sub-section (1) of Section 45, gives the power to the State Government to make rules for carrying out the purposes of the Act. Sub-section (2) specifies some of these powers. We are only concerned with clause (f) which runs as follows.—

"(f) the terms and conditions of appointment, the scale of pay and the rules of discipline relating to the Secretary of the Board".

Section 46 deals with the repeal and continuance. The relevant provisions are as follows:—

"46(1) The West Bengal Secondary Education Act, 1950 (hereafter referred to as the said Act), and the West Bengal Secondary Education (Temporary Provisions) Act, 1954, are hereby repealed.

(2) Upon such repeal.

.....
(c) all officers and other persons in the employment of the Board of Secondary Education immediately before the commencement of this Act shall, until other provision is made, continue in the service of the Board".

3. I have already mentioned that in exercise of the powers under Section 45 (1) and (2) of the Act of 1963 the State Government has made rules known as the West Bengal Board of Secondary Education (Appointment of Secretary) Rules, 1963. We are concerned with Rule 8. The relevant part whereof runs as follows.—

"8 Power to dispense with the services of the Secretary — The State Government shall have the power to dispense with the services of the Secretary on three months' notice or in lieu of such notice on payment of three months' salary and also to discharge or dismiss the Secretary from service without notice or compensation in the event of misconduct or of a breach of any of the duties attached to the post of Secretary."

4. It is in exercise of power under this Rule that the Governor passed the impugned order in this case dated 5th of November, 1966.

5. It must be remembered that this is not a case of dismissal or a disciplinary action at all. It is simply termination of the services of the said respondent upon three months' notice or payment of three months' salary in lieu of notice as specified in Rule 8. Under the impugned order, the services of the said respondent were terminated at once and three months' salary was offered to him. In fact, it was sent to him together with the order. It is admitted that if Rule 8 did not apply then the power could not be exercised and the impugned order would be invalid. So far as the validity of Rule 8 is concerned, I do not think that the part of the Rule which enables services to be terminated merely upon notice or the payment of compensation comes within the purview of clause (f) of sub-section (2) of Section 45. Under that provision, what can be prescribed are the terms and conditions of appointment, the scale of pay and rules of discipline relating to the Secretary of the Board. Mere termination of service does not come under any of these headings. The powers enumerated in sub-section (2) are however, merely illustrative. In other words, they are illustrations of the exercise of the general power contained in sub-section (1) of Section 45. In our opinion, Rule 8 comes within the scope of sub-section (1), and is perfectly valid and intra vires. The next question is as to whether it applies to the facts and circumstances of this case. That the respondent was originally appointed by the "Board" as constituted under Act of 1950 there can be no doubt. The question (is?) as to the effect of Sec. 46 (2) (c). It will be observed that in clause (c), the word "Board" is mentioned twice. Our task is made easy because it is admitted before us that the first mentioned "Board" is under the Act of 1950 and that the second mentioned "Board" is under the Act of 1963, namely the West Bengal Board of Secondary Education. It is admitted that after the repeal of the Act of 1950, the Board of Secondary Education under that Act ceased to exist and is completely non est. Mr. Chadhury further admits that the said respondent is now in the service of the West Bengal Board of Secondary Education. According to him, it is that Board only which can dismiss his client. When we asked him as to under what rules could that be done, particularly as his argument is that the present Board is not the appointing authority, the answer given is that the Board could do it under the general law of master and servant, and no statutory rules are to be found. In fact, according to him, the rule-making power given under Section 45 cannot be exercised at all in respect of his client who is not subject to any of

the provisions of the said Rules. According to him, the State Government has no power or authority to terminate the services of the said respondent. If we are to accept the argument of Mr. Chaudhury, the position of his client is a peculiar one. It is admitted that he is in the service of the West Bengal Board of Secondary Education, which is a body incorporated by the Act of 1963. The very Act which has created the Board has also given power to the State Government to make rules, and elaborate rules have been made with regard to the post of Secretary to the Board. It deals with his conditions of service, the period of his service, rules with regard to his leave, provident fund, allowances and duties. None of these are to affect the said respondent, but everything is to be governed by the general law of master and servant. We find it very difficult to accept this proposition. Mr. Chaudhury, however, says that the point is concluded by a Supreme Court judgment — State of Assam v. Kripanath Sharma, AIR 1967 SC 459. The facts in that case were as follows: In the year 1947, the Assam Legislature passed an Act known as the Assam Primary Education Act No. XIII of 1947 in order to provide for the development of primary education in the State. That Act was repealed by the Assam Basic Education Act No. XVI of 1954 (hereinafter referred to as the "Act of 1954"). This Act provided for a State Advisory Board. It further made provisions for the constitution of regional boards known as School Boards. These School Boards had the power to appoint and punish basic school teachers. The 1954 Act was repealed by the Assam Elementary Education Act No. XXX of 1962 (hereinafter referred to as the "1962 Act"). Under this Act was constituted the State Board for elementary education. The main change introduced by the 1962 Act was that the School Boards functioning under the 1954 Act were abolished and in their place the Deputy Inspectors of Schools, by virtue of their office, were made Assistant Secretaries of the State Board with the same headquarters and jurisdiction as they had as Deputy Inspectors of Schools. They were inter alia authorised to operate the fund placed at their disposal by the State Board to appoint their office staff, and in particular by clause (iii) of Section 14(3),

"to appoint teachers in recognised schools on the advice of a Committee constituted by the State Board under Section 16 and transfer them as necessary and also grant such leave, other than casual leave, to them as may be admissible"

The Act came into force from October 5, 1962. Section 34 (2) of the Act provided that as soon as it came into force, all

teachers and other employees of the schools maintained by the School Board would be taken over by the State Board subject to certain conditions. Section 38 provides as follows:—

"All teachers existing or to be appointed in any Elementary School recognised under this Act except in the case of Autonomous Districts, shall be deemed to have been employed by the State Board." Section 64 granted rule-making power to the State Government for carrying out the purposes of the Act. Section 55 is a repealing section and provided as follows:—

"Notwithstanding the repeal all authorities constituted, appointments, rules, orders or notifications made under the said Act shall be deemed to be constituted or made under this Act, and continue to function or to be in force until actions under the provisions of this Act are taken."

The next thing to be considered is that even after October 5, 1962 the State Advisory Board continued to function, until the State Board was constituted. Not only did it continue, but on 20th November, 1962 it passed a resolution which was in the following terms:—

"Subject to the exceptions enumerated in repeal all teachers who are not matriculates or who have not passed teachers' test but who are working as teachers in schools shall be discharged with effect from 31-3-1963."

In pursuance of this resolution, the Secretary to the State Advisory Board wrote a letter to all the Secretaries of the School Board, who were no other than the Deputy Inspectors of Schools and who became Assistant Secretaries of the State Board under Section 14 of the Act, requesting them to give effect to the said resolution. It appears that after 31st March, 1963, action began to be taken on this instruction and the services of several teachers including that of the respondent in the Supreme Court Appeal, AIR 1967 SC 459, Shri Kripanath Sharma, were terminated on the ground that they were not matriculates or T. T. teachers. A number of writ petitions including that of the petitioner were filed in the High Court challenging the orders of termination. The main point raised was that the Secretary of the School Board or Assistant Secretary to the State Board, under whose signature the letters of termination were issued had no authority under the Act to terminate the services of the teachers who had been appointed under the old Act. The first point to be considered was whether the Deputy Inspector of Schools, in his capacity as the Assistant Secretary of the State Board, could terminate the services of the respondent. I

have already referred to clause (iii) of Section 14 (3) which gave him the power to appoint teachers. But it gave him no right to dismiss them. It was argued that under Section 18 of the Assam General Clauses Act No. II of 1950, a person who had the power to appoint had the power to dismiss. The Supreme Court accepted this proposition of law, but proceeded to examine the question as to whether, if this was the only provision as to dismissal, it could be said that the respondents were appointed by the Deputy Inspector of Schools in his capacity as Assistant Secretary of the State Board. Wanchoo, J., pointed out that the Assistant Secretary of the State Board was created for the first time by the 1954 Act. Therefore, persons who had been appointed before the Act came into force could not possibly have been appointed by him, because under the old Act, which was repealed, there was no such post at all. In the earlier Act, the appointing Authority was the School Board, and there was no Assistant Secretary or the State Advisory Board. It was next urged that under Section 55 which has been set out above, all appointments under the 1954 Act by the School Board, must be deemed to have been made by the Assistant Secretary under Section 14 (3) (iii) of the 1963 Act. Wanchoo J. said as follows:—

“We are of opinion that this contention cannot be accepted in view of the specific provision contained in the Act under Section 34 (2) and Section 38. Section 34 (2) lays down that all teachers and other employees of schools maintained by the School Board would be taken over by the State Board. This being a specific provision relating to teachers, we cannot take recourse to the general deeming provision contained in Section 55 (2) with respect to appointment of teachers and other employees of schools maintained by School Board. Further Section 38 specifically says that all teachers then existing would be deemed to have been employed by the State Board. Reading, therefore, Section 34 (2) and Section 38 together, the conclusion is inevitable that there is no occasion for the application of the deeming provision in Section 55 in the case of these teachers. In the face of these two specific provisions the general deeming provision contained in Section 55 (2) cannot be used to come to the conclusion that those teachers who were existing from before are to be deemed to have been appointed by the Assistant Secretary under Section 14 (3) (iii). We are, therefore, in agreement with the High Court, though for slightly different reasons, that the services of the respondent-teachers could not be terminated by the Assistant Secretary of the State Board under Section 14 (3) (iii) of the

Act read with Section 18 of the 1915 Act.”

6. In my opinion there are substantial points of distinction between the facts involved in the Supreme Court decision, AIR 1967 SC 459 and the facts of the instant case. The first and foremost distinction is that in the Supreme Court case, AIR 1967 SC 459 the State Advisory Board under the 1954 Act continued to exist and in fact it was the implementation of a resolution passed by that Board, which caused the difficulty. In the present case, the old Board created by the Act of 1950 had ceased to exist and was completely non est after the Act of 1963 came into force. The next point of distinction is that in the Assam case, no rules have been framed under the 1962 Act, but the power of dismissal was sought to be deduced under the General Clauses Act, from a power to appoint contained in the 1962 Act. As the appointments were made much earlier in point of time to the creation of the Appointing Authority, the question arose as to whether the Assistant Secretary could be said to be the Appointing Authority in respect of such appointments. By construing the provisions of the Assam Act, it was held that it could not be so. In the present case, however, the old Appointing Authority was no longer in existence and by the provision of the relevant Act, the said respondent came to be an employee of the West Bengal Board of Secondary Education which was created under the 1962 Act. The point as to whether the State could dismiss or terminate the services of the said respondent is not, on the facts of the present case, dependant on the question as to who is the Appointing Authority. The position is completely covered by rules which have been made under the 1963 Act. These rules deal elaborately with regard to the post of the Secretary to the Board, which means the West Bengal Board of Secondary Education. If, as has been admitted before us, the said respondent has become an employee of the “Board” as defined under the 1963 Act, then it does not stand to reason that rules cannot be made in respect of him under the express rule-making powers granted under Section 45 of the Act of 1963. There seems to be no reason whatsoever to import in his case the law of master and servant. In the Assam case, AIR 1967 SC 459 the State Advisory Board was continuing. The old School Boards functioning under the 1954 Act were abolished and in their place the Deputy Inspectors of Schools were made Assistant Secretaries of the said Board, which meant the new Board constituted under the 1962 Act. It is one of these Assistant Secretaries who tried to dismiss persons who had been appointed by

the old School Board. The only power contained in the 1962 Act was one giving him the power to appoint teachers. It was held that this might give him the power to dismiss, but the power would be prospective, and therefore, as he was not the Appointing Authority in respect of teachers appointed at a time when his post did not exist, he had no power to dismiss them. Under the deeming provision contained in Section 55, appointments made under the old Act were to be deemed to be made under the new Act, but under the new Act there were specific provisions whereby employees of the old School Board were to be taken over by the State Board. Therefore, it was only the State Board which could exercise the power of dismissal and the State Board had not been formed yet, and in any event it was held that the action taken by the Assistant Secretary was not authorised by any State Board.

7. These facts have no application to the facts of the present case. In the present case, the new Board has come into existence and it is admitted that the said respondent is an employee of the new Board, namely, the West Bengal Board of Secondary Education. Powers have been specifically given under the 1963 Act to the State Government to make rules for the Secretary of the Board and such rules have been made and in our opinion Rule 8 is a valid rule and has been validly exercised.

8. In the circumstances we are of the opinion that the learned Judge in the Court below has come to an erroneous decision and that the appeal should be allowed and the order of the Court below should be set aside and the rule should be discharged, but there will be no order as to costs. There will also be no order with regard to costs of this appeal.

9. Let the status quo be maintained for six weeks from this date.

10. A. N. SEN, J.:— I agree.

JHS/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 180 (V 56 C 34)

S. P. MITRA, J. on difference of opinion between P. B. MUKHARJI AND A. N. SEN, JJ.

Debesh Chandra Das, Appellant v. Union of India and others, Respondents.

A. F. O. O. No. 381 of 1967, D/- 21-8-1968, from judgment of P. B. Mukharji and A. N. Sen, JJ., D/- 11-4-1968.

(A) All India Services Act (1951), S. 3 (1) — Rules under — Indian Administrative Service (Cadre) Rules (1951), R 6 — Member of I. A. S. serving in Assam State deputed to serve Central

Government — Cadre Officer within R. 6 — On facts held petitioner did not hold a permanent post in Central Government nor was he appointed substantively as such.

The appellant, a member of the Indian Administrative Service not permanently allotted to Judiciary under R. 3 of I. A. S. Recruitment Rules 1954, was on deputation to the Government of India from the State of Assam. He had held the post of a Joint Secretary to the Central Government from January, 1955 to February 1961. Thereafter, he became the Managing Director of the Central Warehousing Corporation and then in July, 1964, he was appointed Secretary to the Department of Social Security.

Held that the appellant was a cadre officer on deputation within meaning of R. 6 and, as such, the offices that he held, were of transitory nature and the Central Government had the right to replace his services to the State of Assam as and when it thought fit. His substantive service was not in the Central Government but in the Government of Assam.

Held further that the appellant was neither holding a permanent post in the Central Government nor had been appointed to any such post substantively.

(Para 16)

(B) Constitution of India, Art. 314 — Member of Indian Civil Service allotted to Assam on deputation to Central Government — Rights and conditions of service as respects remuneration, leave and pension are governed by Art. 314.

(Para 18)

(C) Civil Service — Fundamental Rules, R. 56 (f) — Member of Indian Civil Service on deputation to Central Government holding post of Secretary for less than five years from date of appointment as Secretary — R. 56 (f) can have no application to his case if he has not reached the end of thirty five years' service counted from his date of arrival in India — Hence no question of his holding the post for a period of five years arises.

(Para 19)

(D) Constitution of India, Arts. 53, 77, 226 — Scope — Arts. 53 and 77 should be read together — Executive power of Union vested in President — Power exercised through other officers must comply with provisions of Art. 77 (2) & (3) — Government of India (Allocation of Business) Rules (1961) framed under Art. 77 (3) — Scheme under, for staffing senior posts for Centre — Implementation of decisions of appointments committee must be expressed in name of President, otherwise they have no statutory force and cannot be enforced.

Articles 53 and 77 of the Constitution should be read together. In the exercise of executive power the President may,

under Art. 53 (1) act either directly or through his officers; but whether he acts directly or through officers the act must be done in accordance with the Constitution. When the President instead of acting directly, acts through his officers, the action of the officers must be expressed to be taken in the name of the President as required by Art. 77 (1) and must also comply with Art. 77 (2)

(Para 27)

By the Government of India (Allocation of Business) Rules, 1961 made under Article 77 (3), the affairs of the Appointments Committee of the Cabinet were allocated to the Ministry of Home Affairs which had also the power, under these Rules, to frame schemes for staffing senior posts at the Centre; but the implementation of the decisions of the Appointments Committee or the scheme for staffing officers required compliance with the provisions of sub-articles (1) and (2) of Article 77. And until these requirements were fulfilled, the decisions or resolutions concerned, could not be said to have statutory force. (Para 27)

The petitioner's appointment as secretary, Department of Social Security having been approved by the Appointments Committee of the Cabinet for six months in the first instance, a gazette notification dated 31-7-1964 in the name of the President was published whereby the petitioner was appointed Secretary with effect from 30-7-1964 until further orders. The notification was signed by the Secretary, Govt. of India. Again on 6-3-1965, the Appointments Committee of the Cabinet approved the proposal to continue the petitioner on the same post but it was neither followed by a Presidential order or gazette notification of that order. On 20-6-1966 the petitioner received a letter from the Cabinet Secretary intimating the Govt.'s decision that he should be asked to revert to his parent State of Assam or proceed on leave preparatory to retirement and asking him what he proposed to do. The petitioner made a representation to the Prime Minister who granted him a personal interview. On 7-9-1966 the Govt. intimated to him its final decision that he should revert to his parent State or retire. The petitioner thereupon challenged this decision under Art. 226 as unconstitutional.

Held that the only gazetted and announced appointment, in the instant case, was that in the name of the President on the 31st July, 1964, which expressly stated that the appointment was to be "until further orders". Hence the Court could not take into consideration any other alleged order of appointment or any assurances that might have been given by high authorities in the Government of India. The petitioner was on

deputation from the State of Assam and was not holding any permanent or substantive post in the Government of India. He had no right to the post of a Secretary: he had been appointed "until further orders": and at any time he could be reverted to his parent State viz., the State of Assam. (Paras 27 and 42)

(E) Constitution of India, Arts. 226, 77 and 309, Proviso — Home Ministry's Resolution dated 17th October, 1957, has no statutory force — It is not a rule either under S. 3 of All India Services Act or under Art. 77 or Proviso to Art. 309 — Claim to hold the post of a secretary to Central Government under the above resolution held could not be enforced by Court — (All India Services Act (1951), S. 3.)

The resolution of the Ministry of Home Affairs dated the 17th October, 1957, is neither a rule under the proviso to Article 309 nor a rule under Section 3 of the All India Services Act, 1951 nor is it an executive action under Article 77 of the Constitution. It is merely a public announcement of the decisions of the Government of India on certain important matters of policy and, by itself, has no statutory force. By this resolution the Government of India merely sanctioned the Constitution of the Central Administrative Pool and then the Ministry of Home Affairs was authorised to take all steps necessary for the implementation of the Scheme. (Paras 34, 36)

In the present case the petitioner could not claim to hold the post of a Secretary for a period of five years on the basis of the aforesaid resolution of the 17th October, 1957 as containing a solemn promise on the part of the Government and could not ask the Court to compel its performance relying on the principles decided by the Supreme Court in AIR 1968 SC 718.

Further, under Article 309 of the Constitution any service rule having the force of law, must be either under an Act of the appropriate legislature or made by the President or the Governor, as the case may be, until provision in that behalf is enacted by the appropriate legislature. The requirements of Article 309 cannot be replaced by any representation made by the Government of India. AIR 1968 SC 718, Dist. (Para 38)

The contention that in the absence of statutory rules the administrative instructions contained in the Home Ministry's Resolution of the 17th October, 1957, (assuming it has no statutory force) would fill up the gap and would govern the position of Secretaries to the Central Government cannot be accepted. The petitioner was appointed as a Secretary to the Central Government in July, 1964;

but the Indian Administrative Service (Cadre) Rules, 1954, came into force long before this date, and under Rule 4 (1) thereof, the Indian Administrative Service (Fixation of Cadre Strength) Regulations, were made in 1955. The petitioner's appointment as Secretary to the Central Government, was covered by the said rules and the said regulations and, as such, there was no gap to be filled up by administrative instructions. AIR 1967 SC 1910, Dist. (Paras 40, 41)

(F) Letters Patent (Cal.), CL 36 — Reference under, to third Judge on a difference of opinion between two Judges of High Court — Whether third Judge can differ from referring bench on a point on which both Judges had agreed. (Quaere) — AIR 1949 Pat 369, Ref. (Para 36)

(G) Constitution of India, Art. 311 (2) — Procedure contemplated by CL (2) — Compliance of — Waiver.

An appeal to the Prime Minister against an order of reduction in rank and the communication of the Prime Minister's decision is not the procedure contemplated by sub-article (2) of Art. 311 which is meant to give protection to Government servants against arbitrary or unreasonable dismissal or removal or reduction in rank. Moreover, the fact that the petitioner appealed to the Prime Minister cannot be treated as waiver of his constitutional rights in the absence of any evidence of an intentional relinquishment of a known right. (Para 47)

(H) Constitution of India, Art. 311 — Reduction in rank — All India Services (Discipline and Appeal) Rules (1955), R. 3 (4) — Government servant officiating in higher post — Reversion to lower post for administrative reasons or unsuitability — Not a reduction in rank.

Under sub-rule (4) of Rule 3 of the All India Services (Discipline and Appeal) Rules, 1955, the reversion to a lower post of a member of the service who is officiating in a higher post, after a trial in the higher post or for administrative reasons (such as the return of the permanent incumbent from leave or deputation, availability of a more suitable officer, and the like) does not amount to reduction in rank. (Para 48)

(I) Constitution of India, Art. 311 — 'Reduction in rank' — Principles to determine — Government servant officiating in a post — Reversion to substantive post if and when amounts to reduction in rank — Probationer or temporary servant — Termination of service — When amounts to punishment attracting Art. 311 (2) — Principles equally apply

to a post held on deputation until further orders.

The petitioner, a member of the Indian Civil Service, serving the State of Assam, was deputed to serve Central Government and was later appointed as Secretary to the Central Government in the Department of Social Security until further orders. Subsequently the Government made an enquiry as to the suitability of officers occupying top level administrative posts and decided that the petitioner was unsuitable and proposed to him that he should either go back to his parent State or proceed on leave preparatory to retirement or accept a post lower than the post of a secretary to the Government. The decision was communicated to him by a letter dated 20-6-1966.

Held that the order of reversion of the petitioner was in 'unexceptionable form' to which the provisions of Art. 311 were not attracted. If an enquiry is held with a view to ascertain whether a probationer is fit to be confirmed and if as a result of enquiry the probationer's services are terminated, the provisions of Article 311 would not be attracted. On principle there should be no difference between a post held temporarily or on probation or on an officiating basis and a post held on deputation until further orders. The Government had the right to revert him to his parent State: and the enquiry referred to in the letter of June 20, 1966, as to the suitability of persons occupying top level administrative posts, appeared to be in the nature of a preliminary enquiry and not a departmental enquiry contemplated by Article 311 (2). Consequently the impugned order was neither illegal nor unconstitutional. Principles laid down by the Supreme Court in Civ. App. No. 1272 of 1966, D/- 12-1-1968 (SC) & AIR 1968 SC 1089, Reiterated and Applied; AIR 1961 SC 177 & Civ. App. No. 590 of 1962, D/- 23-10-1963 (SC) & Civ. App. No. 1341 of 1966, D/- 13-12-1966 (SC), Rel. on. (Paras 57, 60, 62, 64 & 66)

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Nani Coomar Chakarvarti, Nepal Chandra Sen and Sibendra Nath Sen Gupta, for Appellant; Sankardas Banerjee, Salil Kumar Dutta, Prasanta Kumar Ghosh and S. S. Javali, for Respondent.

S. P. MITRA, J.:— This matter has been assigned to me under clause 36 of the Letters Patent. P. B. Mukharji, J., and A. N. Sen, J., by their Lordships' order of April 11, 1968, have been pleased to state that their point of disagreement is as follows:—

"Whether the order or direction of the Government of India contained in the letter dated the 20th June, 1966 and the 7th September, 1966, is unconstitutional or illegal."

2. In 1933, the petitioner qualified himself for the Indian Civil Service. In 1934, the petitioner, after serving his period of probation, arrived in India and was allotted to Assam, now known as the State of Assam. Between 1938 and 1940 he held the post of Under-Secretary to the Assam Government in the Home (Political) Department. In 1940, the Government of Assam placed the petitioner's services at the disposal of the Government of India and he was appointed to the post of Under-Secretary in the Home Department. In 1947, the petitioner held the post of the Deputy Secretary to the Government of India in its Home Department; but at the end of that year the Assam Government required his services and he was successively appointed in

Assam to the posts of the Development Commissioner, the Additional Chief Secretary and the Chief Secretary. Between 1951 and 1954 the petitioner again served the Government of India as Secretary to the Union Public Service Commission. Between January 1955 and February 1961, he was the Joint Secretary to the Government of India in the Ministry of Transport and Communication. From February 1961, to July 1964, the petitioner was the Managing Director of the Central Warehousing Corporation which was a statutory corporation outside the Secretariat of the Government of India. In July 1964, the petitioner was appointed Secretary to the Ministry of Social Security, Government of India, later named as the Ministry of Special Welfare. And it is his present post as Secretary to the Government of India which is the subject-matter of this dispute.

3. On the 29th July, 1964, the petitioner's appointment as Secretary, Department of Social Security was approved by the Appointments Committee of the Cabinet for six months in the first instance. Two days later, that is, on the 31st July, 1964, there was a gazette notification to the following effect:—

"The President is pleased to appoint Shri D. C. Das as Secretary, Department of Social Security with effect from the forenoon of the 30th July, 1964 and until further orders."

4. The notification was signed by a Deputy Secretary to the Government of India. Again, on the 6th March, 1965, the Secretary, Appointments Committee of the Cabinet in a Communication, stated as follows:—

"The Appointments Committee of the Cabinet have approved the proposal to continue Shri D. C. Das, I. C. S as Secretary Department of Social Security."

5. A copy of this communication was sent to the petitioner; but it was not followed by a Presidential Order or a gazette notification of that order.

6. In June, 1966, the petitioner received a letter dated June 20, 1966, from Shri Dharma Vira (as he then was), the Cabinet Secretary, which runs thus:—

"For some time, the Government has been examining the question of building up a higher level of administrative efficiency. This is much more important in the context of the recent developments in the country. In this connection, the Government examined the names of those who are at present occupying top level administrative posts with a view to ascertaining whether they are fully capable of meeting the new challenges or whether they should make room for younger people. As a result of this examination, It has been decided that you should be asked either to revert to your parent

State or proceed on leave preparatory to retirement or to accept some post lower than that of Secretary of Government I would be glad if you would please let me know immediately as to what you propose to do, so that further action in the matter may be taken.

.....

7. On receipt of this letter the petitioner made various representations including representations to the Prime Minister and had also a personal interview with her; but ultimately, on the 7th September, 1966, he received the following letter from Shri D. S. Joshi, the then Cabinet Secretary:—

"You had submitted on the 23rd July, 1966, a representation to the Prime Minister regarding your case. You had also represented to my predecessor on the 23rd June, 1966. As requested by you, the Prime Minister granted you an interview on the 31st August, 1966. I am now directed to inform you that after considering your oral and written representations in the matter, Government has decided that your services may be replaced at the disposal of your parent State, namely, Assam. In case, however, you like to proceed on leave preparatory to retirement, will you please let me know?

.....

8. The two letters of Shri Dharma Vira and Shri D. S. Joshi, are the documents mentioned in the referring order of P. B. Mukharji, J. and A. N. Sen, J., quoted above and I have to decide whether these are illegal or unconstitutional. The petitioner's application to this Court was an application made on the 20th September, 1966, under Article 226 of the Constitution praying, *inter alia*, for a writ in the nature of mandamus directing, the Union of India to recall, cancel and withdraw the orders dated the 20th June, 1966, and the 7th September, 1966, A rule nisi was issued by A. N. Ray, J., on September 20, 1966; but his Lordship was pleased to discharge the rule on the 19th May, 1967. Thereafter the matter went up to the Appellate Court, and, ultimately, P. B. Mukharji, J. and A. N. Sen, J., delivered their respective judgments which were concluded on the 31st January, 1968. The Division Bench gave a certificate under Article 132 (1) of the Constitution, but the Supreme Court on the 29th March, 1968, cancelled the certificate for disposal of this case under clause 36 of the Letters Patent

9. At the hearing before me, I asked learned Counsel for both the parties to state the details of the differences between the two learned Judges Counsel for both the parties have formulated these differences as follows:—

1. P. B. Mukharji, J., has held that the petitioner's post of the Secretary does

not come under any of three categories of posts, namely, (a) permanent post, (b) temporary post and (c) tenure post: it was a post to be held "until further orders"; and the petitioner had no legal right to hold the post or claim the post for any period of time limited or unlimited (vide pages 6 and 7 of the Judgment). A. N. Sen, J., is of the view that the petitioner held a substantive appointment to a permanent post and, as such, he had a right to the post (vide pages 23 to 25 of the Judgment).

2. According to P. B. Mukharji, J., assuming that the petitioner was substantively holding a permanent post, on the facts of this case, the requirements of Article 311 (2) of the Constitution have been complied with: in any event, the petitioner has waived his rights under Article 311 (2) (vide pages 37 and 41 of the Judgment). A. N. Sen, J., has held that there has been no compliance with the provisions of Article 311 (2) nor has there been any waiver of his legal rights by the petitioner (see pages 48 and 49 of the Judgment).

3. P. B. Mukharji, J., has said that the petitioner has not been reduced in rank within the meaning of Article 311 of the Constitution (vide pages 23 and 24 of the Judgment). A. N. Sen, J., thinks that the Government has inflicted on the petitioner the punishment of reduction in rank (see page 44 of the Judgment).

4. Arising out of the point just preceding Mr. Justice P. B. Mukharji's view is that the letters of the 20th June, 1966, and the 7th September, 1966, do not contain any stigma within the meaning of Article 311 of the Constitution; but are policy letters indicating the policy of readjustment in administrative services as is evident from the expressions — "context of recent development in the country", "meeting the new challenges" and "whether they should make room for younger people" used in the letter of the 20th June (see page 44 of the Judgment). A. N. Sen, J., has said that that anyone reading these documents would naturally conclude that the petitioner was found to be inefficient, incompetent and unfit to hold the post of a Secretary at the Centre, and that necessarily imports an element of punishment which is the basis of the decision and the order and is its integral part (vide pages 43 and 44 of the Judgment).

10. The first question, therefore, that we have to decide is whether the petitioner had any right to the post of a Secretary to the Central Government. Mr. Nani Chakraverty, learned Counsel for the petitioner, has argued that by the document of the 29th July, 1964, the appellant was appointed Secretary to the Central Government for a period of six

months in the first instance (page 53 of the paper book): it is common case that he joined his post on the forenoon of the 30th July, 1964; on the 31st July, 1964, there was a notification in the Gazette of India stating that the appellant had been appointed "Until further orders" (page 54 of the paper book); and by the document of the 6th March, 1965, the appellant's appointment as Secretary is approved without any limitation as to the period for which he is to hold office (page 55 of the paper book).

11. On the basis of these documents Mr. Chakravarty's first contention is that, the petitioner held a substantive appointment to a permanent post. He relies on the Indian Administrative Service (Cadre) Rules, 1954, framed under Section 3 (1) of the All India Services Act, 1951. Rule 3 (1) says that there shall be constituted for each State or group of States an Indian Administrative Service Cadre. Then he says that by the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, it is provided that the State of Assam would have 55 senior posts under the State Government and 22 senior posts under the Central Government.

12. Mr. Chakravarty then asked me to consider some of the instructions of the Union Government. In the Government of India's instructions printed from page 16 of the All India Services Manual (corrected up to 1-5-67) it is stated *inter alia*, in paragraph 1.3 (at page 17) that the senior posts as notified in the schedule of each State cadre were divided into three main categories, namely, (a) senior posts under the State Government; (b) Central deputation quota and (c) deputation reserve. In paragraph 2.4 of these instructions (at page 19) it is, *inter alia*, stated that all cadre posts held by Cadre Officers should be accounted for against the Central deputation quota. In paragraph 5 of these instructions (at page 20) it is provided that the allocation of cadre officers to the various cadres shall be made by the Central Government in consultation with the State Government or the State Governments concerned; and the Central Government may, with the concurrence of the State Government concerned, transfer a cadre officer from one cadre to another cadre. In paragraph 6 of these instructions (at page 20) it is observed, *inter alia*, that a cadre officer may, with the concurrence of the State Government or the State Governments concerned and the Central Government, be deputed for service under the Central Government or another State Government.

13. Learned Counsel for the appellant then invited me to look at Rule 9 (4) of the Fundamental Rules, Vol. I

(corrected up to the 30th September, 1966). Under Rule 9 (4) (at page 7) "cadre" means the strength of a service or a part of a service sanctioned as a separate unit. Then, Rule 9 (19) (at page 25) explains what is meant by the word 'officiate'. It says that a Government servant officiates in a post when he performs the duties of a post on which another person holds a lien. It also says that a local Government may, if it thinks fit, appoint a Government servant to officiate in a vacant post on which no other Government servant holds a lien. Mr. Chakravarty contends that the appellant, in the instant case, was not officiating in the post of the Secretary to the Department of Social Security. No other person held a lien on this post. The post was created for first time in or about July, 1964, and the appellant was immediately appointed to it. Learned Counsel then relies on Rule 9 (22) (at page 26). This sub-rule defines a "permanent post". It means a post carrying a definite rate of pay sanctioned without limit of time. The appellant's Counsel thereafter drew my attention to schedule iii C to the Indian Administrative Service (Pay) Rules, 1954 at page 264 of the All India Services Manual (corrected up to 1-5-67). It shows that Secretaries to the Government of India, were to receive a pay of Rs. 3,500.00 per month. Mr. Chakravarty submits that there is a definite rate of pay for secretaries to the Government of India without limit of time and, as such the post of a secretary is a permanent post. He wanted me to compare the definition of "permanent post" in the Fundamental Rules quoted above with those of a "temporary post" and a "tenure post" in the said Rules. Rule 9 (30) (at page 31) says that a "temporary post" means a post carrying a definite rate of pay sanctioned for a limited time. Counsel for the appellant contends that the post of the Secretary to the Department of Social Security carried a definite rate of pay; but was not sanctioned for a limited time. Then, Rule 9 (30-A) (at page 31) defines a "tenure post". It means a permanent post which an individual Government servant may not hold for more than a limited period. Mr. Chakravarty submits that, the cumulative effect of the provisions cited above is that, the appellant was holding neither an 'officiating post' nor a 'temporary post' nor a 'tenure post' but a 'permanent post' under the Central Government. In other words, the post of a Secretary to the Central Government, is a permanent post and the petitioner, according to Mr. Chakravarty, is holding it substantively and cannot be removed from that post without recourse to the provisions of Article 311 (2) of the Constitution.

14. In my view, these arguments of learned Counsel for the appellant are untenable. He had himself relied on Rule 6 of the Indian Administrative Service (Cadre) Rules, 1954. This Rule has to be closely scrutinised and carefully considered to determine the nature of the appointment given to the petitioner under the Central Government. Rule 6 runs thus:

"6. Deputation of cadre officers:— (1) A cadre officer may, with the concurrence of the State Government or the State Governments concerned and the Central Government, be deputed for service under the Central Government or another State Government or under a Company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by the Government.

(2) A cadre officer may also be deputed for service under:—

(i) A Municipal Corporation or a Local Body, by the State Government on whose cadre he is borne, or by the Central Government with the concurrence of the State Government on whose cadre he is borne, as the case may be; and

(ii) An international organisation, an autonomous body not controlled by the Government or a private body, by the Central Government in consultation with the State Government on whose cadre he is borne:

Provided that no cadre officer shall be deputed to any organisation or body of the type referred to in Item (ii) of this sub-rule except with his consent."

15. There is a note under Rule 6 (at page 21) of the All India Services Manual (corrected up to 1-5-67). The note says:

"The terms of deputation of a cadre officer deputed to another State shall be finalised by the borrowing Government in consultation with the lending Government. If there is any point of difference between them, it may be referred to the Government of India".

16. Now, there is no dispute that R. 6 of the Indian Administrative (Cadre) Rules, 1954, applies to members of the Indian Civil Service, not permanently allotted to the judiciary under Rule 3 of the Indian Administrative Service (Recruitment) Rules, 1954: vide page 115 of the All India Services Manual (corrected up to 1-5-67). The said Rule 6, therefore, governs the position of the appellant, in the instant case, in the Government of India. It appears from the Assam Civil List (corrected up to 1-1-60) at page 17 as well as the Civil List of the Indian Administrative Service as on 1-1-67 (pages 23 to 29) that the appellant was on deputation to the Government of India from the State of Assam. He had held the post of a Joint Secretary to the

Central Government from January, 1955 to February 1961. Thereafter, he became the Managing Director of the Central Warehousing Corporation and then in July, 1964, he was appointed Secretary to the Department of Social Security. He was a cadre officer on deputation and, as such, the offices that he held, were of transitory nature and the Central Government had the right to replace his services to the State of Assam as and when it thought fit. His substantive service was not in the Central Government; but in the Government of Assam. For these reasons I overrule Mr. Chakraborty's contention that the appellant was holding a permanent post in the Central Government or had been appointed to any such post substantively.

17. Mr. Chakraborty's next argument is that, assuming the appellant had not been substantively appointed to a permanent post, the effect of the aforesaid documents of appointment have to be adjudged in the light of Article 314 of the Constitution; Rule 56 (f) of the Fundamental Rules, and clause 7 in Part-II of the Home Ministry's Resolution of the 17th October, 1957 at page 487 of the paper book.

18. Under Article 314 of the Constitution the appellant being a member of the Indian Civil Service, was entitled to receive from the Government of India the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as the appellant was entitled to immediately before the commencement of the Constitution. There is no dispute in the instant case that Article 314 applies to the appellant.

19. Rule 56 (f) of the Fundamental Rules provides:

"A member of the Indian Civil Service shall retire after thirty-five years' service counted from the date of his arrival in India; provided that if he has at the end of thirty-five years' service held his post for less than five years, he may, with the sanction of the President, be permitted to retain his post until he has held it for five years."

I do not see how this rule can be of any assistance to the appellant. Mr. Chakraborty wanted to say that by virtue of this rule the appellant was entitled to hold the post of a Secretary to the Central Government for five years from the date of his appointment as Secretary; but this rule, on the admitted facts of this case, cannot apply to the appellant. The appellant has not yet reached the end of thirty-five years' service counted from the date of his arrival in India in 1934. There is, therefore, no question of his

holding any post for any additional number of years at the end of thirty-five years' service.

20. Let us now come to Rule 7 in Part-II of the Home Ministry's resolution of October 17, 1957. Mr. Chakraborty was describing it as a 'Rule'; but I find it is not "Rule 7" but Clause 7 of a "scheme for staffing senior administrative posts of and above the rank of Deputy Secretary under the Government of India" which was annexed to a resolution of the Ministry of Home Affairs dated the 17th October, 1957. The heading of Part-II is "tenure deputation" and clause 7 runs thus—

"7. Periods of tenure— (i) Officers who are borrowed for appointment to posts of or equivalent to Deputy Secretary will ordinarily revert to the parent State cadre or service on the expiry of four years and officers who are borrowed for appointments to posts of or equivalent to Joint Secretary and Secretary will similarly revert on the expiry of a period of five years.

(ii) In exceptional circumstances, however, where public interests so demand the tenure of an individual officer in the same post or any other post or class of post may be extended or curtailed with the concurrence of the lending authority."

Mr. Chakravarti contends that, in terms of clause 7 quoted above, the appellant has a right to hold the post of a Secretary to the Central Government at least for a period of five years. He concedes, however, that the validity of this contention depends on whether the said Cl. 7 has statutory force.

21. In order to establish that clause 7 has statutory effect, Counsel for the petitioner first relied on the affidavit-in-opposition filed on behalf of the respondents Nos 1 and 2 on an application for production of documents and affirmed on the 8th April, 1967. In paragraph 5 of this affidavit it is stated, *inter alia*:

"The Ministry of Home Affairs notification dated 17th October, 1957, sets forth the correct and up-to-date position regarding the appointment of Secretaries to the Government of India. The report, no doubt, recommends that the appointment to the post of a Secretary to the Government of India should be for a term of five years. But this did not take away the right of the Government of India to transfer or revert an officer to his parent State, if, in the opinion of the Government of India, the officer is not fit or not up to the calibre expected of an officer of the status of the Secretary to the Government of India"
(Vide page 99 of the paper book).

22. The appellant's Counsel contends that in this paragraph there is a clear

admission that clause 7 represents the correct and up-to-date position regarding the appointment of Secretaries to the Government of India. That is to say, that if a person is borrowed from a State Government for appointment to the post of a Secretary to the Central Government, he would revert to his parent State cadre only on the expiry of five years from the date of his appointment as Secretary and if it is intended to revert him to the State cadre prior to the expiry of five years on the ground of unsuitability or inefficiency, Article 311 of the Constitution would at once be attracted.

23. Apart from the respondents' case in the said affidavit-in-opposition, Mr. Chakraborty says that the Home Ministry's resolution has statutory force by reason of certain provisions of the Constitution of India. Article 74 (1) of the Constitution provides that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. In the Manual of Office Procedure (Diglot Edition), 1963, in clause 2 at page (x) it is, *inter alia*, stated:

"(a) As an elder statesman chosen as the head of the State by the free will of the people, the President commands universal respect and high esteem and his wise Counsel is always available but every act or decision of Government expressed to be taken in his name is based on a decision taken by or under the authority of a Minister or the Council of Ministers." Mr. Chakraborty then relies on Art. 77. In sub-article (1) of Article 77 it is provided that all executive action of the Government of India shall be expressed to be taken in the name of the President. And sub-article (3) of Article 77 provides that the President shall make rules for the convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. Now, in the exercise of powers conferred by Article 77 (3), the President made the Government of India (Allocation of Business) Rules, 1961 (vide page 650 of "Encyclopaedia of Statutory Rules under Central Acts", Vol. III, 1963). From page 672 appears the different items allocated to the Ministry of Home Affairs. Item No. 47 at page 674 is "Scheme for Staffing senior posts at the Centre." And Item No. 48 mentions the "Appointments Committee of the Cabinet". In other words, the Appointments Committee of the Cabinet is under the Ministry of Home Affairs and this Ministry also makes schemes for the staffing of senior posts at the Centre. Mr. Chakraborty then invites my attention to page 484 of the Paper Book. At this page we find the resolution of the Ministry of Home Affairs dated the 17th October, 1957. The resolution says:

"The Government of India have had under consideration the question of making adequate arrangements for staffing senior administrative posts of and above the rank of Deputy Secretary in the Government of India. In consultation with the State Governments and other authorities concerned, the Government of India have now sanctioned,, the constitution of the Central Administrative Pool as provided for in the scheme annexed. The Ministry of Home Affairs have been authorised to take all steps necessary for the implementation of the scheme."

24. Mr. Chakraborty contends that by this resolution the Ministry of Home Affairs was framing a scheme for staffing of senior posts at the Centre under item no. 47 aforesaid and that is also the heading of the annexure to the resolution at page 485. The heading is "Scheme for Staffing Senior Administrative Posts of and above the rank of Deputy Secretary under the Government of India." At page 487 in Part-II the heading is: "Tenure Deputation". And clause 7 under this heading provides, inter alia, for the period of tenure of an officer who is borrowed for appointment to the post of a Secretary. The tenure is, as we have seen, for a period of five years. Mr. Chakraborty says that it is true that Article 77 (1) requires that all executive action shall be expressed to be taken in the name of the President; but Article 77 (3) is independent of Article 77 (1) and if any action is taken pursuant to any Rule made under Article 77 (3), it need not be expressed to be taken in the name of the President. And that is why, the Home Ministry's resolution of the 17th October, 1957, though not expressed to be taken in the name of the President, has a statutory force under Article 77 (3).

25. I agree that a scheme for staffing senior posts for the Centre, may be framed under the Government of India (Allocation of Business) Rules, 1961, which were made in the exercise of powers conferred by Article 77 (3); but, it seems to me, that if any executive action is taken pursuant to the scheme or for implementation of the scheme, such action must be expressed to be taken in the name of the President. My attention has not been drawn to any Presidential Order sanctioning the proposal to provide a tenure of five years for a Secretary to the Central Government. I shall, however, express my views on this point in details later in this judgment.

26. Counsel for the appellant then says that the Appointments Committee of the Cabinet has been referred to in Item No. 48 under the Ministry of Home Affairs at page 675 of the Encyclopaedia of Statutory Rules, Vol. III, 1963. This

Appointments Committee consists of (i) the Prime Minister, (ii) the Minister for Home Affairs and (iii) the Minister or Ministers concerned with the particular appointment in question (see page 496 of the paper book). One of the functions of the Appointments Committee is to consider all recommendations and take decisions in respect of appointments of a Secretary to the Government of India (vide pages 496 and 498 of the Paper Book). Learned Counsel contends that in the instant case the Appointments Committee took the decision to appoint the petitioner as Secretary to the Department of Special Security for six months in the first instance on the 29th July, 1964 (vide page 53 of the Paper Book). This appointment was followed by a gazette notification on the 31st July, 1964, stating that the President was pleased to appoint the appellant as Secretary, Department of Social Security, with effect from the forenoon of the 30th July, 1964, and until further orders (vide page 54 of the paper book). On the 6th March, 1965, the Appointments Committee again took a decision giving its approval to "the proposal to continue Shri D. C. Das, I. C. S. as Secretary, Department of Social Security" (vide page 55 of the Paper Book). According to Mr. Chakraborty the Appointments Committee's decision of the 6th March, 1965, signifies that the appellant was entitled to continue as Secretary for the full period of five years commencing from the date of his appointment as Secretary.

27. Here, again, I am unable to uphold the contentions of the petitioner's Counsel. The Appointments Committee may have been constituted under the Government of India (Allocation of Business) Rules, 1961. It may consider recommendations and take decisions in respect, inter alia, of appointments of Secretaries to Government Departments; but under Article 77 (1) the implementation of its decisions must, in my view, be expressed to be made in the name of the President. Mr. Chakraborty contends that the appointment of a Secretary is not the business of the President but of the Government of India. And no Presidential Order is required for appointing a Secretary. He points to several Articles in the Constitution, as for example, Article 76 (Appointment of the Attorney-General for India), Article 217 (Appointment of High Court Judges), Article 124 (Appointment of Judges of the Supreme Court), Art. 148 (Appointment of Comptroller and Auditor-General of India), Art. 155 (Appointment of a Governor of a State), Art. 316 (Appointment of the Public Service Commission), Art. 338 (Appointment of a Special Officer for the Scheduled Castes and Scheduled Tribes), Article 340 (Appointment of a Commis-

sion to investigate the conditions of backward classes) and Article 350 (Appointment of a Special Officer for linguistic minorities), and comments that all these appointments are made by the President himself; but there is no Article in the Constitution providing for appointment by the President of a Secretary to the Government of India. I agree that a Secretary is not directly appointed by the President or by a Warrant under his hand and seal. The appointment of a Secretary may be the business of the Government of India; but the manner in which this business is to be conducted, has been provided for in the Constitution. And Article 77 (1) clearly lays down that all executive action of the Government of India shall be expressed to be taken in the name of the President. Mr. Chakraborty laid special emphasis on the personnel of the Appointments Committee; but the position of the Council of Ministers as we have seen, has been dealt with in Article 74 (1). It says: "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions". The ministers, in terms of our Constitution, may "aid and advise" the President; but any executive action taken on the advice of ministers must be expressed to be taken in the name of the President. That is why, in the instant case, on the 29th July, 1964, the Appointments Committee announced the petitioner's appointment as Secretary for six months; but this announcement was followed by a Presidential Order on the 31st July, 1964, appointing the petitioner as Secretary "until further orders". There was no Presidential Order following the Appointments Committee's decision on the 6th March, 1965. The position, therefore, is that the only order of appointment which this Court is entitled to take notice of, is the order of the President made on the 31st July, 1964, which was published in the Gazette of India and that order merely appoints the petitioner "until further orders". In other words, the petitioner's appointment as Secretary could be brought to an end at any time by a further order of the President which, in fact, I am told, was passed by the President on the 20th May, 1967, after A. N. Ray, J., had discharged the Rule on the 19th May, 1967. By this order in the name of the President the petitioner's services were "replaced at the disposal of the Government of Assam with immediate effect". The order has not been implemented as the petitioner had preferred an appeal against the Judgment of A. N. Ray, J. Now, there is a difference of opinion between P. B. Mukharji, J. and A. N. Sen, J., on the construction of the Appointments Committee's decision of the 6th March, 1965.

By this decision the Appointments Committee "approved the proposal to continue" the appellant as Secretary, Department of Social Security. P. B. Mukharji, J., is of the view that the Appointments Committee was merely continuing the appointment made by the President by the gazette notification dated the 31st July, 1964, (vide pages 5 to 6 of the Judgment). A. N. Sen, J., is of the view that the decision of the Appointments Committee recorded in the document of the 6th March, 1965, indicates that the appellant had a substantive appointment to the post. To my mind, whatever may be the construction of the document, if the intention was to give to the petitioner the post of a Secretary to the Government of India either permanently or for a fixed period, there should have been a Presidential Order to that effect. P. B. Mukharji, J., if I may say so with great respect, has rightly pointed out that the only gazetted and announced appointment, in the instant case, was that in the name of the President on the 31st July, 1964, which expressly stated that the appointment was to be "until further orders" (vide page 5 of the Judgment). This Court, having regard to the provisions of the Constitution, already noted, cannot in my judgment take into consideration any other alleged order of appointment or any assurances that might have been given by high authorities in the Government of India. Mr. Chakraborty has also showed to me a standard form of appointment to tenure posts which shows that these appointments are also made "until further orders". Relying on this form Mr. Chakraborty submits that the Presidential order of the 31st July, 1964, was in conformity with the standard form of appointment for tenure posts as the post of Secretary to the Government of India was for a fixed period of tenure. Mr. Chakraborty's argument might have been sound if he could establish that the Home Ministry's resolution of the 17th October, 1957, had statutory force; but as I have said no statutory effect was given to this resolution. It seems to me that Articles 53 and 77 of the Constitution should be read together. Article 53 (1) provides that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. In other words, in the exercise of executive power the President may act either directly or through his officers; but whether he acts directly or through officers the act must be done in accordance with the Constitution. Then Article 77 (1) says that all executive action of the Government of India shall be expressed to be taken in the name of the President. It means that when the Presi-

dent instead of acting directly, acts through his officers, the action of the officers must be expressed to be taken in the name of the President. That is why, Article 77 (2) says that orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President. In this appeal my attention has not been drawn to any rule made by the President showing that a resolution of the Home Ministry signed or authenticated by its Joint Secretary and Establishment Officer (vide page 484 of the paper book), would be treated as an executive action of the Government of India "expressed to be taken in the name of the President". In fact, I do not think that such a rule could ever be made. Lastly, comes sub-article (3) of Article 77 which lays down that the President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation amongst Ministers of the said business. I agree with the appellant's counsel that the Government of India (Allocation of Business) Rules, 1961, was made, as the preamble to the order of the President dated the 14th January, 1961, shows, under Article 77 (3). By these Rules the affairs of the Appointments Committee of the Cabinet were allocated to the Ministry of Home Affairs. This Ministry had also the power, under these Rules, to frame schemes for staffing senior posts at the Centre; but the implementation of the decisions of the Appointments Committee or the scheme for staffing officers required, in my view, compliance with the provisions of sub-Articles (1) and (2) of Article 77. And until these requirements were fulfilled, the decisions or resolutions concerned, could not be said to have statutory force.

28. Counsel for the appellant advanced two other alternative arguments in support of his contention that the Home Ministry's resolution of the 17th October, 1957, gave to the appellant the right to hold the post of a Secretary to the Central Government for a period of five years. He first relied on Article 309 of the Constitution. The Article runs thus—
"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and

posts in connection with the affairs of the Union, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

29. Learned Counsel for the appellant submits that the resolution of the Ministry of Home Affairs dated the 17th October, 1957, is a rule within the meaning of the proviso to Article 309. I shall express my views on this submission a little later.

30. Mr. Chakraborty also contended that assuming that the aforesaid resolution is not a rule under the proviso to Article 309, it is a rule under Section 3 of the All India Services Act, 1951. Section 3 of this Act provides as follows:—

"1. The Central Government may, after consultation with the Governments of the States concerned, make rules for the regulation of recruitment, and the conditions of service of persons appointed, to an all India service.

2. All rules made under this section shall be laid for not less than fourteen days before Parliament as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as Parliament may make on a motion made during the session in which they were so laid."

31. The petitioner's counsel contends that the said resolution of the Home Ministry dated the 17th October, 1957, is a Rule under Section 3 of the All India Services Act, 1951 and under this Rule the petitioner has a right to the post of a secretary to the Government of India for five years. Learned counsel contends further that it is immaterial whether or not this Rule was placed before Parliament. Its validity is not affected by non-compliance with the provisions of sub-section (2) of Section 3 of the Act of 1951. In support of his second contention he relies on *Krishan Khanna v. State of Punjab*, AIR 1962 Punj 32; *Munnalal v. Harold*, AIR 1955 Cal 451; and *Brojen-dra v. Union of India*, AIR 1961 Cal 217.

32. It may be that the statutory effect of a rule made under Section 3 (1) of the All India Services Act, 1951, is not affected by non-compliance with sub-section (2) of Section 3, but the question is whether the Home Ministry's resolution is at all a rule under Sec. 3 of the Act. No doubt, the resolution says; "In consultation with the State Governments and other authorities concerned, the Government of India have now sanctioned,, the Constitution of the Central Administrative Pool as provided for

in the scheme annexed. "The consultation, it appears, was not with respect to the making of a rule, but only to the Constitution of a Central Administrative Pool. There was also no consultation, either with regard to (i) the regulation of recruitment or (ii) the conditions of service. Reading the resolution as a whole it seems to me that the Government of India is not making any rules but merely sanctioning the Constitution of a Central Administrative Pool. The sanction had to be followed by a rule properly framed.

33. Moreover, the document in question at page 484 of the Paper Book does not say that it is a rule made either under Article 77 or under the proviso to Article 309 of the Constitution or under Section 3 of the All India Services Act, 1951. In fact, the term 'resolution' has a special meaning in the official procedure of the Government of India. At page 28 of the Manual of Office Procedure (Diglot Edition), 1963, in clause 74, what is meant by a resolution has been explained. It says:

"This form of communication is used for making public announcements of decisions of Government on important matters of policy, appointment of committees or commissions of enquiry and of the results of the review of important reports of such bodies. Resolutions are also usually published in the Gazette of India."

34. Clause 74 in the Manual of Office Procedure sets this controversy in this appeal, in my view, at rest. The resolution of the Ministry of Home Affairs dated the 17th October, 1957, is neither a rule under the proviso to Article 309 nor a rule under Section 3 of the All India Services Act, 1951 nor is it an executive action under Article 77 of the Constitution. It is merely a public announcement of the decisions of the Government of India on certain important matters of policy and, by itself, has no statutory force. It is also to be observed that by this resolution the Government of India merely sanctioned the Constitution of the Central Administrative Pool and then it says that the Ministry of Home Affairs "have been authorised to take all steps necessary for the implementation of the scheme". There is no evidence on record as to what steps, if any, the Ministry of Home Affairs took to implement the scheme. From this point of view also the petitioner cannot claim that he had a right to the post of a Secretary for five years.

35. I have also to point out that both P. B. Mukharji, J. and A. N. Sen, J., came to the conclusion that the Home Ministry's resolution of the 17th October, 1957, had no statutory force or validity (vide the judgment of P. B. Mukharji, J., pages 15 to 21 and the judgment of A. N.

Sen, J., pages 37 to 46). P. B. Mukharji, J., has, *inter alia*, said:

"That resolution is more in the nature of an administrative arrangement It created no legal right in the public servant and it created no law for the Government."

A. N. Sen, J., has said, *inter alia*:

"I am of opinion, in agreement with the view of the learned Trial Judge, that this resolution is really in the nature of an executive direction for administrative convenience and does not amount to any Service Rule. The resolution by itself does not make the post of the Secretary a tenure post and does not confer on the appellant any special or particular right to the post for any term. The right to the post, the appellant enjoys or has, is by virtue of his substantive appointment to a permanent post."

36. Mr. Chakraborty, learned Counsel for the appellant, submitted to me that although on the question of the statutory effect of the Home Ministry's resolution, there was no difference of opinion between the two learned Judges, I was not bound by their Lordships' reasonings. He relied on the judgment of the Full Bench of the Patna High Court in *Kanai Lal Paul v. Province of Bihar*, AIR 1949 Pat 369 (FB) at p. 388, paragraph 50. Learned Counsel for the respondents has urged that under Clause 36 of the Letters Patent, I have no jurisdiction to differ from the referring Bench on a point on which both the Hon'ble Judges of that Bench had agreed. I do not intend to enter into this controversy in this appeal. I respectfully agree with P. B. Mukharji, J. and A. N. Sen, J., that the Home Ministry's resolution of the 17th October, 1957, has no statutory effect.

37. The next argument of Mr. Chakraborty, is on the assumption that the Home Ministry's resolution of the 17th October, 1957, has no statutory force. Learned Counsel relies on the Judgment of the Supreme Court in *Union of India v. Anglo-Afghan Agencies and Union of India v. Om Prakash*, reported in AIR 1968 SC 718. The Textile Commissioner published on October 10, 1962, a Scheme called "The Export Promotion Scheme" providing incentives to Exporters of Woollen goods. By the Scheme as extended to export to Afghanistan, the exporters were invited to get themselves registered with the Textile Commissioner for exporting woollen goods, and it was represented that the exporters will be entitled to import raw materials of the total amount equal to 100% of the F. O. B. value of exports. One of the questions that arose before the Supreme Court was whether the said representation of the Textile Commissioner was sta-

tutory in character. The Supreme Court has observed, *inter alia*, that granting that it was executive in character, the Courts have the power in appropriate cases to compel performance of the obligations, imposed by the scheme upon the departmental authorities: it could not be said that executive necessity released the Government from honouring its solemn promises relying on which the citizens had acted to their detriment, under our constitutional set up, no person may be deprived of his right or liberty except in due course of and by authority of law: and if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law — common or statute — the Courts will be competent to, and indeed would be bound to protect the rights of the aggrieved citizen.

38. Mr. Chakraborty says that the principles laid down by the Supreme Court in the above case should be applied to the facts in the present appeal. By the said resolution, submits Mr. Chakraborty, the Home Ministry made a solemn promise that officers who were borrowed for appointments to the post of a Secretary to the Central Government would revert on the expiry of a period of five years. And if the Government of India seeks to go back on this promise, the Court should compel its performance. I do not think that the principles decided in the case reported in AIR 1968 SC 718 can be applied to the facts before me. There is no averment here as to any representation made by the Government of India. There is no averment that the petitioner acted upon any representation to his detriment. Further, under Article 309 of the Constitution any service rule having the force of law, must be either under an Act of the appropriate legislature or made by the President or the Governor, as the case may be, until provision in that behalf is enacted by the appropriate legislature. The requirements of Article 309 cannot, in my view, be replaced by any representation made by the Government of India.

39. Learned Counsel for the appellant advanced another alternative argument. In the case of Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910, the Supreme Court had to deal with a case of promotion to 'Selection Grade Posts' under the Indian Police Service (Pay) Rules, 1954, and under the Indian Police Service (Regulation of Seniority) Rules, 1954.

In paragraph 7 at p. 1914 the Supreme Court observes—

"It is true that there is no specific provision in the rules laying down the principle of promotion of junior or senior grade officers to selection Grade Posts.

But that does not mean that till statutory rules are framed in this behalf, the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the Officers concerned to Selection Grade Posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

40. The appellant's counsel argues that the respondents, in the instant case, cannot point to any statutory Rules relating to appointments of Secretaries to the Central Government. And in the absence of such Rules the administrative instructions contained in the Home Ministry's Resolution of the 17th October, 1957 (assuming it has no statutory force) would fill up the gap and would govern the position of Secretaries to the Central Government.

41. This argument of Counsel for the appellant cannot be accepted. The appellant was appointed as a Secretary to the Central Government in July, 1964; but the Indian Administrative Service (Cadre) Rules, 1954, came into force long before this date, and under Rule 4 (1) thereof, the Indian Administrative Service (Fixation of Cadre Strength) Regulations, were made in 1955. The appellant's appointment as Secretary to the Central Government, is covered by the said Rules and the said regulations and, as such, there was no gap to be filled up by administrative instructions.

42. I have in the foregoing paragraphs of this judgment dealt with all the arguments advanced before me of learned Counsel for the appellant in support of his contention that his client had a substantive right to the post of a Secretary to the Central Government and have stated my reactions thereto. Learned Counsel, incidentally drew my attention to the Maxwell Committee's report which did not carry the matter any further as there was no dispute that it had no statutory force. For the reasons I have enumerated, I am of opinion that the appellant was on deputation from the State of Assam and was not holding any permanent or substantive post in the Government of India. He had no right to the post of a Secretary: he had been appointed "until further orders": and at any time he could be reverted to his parent State viz., the State of Assam.

43. I am not dealing, in this judgment, with the argument on behalf of the respondents, that, in any event, the appellant had a full period of five years in the Central Government, if his periods of service as Joint Secretary and

Secretary were taken together. Having regard to the conclusions I have already reached it is unnecessary to consider this point.

44. I would now consider the next question that arises in this appeal, namely, whether the action that was proposed against the appellant amounted to a reduction in rank within the meaning of Article 311 (2) of the Constitution.

45. Counsel for the petitioner contends that in Shri Dharma Vira's letter of June 20, 1966, three alternatives were suggested to his client, namely (1) he should be asked to revert to his parent State or (2) he should proceed on leave preparatory to retirement or (3) he should accept some post lower than that of Secretary to Government. My attention was invited to the All India Services (Discipline and Appeal) Rules, 1955. According to R. 3(iii) & (v), reduction in rank including reduction to a lower post or time-scale or to a lower stage in a time-scale as well as compulsory retirement are penalties which may for good and sufficient reasons, be imposed on a member of the service. Learned Counsel then says that the final order in this regard was in the letter of Shri D. S. Joshi dated, September 7, 1966. In this letter the petitioner was informed that his services might be replaced at the disposal of his parent State, namely, Assam. According to the petitioner the order of the 20th June, 1966, became merged in the order of the 7th September, 1966 (vide paragraph 29 of the petition at page 13 of the Paper Book). Mr. Chakraborty contends that this order of the 7th September, 1966, amounted to "reduction in rank", so far as the petitioner was concerned, and it required compliance with the procedure laid down in Article 311 (2) of the Constitution. It is a reduction in rank, submits Mr. Chakraborty, for four reasons, namely, (1) the salary of a Secretary to the Central Government is Rs. 3,500 00 per month; the salary of the Chief Secretary to the Government of Assam is Rs 3,000.00 per month which is the maximum the appellant could expect; (2) in the order of precedence a Secretary to the Union Government occupies the 28th place whereas the Chief Secretary to a State Government occupies the 30th place; (3) as it is clear from Shri Dharma Vira's letter of the 20th June, 1966, and Shri D. S. Joshi's letter of the 7th September, 1966, that the appellant has been found to be unfit to serve as Secretary to the Central Government his future chances of promotion have been seriously affected and (4) if the petitioner is given a post lower than the post of the Chief Secretary to the State of Assam, his Seniority would be lost.

46. On behalf of the respondent it is contended (a) that Article 311 has no ap-

plication to this case; (b) assuming that it applies there has been no reduction in rank; and (c) assuming that it applies and further assuming that there has been reduction in rank, the requirements of the said Article have, in fact, been complied with or at any rate waived by the appellant.

47. I shall first take up the third argument of the respondent's Counsel. It is stated that the appellant, after receipt of Shri Dharma Vira's letter, made an appeal to the Prime Minister on the 23rd July, 1966. The Prime Minister granted him an interview on the 31st August, 1966. And thereafter the final decision of Government was communicated to him by Shri Joshi's letter of the 7th September, 1966. According to Counsel for the respondents, the procedure that the petitioner chose to adopt, gave him "a reasonable opportunity of being heard" within the meaning of Article 311 (2) after he was informed of the charges against him. He was also, according to the respondent's Counsel, on the facts of this case, given a reasonable opportunity of making representation on the penalty proposed. In any event, submits the respondents' Counsel, the petitioner has waived his rights under Article 311 (2). I do not accept these arguments advanced on behalf of the respondents. An appeal to the Prime Minister and the communication of the Prime Minister's decision is not the procedure contemplated by sub-article (2) of Article 311 which is meant to give protection to Government servants against arbitrary or unreasonable dismissal or removal or reduction in rank. Moreover, the fact that the petitioner appealed to the Prime Minister cannot, in my view, be treated as waiver of his constitutional rights. I do not think there is any evidence in this case of an intentional relinquishment of a known right. I agree, in this respect, with the views of A. N. Sen, J.

48. Let us now deal with the first and second contentions aforesaid of Counsel for the respondents. I have already held that the petitioner was on deputation to the Central Government from his parent State, namely, the State of Assam Under sub-rule (4) of Rule 3 of the All India Services (Discipline and Appeal) Rules, 1955, the reversion to a lower post of a member of the service who is officiating in a higher post, after a trial in the higher post or for administrative reasons (such as the return of the permanent incumbent from leave or deputation, availability of a more suitable officer, and the like) does not amount to reduction in rank.

49. On the point at issue the observations of the Supreme Court in Civil Appeal No. 1272 of 1966 (SC), Jasbir Singh

Bedi v. Union of India, made on the 12th January, 1968, appear to be relevant. The Supreme Court has observed:

"It is well established that a Government servant who is officiating in a post has no right to hold it for all time and the Government servant who is given an officiating post holds it on the implied term that he may have to be reverted if his work was found unsuitable. In a case of this description a reversion on the ground of unsuitability is an action in accordance with the terms on which the officiating post is held and not a reduction in rank by way of punishment to which Article 311 of the Constitution could be attracted. It was argued on behalf of the appellant that the order of reversion was made by way of reversion (sic) dated February 2, 1965, which would throw a stigma on the appellant. It is, of course, well settled that temporary Government servants are entitled to the protection of Article 311 (2) of the Constitution in the same manner as permanent Government servants if the Government takes action against them meeting out one of the three punishments, namely, dismissal/removal or reduction in rank. See *Parshottam Lal Dhingra v. Union of India*, AIR 1958 SC 36. But this protection is only available where the dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. As pointed out in *Parshottam Lal Dhingra's case*, AIR 1958 SC 36 the two tests applicable in a matter of this description are, (1) whether the Government servant has a right to the post or the rank or (2) whether he has been visited with evil consequences, and if either of the tests is satisfied, it must be held that the Government servant had been punished. Further even though misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influence the Government to take action under express or implied terms of the contract of employment or under the statutory rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The test for attracting Article 311 (2) of the Constitution in such a case is whether the misconduct or negligence is a mere motive for the order of reversion or termination of service or whether it is the very foundation of the order of termination of service of the temporary employee (see the decision of this Court in *Champak Lal Chumanlal Shah v. Union of India*, (1964) 5 SCR 190=(AIR 1964 SC 1561). In the present case however, the order of reversion does not contain any express words of stigma attributed to the conduct of the appellant and therefore it cannot be

held that the order of reversion was made by way of punishment and the provisions of Article 311 of the Constitution are consequently attracted. This view is supported by the decision of this Court in *State of Bombay v. F. A. Abraham*, 1962 (2) Supp SCR 92=(AIR 1962 SC 794) in which the respondent who held the substantive post of Inspector of Police and had been officiating as the Deputy Superintendent of Police was reverted to his original rank of Inspector without being given any opportunity of being heard in respect of the reversion. His request to furnish him with reasons of his reversion was refused. Later a departmental enquiry was held behind his back in respect of certain allegations of misconduct made against him in a confidential communication from the District Superintendent of Police to the Deputy Inspector-General of Police but these allegations were not proved at the enquiry. The Inspector-General of Police thereafter wrote to the Government that the respondent's previous record was not satisfactory and that he had been promoted to officiate as Deputy Superintendent of Police in the expectation that he would turn a new leaf but the complaint made in the confidential memorandum was a clear proof that the respondent was habitually dishonest and did not deserve promotion. As the order of reversion was maintained by the Government, the respondent filed a suit challenging the order. The suit was decreed by the Court of first instance and the decree was affirmed by the High Court on appeal. On further appeal to this Court it was held that reversion of the respondent on the ground of unsuitability was an action in accordance with the terms on which the officiating post was being held and was not a reduction in rank by way of punishment to which Section 240 of the Government of India Act, 1935, would be attracted. The appeal of the Government was allowed and the suit of the respondent dismissed. A similar view was expressed by this Court in *L. N. Saxena v. State of Madhya Pradesh*, (1967) 2 SCR 496=(AIR 1967 SC 1264) where it was pointed out that since there were no express words in the order of compulsory retirement itself which would throw a stigma on the Government servant, there was no order of 'removal' of the Government servant requiring action under Article 311 of the Constitution. On behalf of the appellant reference was made to the decision in *Jagdish Mitter v. Union of India*, AIR 1964 SC 449 but the material facts of that case are different. The order impugned in that case was in the following terms. Shri Jagdish Mitter, a temporary second division clerk of this office having been found undesirable to be retained in Government service is here-

by served with a month's notice of discharge with effect from November 1, 1949. It was held that when the order referred to the fact that Jagdish Mitter was found undesirable to be retained in Government service, it expressly cast a stigma on him, and in that sense must be held to be an order of dismissal and not a mere order of discharge. In the present case, however, the order of reversion D/- February 2, 1965 does not show on the face of it that any stigma was cast on the appellant and, though the inspection note of the Additional Member (Vigilance) Railway Board may constitute a motive for the reversion of the appellant, it is not possible to hold that the reversion of the appellant was by way of punishment and the provisions of Article 311 of the Constitution are consequently applicable to the case."

50. I have extensively quoted the above observations for two reasons. Firstly, several previous decisions of the Supreme Court have been considered in this case. Secondly, this is one of the latest judgments of the Supreme Court on the point under consideration. For our purposes in this appeal, it appears that, in considering whether there has been a "reduction in rank", the following principles should be borne in mind:—

1. A Government servant officiating in a post has no right to hold it for all time: he holds it on the implied term that he would have to be reverted if his work was found unsuitable and in a case of this description a reversion on the ground of unsuitability is an action in accordance with the terms on which the officiating post is held and not a reduction in rank by way of punishment to which Article 311 of the Constitution could be attracted.

2. Temporary Government servants are also entitled to protection of Article 311 (2) if the Government takes action against them meting out one of the three punishments, namely dismissal or removal or reduction in rank.

3. Where an order of reversion does not contain any express words of stigma attributed to the conduct of the Government servant concerned, it is not an order of reversion made by way of punishment and Article 311 of the Constitution is not attracted to it.

51. In Jasbir Singh Bedi's case, Civil App No 1272 of 1966, D/- 12-1-1968 (SC) the order of reversion dated February 2, 1965, simply stated: "Sri Jasbir Singh Bedi, Officiating Vigilance Inspector in scale of Rs 335-425(AS) is reverted to his parent department with immediate effect". This is why, the Supreme Court was of the view that this order of reversion did not show on the face of it that any stigma was cast on the appellant.

52. In Jasbir Singh Bedi's case, Civil App No 1272 of 1966, D/- 12-1-1968 (SC) the judgment was delivered by Ramaswami, J. and Shah, J. and Bhargava, J. concurred with it.

53. There is a more recent judgment of the Supreme Court delivered on the 22nd February, 1968 in Civil Appeal No. 433 of 1965. (AIR 1968 SC 1089). State of Punjab v. Sukh Raj Bahadur. This judgment was delivered by G K Mitter, J. with whom Shah, J. and Ramaswami J. had concurred. In this appeal the order complained of was as follows—

"The Governor of Punjab is pleased to revert Shri Sukh Raj Bahadur, Extra Assistant Commissioner, from P. C S (Executive Branch) to the post of Superintendent under the Chief Secretary, Delhi Administration, with immediate effect."

54. Before the order of reversion was issued there was departmental enquiry, but the enquiry did not proceed beyond the stage of submission of charge sheet followed by the respondent's explanation thereto. The enquiry was not proceeded with, there were no sittings of any Enquiry Officer; no evidence was recorded, and no conclusion was arrived at on the enquiry. The Supreme Court took the view that Article 311 (2) was not attracted to the facts of the case. In this judgment several decisions of the Supreme Court have been reviewed and Mitter, J., on a conspectus of these cases has laid down the following propositions.

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311 that is an Inquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said Article.

55. Let us now try to apply the principles that emanate from the judgments in Jasbir Singh Bedi's case, Civil App. No. 1272 of 1966, D/- 12-1-1968 (SC) and in the case of the State of Punjab, Civil App. No. 433 of 1965, D/- 22-2-1968=(AIR 1968 SC 1089) to the orders or directions of the Government of India contained in the letters dated the 20th June, 1966 and the 7th September, 1966, in the instant case.

56. In the letter of Shri D. S. Joshi dated the 7th September, 1966, I do not find any express words of stigma. It refers to the representation which the appellant submitted to the Prime Minister on the 23rd July, 1966, and also the appellants' representation to Shri Dharma Vira dated the 23rd June, 1966. It refers also to the interview the Prime Minister granted to the appellant on the 30th August, 1966. Then it proceeds to state "I am now directed to inform you that after considering your oral and written representation in the matter Government has decided that your services may be replaced at the disposal of your parent State namely, Assam. In case, however, you like to proceed on leave preparatory to retirement, will you please let me know?"

57. To my mind, this is an order of reversion in "unexceptionable form" to which the provisions of Article 311 are not attracted at all. The President had appointed the petitioner a Secretary to the Central Government "until further orders". And an order of reversion in these circumstances "without anything more" would not attract the operation of Article 311.

58. We have now to consider whether the letter of Shri Dharma Vira dated the 20th June, 1966, attracts Article 311. This letter contains, inter alia, the following statements:—

1. The Government has been examining the question of building up a higher level of administrative efficiency.

2. The Government has examined the names of those who are at present occupying top level administrative posts with a view to ascertain whether they are fully capable of meeting the new challenges or whether they should make room for younger people.

3. It has been decided that you should be asked either to revert to your parent State or to proceed on leave preparatory to retirement or to accept some post lower than the post of Secretary to Government.

59. It is apparent from this letter that the Government made an enquiry as to the suitability of officers occupying top level administrative posts and decided that the appellant was unsuitable and proposed to him that he should either go

back to his parent State or proceed on leave preparatory to retirement or accept a post lower than the post of a Secretary to the Government. The question is whether such a decision preceded by an enquiry as to suitability attracts the provisions of Article 311. In the case of the State of Punjab, Civil App. No. 433 of 1965, D/- 22-2-1968=(AIR 1968 SC 1089) G. K. Mitter, J., has referred to three decisions of the Supreme Court which appear to be relevant to the point under consideration. In *State of Orissa v. Ram Narayan Das*, (1961) 1 SCR 606=(AIR 1961 SC 177) the respondent was a Sub-Inspector of Police on probation in the Orissa Police Force. He was served with a notice to show cause why he should not be discharged from service "for gross neglect of duties and unsatisfactory work". He submitted an explanation which the Deputy Inspector-General of Police considered to be unsatisfactory. He passed an order discharging the respondent from service "for unsatisfactory work and conduct". The respondent's contention was that the order was invalid because he had not been given a reasonable opportunity to show cause against the proposed action in terms of Article 311 (2) and that he was not given an opportunity to be heard nor was there any evidence taken on the charges. The Supreme Court was of the view that the enquiry against the respondent was only for ascertaining whether he was fit to be confirmed and although

"an order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualifications, may appropriately be regarded as one by way of punishment, an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature."

The Supreme Court said further

"..... the fact of the holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment in the light of the tests laid down in *Parshotam Lal Dhingra's case*."

60. It is clear, therefore, that if an enquiry is held with a view to ascertain whether a probationer is fit to be confirmed and if as a result of enquiry the probationer's services are terminated, the provisions of Article 311 would not be attracted.

61. The next case is the case of *R. C. Lacy v. State of Bihar*, Civil Appeal No. 590/1962, decided on the 23rd October, 1963 (SC). In this case the appellant was working as an Assistant Professor of Botany in Class II of the Bihar Educational Service. He was temporarily promoted to Class I of the service against a

permanent post created in April, 1949, and appointed Professor of Botany in the college in which he was working. He was informed that Government would consider him for permanent appointment depending on the efficiency with which he ran the department, the extent to which he enjoyed the goodwill of his colleagues and the devotion to research work that he revealed during the course of the year. In April, 1950, the appellant moved the Government for confirmation in Class I. The Government, however, decided to continue his temporary service in Class I for another year with the concurrence of the Public Service Commission. Following an incident on the 9th February, 1951, the Commissioner of Patna Division was appointed to make an enquiry into the same. The report of the enquiry went against the appellant. On August 21, 1951, the Government passed an order reverting the appellant to his substantive post in Class II and transferred him from the Patna College to the Ranchi College. The appellant filed a suit which ultimately came up before the Supreme Court. In dismissing the appeal the Supreme Court said:

"The enquiry which was held by the Commissioner was in the nature of a preliminary enquiry to enable the Government to decide whether disciplinary action should be taken against the appellant. It is clear, however, that the Government did not decide to hold any enquiry for the purpose of taking disciplinary action against the appellant, for no enquiry officer was appointed, no charges were framed and no regular departmental enquiry as envisaged by the rules and Article 311 (2) of the Constitution was ever held." According to the Supreme Court the Government's action was in pursuance of its right to revert an officer holding a higher post temporarily if he was not found fit for the purpose.

62. In the instant appeal also the appellant was holding the post a Secretary "until further orders": the Government had the right to revert him to his parent State: and the enquiry referred to in Shri Dharma Vira's letter of June 20, 1966, as to the suitability of persons occupying top level administrative posts, appears to me to be in the nature of a preliminary enquiry and not a departmental enquiry contemplated by Article 311 (2).

63. The next case is the case of A. G. Benjamin v. Union of India, Civil Appeal No. 1341 of 1966 decided on the 13th December, 1966 (SC). The appellant was temporarily employed as Stores Officer in the Central Tractor Organisation. He was not a confirmed Government servant: his services could be terminated under Rule 5 of the Central Civil Service

(Temporary Service) Rules, 1949, with one month's notice on either side: and his services were, in fact, terminated on April 23, 1954. There had been complaints against him and the Chairman of the Central Tractor Organisation sent a notice to him asking him to show cause why disciplinary action should not be taken against him and an enquiry officer was appointed. But before the enquiry could be completed, the Chairman recommended that the services of the appellant should be terminated under R. 5 observing in his note to the Secretary that "The departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities we will be able to deal with the accused in the way he deserves." Acting upon this suggestion the appellant was served with the order complained of. The order was to the effect that the appellant was being informed that his services were no longer required in the Organisation and the same were terminated with effect from the date on which the notice was served on him. He was further informed that in lieu of the notice one month's pay and allowances would be given to him. The Supreme Court came to the conclusion that Article 311 of the Constitution did not apply to the facts of this case.

64. It was argued before me that the principles the Supreme Court had discussed in the cases cited above, do not apply to the appellant as he was neither a temporary servant nor a probationer nor was he holding an officiating post. To my mind, on principle, there should be no difference between a post held temporarily or on probation or on an officiating basis and a post held on deputation "until further orders". In the appellant's case, it appears from Shri Dharma Vira's letter, there was an enquiry as to his suitability or to ascertain whether he should be retained in the post of a Secretary to the Government of India; but there was no full-scale departmental enquiry; no enquiry officer was appointed; no charge-sheet was submitted and no explanation was called for and considered. The appellant was on deputation from the State of Assam and was holding the post of the Secretary to the Department of Social Security "until further orders". He had been reverted to his parent State without any departmental enquiry. In these circumstances, I do not find any scope for invoking the provisions of Article 311.

65. No other point, so far as my recollection goes, was argued before me except that Mr. Chakraborty mentioned at one stage that the appellant had no substantive post or lien on a particular post in the State of Assam and, as such, it could not be said that he had been re-

verted to his substantive rank; but, as P. B. Mukharji, J., has pointed out at page 13 of his Lordship's judgment that, in paragraph 15 of the affidavit-in-opposition, it was specifically, expressly and directly alleged that the appellant held a lien on his substantive post in the Assam Cadre and the appellant in his affidavit-in-reply did not deny that crucial fact as he could not

66. In the premises, my answer to the question referred by the Division Bench, is that the order or direction of the Government of India contained in the letters dated the 20th June, 1966, and the 7th September, 1966 is not unconstitutional or illegal. The matter would now go back to the Division Bench for final disposal.

KSB

Order accordingly.

AIR 1969 CALCUTTA 198 (V 56 C 35)

B C MITRA, J

Mahabir Prasad Sharma, Petitioner v. Prafulla Chandra Ghose and others, Respondents

Civil Order No. 46 (W) of 1968, D/- 6-2-1968

(A) Constitution of India, Arts. 164 (1) and 163 (1) and 226 — Power of Governor to appoint Chief Minister — Governor acts in his sole discretion — Exercise of discretion not questionable in writ.

The Governor in making the appointment of the Chief Minister under Article 164 (1) of the Constitution acts in his sole discretion. The exercise of this discretion by the Governor cannot be called in question in writ proceedings in High Court. (Para 50)

There is no warrant in the Constitution itself to read into Art. 164 (1) a condition or restriction that the Governor must act on the advice of a Council of Ministers as provided in Art. 163 (1) in the matter of appointment of the Chief Minister. It is for him to make such enquiries as he thinks proper, to ascertain who among the members of the Legislature ought to be appointed the Chief Minister and would be in a position to enjoy the confidence of the majority in the Legislative Assembly of the State. (Paras 40 and 43)

(B) Constitution of India, Arts. 164 (1) and (2) and 163 (2) and 226 — Governor's power to withdraw pleasure during which Ministers hold office — Power is unfettered by any restriction — Exercise of power not questionable in writ.

The right of the Governor under Article 164 (1) to withdraw the pleasure, during which the Ministers hold office, is absolute and unrestricted. Furthermore

having regard to the provisions in Cl. (2) of Art. 163 the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in writ proceeding. (Para 42)

The provision in clause (2) of Art. 164, that the Ministers shall be collectively responsible to the Legislative Assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office. Collective responsibility contemplated by Clause (2) of Art. 164 means that the Council of Ministers is answerable to the Legislative Assembly of the State. It follows that a majority of the members of the Legislative Assembly can at any time express its want of confidence in the Council of Ministers. But that is as far as the Legislative Assembly can go. The Constitution has not conferred any power on the Legislative Assembly of the State to dismiss or remove from office the Council of Ministers. If a Council of Ministers refuses to vacate the office of Ministers, even after a motion of no-confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers hold office. The power to appoint the Chief Minister, and the Council of Ministers on the advice of the Chief Minister, and the power to remove the Ministers from office, by withdrawing the pleasure contemplated by Article 164 (1) have been conferred upon the Governor of the State exclusively. (Para 41)

(C) Constitution of India, Art. 226 — Rule nisi — Issuance of — Test.

It is not just enough for the issue of a rule nisi in a case that a section of the public, and even a large section of the public is interested in the questions raised by the petitioner. It is again not just enough that controversial questions relating to the Constitution have been raised by the petitioner. It is easy for a petitioner in writ proceedings to raise questions touching one or other provisions in the Constitution. It is equally easy for a petitioner in writ proceedings to contend that controversial questions relating to interpretation of the Constitution have been raised. But in considering the question if a rule nisi ought to be issued, the test is as it always must be, if arguable issues have been raised by the petitioner. (Para 49)

(D) Constitution of India, Art. 226 — Quo warranto — It is not enough for a person holding a public office, whose appointment is challenged in a quo warranto proceeding, merely to produce the warrant or the notification of the appointment — He must go further and satisfy the Court that the appointment is legal and valid. (Para 16)

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 dar and D. P Kundu, for (Jyoti Basu). A P.
 Chatterjee with N N Gupta, (for Niran-
 ran Sen Gupta), K B Roy, (for Somnath
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 Mukherjee and Shushil Dhara), R N
 Banerjee, (for Hemanta Bose), R. C.
 Deb, Advocate-General, Gouri Mitra and
 S C Bose, (for State) and S D Banerjee
 with Salil Kumar Dutta, (for Union of
 India), for Respondents

ORDER:— This is an application for a rule nisi in a petition for a writ of quo warranto. The petition was moved on January 12, 1968 when an order was made directing the petitioner to serve notice of this application on the respondents. Pursuant to this order notice has been served upon the respondents who have appeared in this application, but some of them opposed the issue of a rule

nisi, while others supported the petitioner.

2. Briefly stated the events that have led to this application are as follows:—

After the last General Election several political parties, whose members are members of the Legislative Assembly and the Legislative Council of West Bengal, formed a coalition under the name and style of 'United Front'. The members of the United Front in the Legislative Assembly, enjoyed the support of the majority, and the Governor appointed the respondent No 12, who was the leader of the United Front, as the Chief Minister of the State, and on the recommendation of the Chief Minister, the Governor appointed the respondent No 1 and the respondents Nos 13 to 29 as the other Ministers. On or about November 1, 1967, the respondent No 1 resigned the office of a Minister and this resignation was accepted by the Governor with effect from November 6, 1967. On the same day, namely, November 6, 1967, the respondent No 1, with some other members of the Legislative Assembly, claimed that the United Front had ceased to command the support of the majority of the members of the Assembly, and therefore, its leaders in the Legislative Assembly had no right to function as the Council of Ministers of the State. On the same day the Governor requested the Council of Ministers, headed by the respondent No 12, to call the Legislative Assembly into session as early as possible, and not later than the third week of November, 1967, on the ground that doubts had been raised about the support of the majority of the members of the Legislative Assembly to the United Front Ministry. On or about November 14, 1967, the Governor requested the respondent No 12 to call the Legislative Assembly into session on November 23, 1967. The Council of Ministers, however, declined to accede to the Governor's request, as it had decided to call the Legislative Assembly into session on December 18, 1967. On or about November 16, 1967, the Governor again requested the Council of Ministers to agree to the Legislative Assembly being summoned not later than November 30, 1967. The Council of Ministers, however, informed the Governor that the session of the Legislative Assembly could not be called before December 18, 1967. On November 21, 1967, the Governor made an order that the respondent No 12 should cease to hold the office of the Chief Minister of the State with immediate effect and also that the Council of Ministers headed by him stood dissolved and the other Ministers should cease to hold office. This order was followed by another order of the same day whereby the Governor appointed the respondent

No. 1 to be the Chief Minister of the State and on the advice of the Chief Minister, he appointed the respondents Nos. 2 and 3 to be members of the Council of Ministers. These two orders made by the Governor on November 21, 1967 are the subject matter of this application for a rule nisi.

3. The first point urged by Mr. Nirmal Chandra Sen for the petitioner was that the Governor in appointing a Chief Minister and other Ministers, in exercise of his powers under Article 164 (1) of the Constitution could not act in his own discretion, and that he was bound to act in accordance with the advice of the Chief Minister. It was further argued that the Governor acting in his discretion, had no power to dismiss a Chief Minister or a Council of Ministers. Mr. Sen referred to the Notification No. 3777-A.R. dated November 21, 1967, published in the Calcutta Gazette of the same date, whereby in exercise of the powers conferred by Clause (1) of Article 164 of the Constitution, the Governor ordered that the Chief Minister Shri Ajoy Kumar Mukherjee should cease to hold office with immediate effect. This order was followed by another direction and declaration that the Council of Ministers headed by Shri Ajoy Kumar Mukherjee stood dissolved and the other Ministers ceased to hold office. By another Notification of the same date being No. 3778 A. R. the Governor appointed Dr. P. C. Ghose to be the Chief Minister of the State of West Bengal and on the advice of the Chief Minister Shri Harendra Nath Majumdar and Dr. Amir Ali Molla were appointed to be the members of the Council of Ministers.

4. With regard to the said Notification No. 3777-A.R. whereby the Governor ordered that Shri Ajoy Kumar Mukherjee, and the Council of Ministers headed by him, ceased to hold office, it was argued that the Governor had no power under Article 164 (1) to dismiss either the Chief Minister or the Council of Ministers, although under Article 164 (1) the Ministers held office during the pleasure of the Governor. It was contended that the provision in the Constitution that the Ministers held office during the pleasure of the Governor, did not confer upon the Governor the power to dismiss the Chief Minister and the Council of Ministers at his discretion. The Governor, it was argued, was bound to act on the advice of the Council of Ministers, or at any rate, of the Chief Minister in the matter of dismissing the Chief Minister or the Council of Ministers. Reliance was placed by Mr. Sen on Clause (1) of Article 74 of the Constitution which provides that there should be a Council of Ministers with the Prime Minister at the head to aid and advise the President in

the exercise of his functions. This provision corresponds to Clause (1) of Article 163 which makes similar provision with regard to a State. Reference was also made to clauses (1) and (3) of Article 75, Clause (a) of Article 78 and Clause (a) of Art. 167.

5. It was next argued that the pleasure of the Governor contemplated by Clause (1) of Article 164, did not confer upon the Governor an arbitrary or discretionary power to dismiss the Ministers. In support of this contention reliance was placed on Clause (1) of Article 310 which provided that members of the Defence Service or Civil Service of the Union or an All India Service or persons who held any Civil post under the Union or a State held office during the pleasure of the President or the Governor. It was argued that the pleasure of the President and of the Governor was conditioned by, and made subordinate to the restrictions imposed by Clauses (1) and (2) of Article 311 of the Constitution.

6. It was next contended that where it was intended that the Governor should act solely in his own discretion, specific provision was made to that effect, as in Clause (2) of Article 239 of the Constitution in which provision had been made for the President to appoint a Governor of a State as an Administrator of an adjoining union territory and in such cases the Governor exercised his functions as such Administrator, independently of his Council of Ministers. Therefore, it was argued, a mere provision that the Ministers held office during the pleasure of the Governor, did not imply that the Governor could act in his own discretion without the advice of the Chief Minister or the Council of Ministers, and in so far as he acted in his own discretion in dismissing the Council of Ministers headed by Shri Ajoy Kumar Mukherjee the order of the Governor must be held to be illegal and void.

7. It was next urged that under Cl. (1) of Article 154 of the Constitution the executive power of the State was vested in the Governor and was to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Clause (1) of Article 154 read with Clause (1) of Art. 163, Mr. Sen argued, made it amply clear that the Governor could act only on the advice of the Council of Ministers.

8. The next point of Mr. Sen was that under Clause (2) of Article 164 the Council of Ministers was collectively responsible to the Legislative Assembly of the State, and that being so, the Legislative Assembly of the State was the only authority which could remove the Council of Ministers. It was argued that the power conferred upon the Governor by

Clause (1) of Article 164 could be exercised only subject to the provisions in Clause (2) of that Article. Collective responsibility of the Council of Ministers to the Legislative Assembly of the State, it was argued, clearly implied that the Legislative Assembly was the only authority in the State which could remove a Council of Ministers from office.

9. Mr. Sen next referred to Art. 160 of the Constitution which provided that the President might make such provision as he thought fit for the discharge of the functions of the Governor of a State in any contingency not provided for in Chapter VI of the Constitution. Reference was also made to Clause (1) of Article 356 of the Constitution under which if on receipt of a report from a State or otherwise the President was satisfied that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution, the President might by a proclamation assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State, and declare that the powers of Legislature of the State should be exercised by or under the authority of the Parliament, and also make such incidental and consequential provisions as appeared to the President to be necessary for giving effect to the objects of the proclamation. It was argued that as a situation had been created which had the effect of a constitutional deadlock, there were ample provisions in Arts. 160 and 356 for removal of the deadlock. But, it was argued, the Governor had no power or authority vested in him, to act in his own discretion in removing a Chief Minister or a Council of Ministers, merely because he thought that the Council of Ministers had ceased to enjoy the confidence of the majority in the Legislative Assembly.

10. It was next argued by Mr. Sen that some of the powers conferred upon the Governor of a State, under the Constitution, were powers which a Governor could exercise in his sole and absolute discretion. There were other powers, it was argued, as those created by Article 154, which could be delegated by him. But the third group of powers of the Governor created by the Constitution were powers which could be exercised by him only upon the advice of the Council of Ministers, and could not be exercised by him arbitrarily in exercise of his own discretion. The power of the Governor created by Clause (1) of Article 164, it was argued, fell under the third group of powers mentioned above, and as such the power to appoint the

Chief Minister and other Ministers and to remove them from Office could be exercised by the Governor only on the advice of the Council of Ministers.

11. I shall now refer to the cases relied upon by Mr. Sen in support of his contentions mentioned above. The first case relied upon was a decision of the Judicial Committee in *Adegbenro v. Akintola*, reported in (1963) 3 All ER 544. In that case upon receipt of a letter signed by a majority of the members of the Legislature of Western Nigeria stating that they no longer supported the Premier, the Governor removed him from office. An action was commenced by the former Premier against the Governor and the new Premier for a declaration that the Governor's act was unconstitutional and the two questions formulated by the trial Court and referred to the Federal Supreme Court of Nigeria for decision were:

"(1) Can the Governor validly exercise power to remove the Premier from office under Section 33 (10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

(2) Can the Governor validly exercise power to remove the Premier from office under Section 33 (10) on the basis of any materials or information extraneous to the proceedings of the House of Assembly?"

It was held that the Governor could validly exercise the power to remove the Premier from office under Section 33 (10) of the Constitution of Western Nigeria without a prior decision or resolution on the floor of the Assembly to show that he no longer commanded the support of the majority of the House and that the Governor could act on the basis of material or information extraneous to the proceedings of the House of Assembly. Reliance was placed on the observations of Viscount Radcliffe at p. 548 of the report where in considering the meaning of the words "the Premier no longer commands the support of a majority of the members" it was held that the phrase recognised a basic assumption of the British Constitution that so long as the House of Representatives was in being, a majority of its members who were prepared to act together with some cohesion was entitled to determine the effective leadership of the Government of the day. It was argued by Mr. Sen that the floor of the Legislative Assembly of West Bengal was the only place where the question, namely, if Shri Ajoy Kumar Mukherjee enjoyed the support of the majority, could be determined and that it was not open to the Governor to

assume, from extraneous materials that the Council of Ministers headed by Shri Ajoy Kumar Mukherjee had lost the support of the majority in the Legislative Assembly of the State. This contention on behalf of the petitioner, however, cannot be accepted. In the first place, the decision of the Judicial Committee turned on the terms of Section 33 (10) of the Nigerian Constitution which are as follows—

“(10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure. Provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and (b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier”

Secondly, in spite of the specific provision in the Nigerian Constitution, that the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commanded the support of the Majority of the members of the House of Assembly, the Judicial Committee held that the Governor could validly exercise the power to remove the Premier without there having been a prior decision or resolution on the floor of the House of Assembly and also that he could act on the basis of material or information extraneous to the proceedings of the House of Assembly. The provisions in our Constitution do not require, as in case of the Nigerian Constitution, that the Governor shall not remove the Chief Minister unless it appeared to him that the Chief Minister no longer commanded the support of the majority in the Legislature. Article 164 (1) of the Constitution is as follows:

“164(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor.”

There is nothing in this Article to indicate that before the Governor removes a Chief Minister and other Ministers he must be satisfied that the Chief Minister and the other Ministers have lost the support of the majority of the members of the Legislative Assembly. A comparison of the provisions in Article 164 (1) of our Constitution with those in Section 33 (10) of the Constitution of Western Nigeria can leave no room for doubt that the powers of the Governor under Article 164 (1) are wider in scope and concept.

12. The next case relied upon by Mr. Sen is a decision of the Supreme Court in *Rai Sahib Ramjawaya Kapur v State of Punjab* AIR 1955 SC 549. In that case a petition under Article 32 of the Constitution was filed by persons who carried on the business of preparing, printing, publishing and selling of text books, prescribed for schools in Punjab. The Education Department of the Punjab Government pursuing a policy of nationalisation of text books, issued notifications regarding printing, publication and sale of these books. The petitioners' case was that these notifications not only imposed unwarrantable restrictions upon the rights of the petitioners who carried on their business, but practically ousted them from the business altogether and this was infringement of the petitioners' fundamental rights under Article 19 (1) (g) of the Constitution. This infringement, it was further alleged, was made by executive order without proper legislation. In these facts the petitioners prayed for writs in the nature of mandamus directing the Punjab Government to withdraw the impugned notifications. The passage in the judgment of B. K. Mukherjee, C. J., on which reliance was placed is at p 555 of the report and is as follows:

“Our Constitution though federal in structure is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State”

To my mind these observations are of no assistance to the petitioner in support of his contentions in this case. The Supreme Court did not in that case consider the question of the power of a State Governor to dismiss the Chief Minister and a Council of Ministers. The passage relied upon affirms the principle established in the Constitution that the executive Government in discharge of its duties and responsibility must retain the confidence of the legislative branch of the State.

13. Reliance was next placed on a decision of the Nagpur High Court reported in AIR 1952 Nag 330. That was an application under Article 226 for a writ of quo warranto challenging the appointment of the Advocate-General of the State of Madhya Pradesh by an order of the Governor. The person who was appointed the Advocate-General relinquished his office as a High Court Judge on account of his age and the petitioner's contention was that as he retired as a Judge of the High Court on attainment of the age of sixty he could not be appointed the Advocate-General or

act as such. The contention on behalf of the respondents in that case that because the Governor was not amenable to the process of the Court, the Court could not examine the order appointing the Advocate-General and pronounce upon its legality, was rejected and it was held that the immunity afforded by Art 361 was personal to the Governor and that the Article did not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of the Courts. It was further held that unless there was a provision excluding a particular matter from the purview of the Court, it was for the Courts to examine how far any act done in pursuance of the Constitution was in conformity with it. This decision again is of no assistance to the petitioner as in that case the appointment was made in violation of Clause (1) of Article 165 of the Constitution which provides that the Governor shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State and quite clearly the person appointed, having exceeded the age limit, the appointment was made in contravention of the provisions of the Constitution. It was held that a person was not qualified for appointment as the Advocate-General after the age of sixty years. It was however also held at p 336 of the report that if the provision in first Clause of Art 217 regarded as a guarantee of tenure of office of a Judge until the age of sixty was not available to the Advocate-General, because he held office during the pleasure of the Governor, there was no compelling reason why the same provision construed as a disability should be made applicable to him. The Nagpur High Court, therefore, clearly recognised that in terms of Article 165 (3) the Advocate-General of a State held office during the pleasure of the Governor. In any case the observations upon which reliance was placed are of no assistance to the petitioner in this case as there are no conditions attached to the exercise of the powers of the Governor under Article 164 (1) of the Constitution, as in the case of the appointment of the Advocate-General of a State under Article 165 (1) of the Constitution.

14. The next case relied upon was a decision of the Supreme Court — *The University of Mysore v. C D Govind Rao*, AIR 1965 SC 491. Reliance was placed on this decision for the proposition that quo warranto proceedings involve an enquiry into the title of a person to hold a public office, and it confers jurisdiction on the Court to control executive actions in the matter of making appointment to public offices. It was argued that it was not enough for a person whose appointment was challenged

in an application for a writ of quo warranto merely to produce a warrant of appointment or a notification in the official gazette regarding the appointment, but that the question of legality or validity of the appointment made by the executive authority could be enquired into by the Court. This contention of the petitioner, in my view, is well founded.

15. The next case relied upon was a decision of the Travancore-Cochin High Court reported in AIR 1953 Trav-Co 140. That was a writ petition challenging the proceedings of the Travancore Government sanctioning retirement of an Additional District and Sessions Judge. Reliance was placed on this decision for the proposition that there was no function which the Rajpramukh was to exercise in his discretion. But it was held that by no stretch of imagination the appointment or removal of an Additional District Judge which the Rajpramukh was to do in consultation with the High Court could be taken to be a business in which the Constitution required the Rajpramukh to act in his own discretion. It was, however, held that compulsory retirement did not amount to removal as contemplated by Article 311 of the Constitution and the petition was dismissed. The Court clearly affirmed that as in the matter of appointment or removal of a District Judge the Governor was required to act in consultation with the High Court, in making the appointment or removing a District Judge the Constitution did not require the Governor to act in his discretion. This decision, to my mind is again of no assistance to the petitioner as there is no fetter or restriction imposed upon the Governor in the matter of exercise of his power under Article 164 (1) corresponding to the limitations and restrictions created by Article 311.

16. I shall now proceed to deal with the contentions raised by Mr. S K. Acharyya, who appearing for the respondent No 13 supported the petitioner. The first contention of Mr. Acharyya was that in an application for a writ of quo warranto it was not enough for the person, who was holding a public office merely to produce the notification or the warrant of appointment, but that the legality and validity of the appointment must be enquired into by the Court, and if the appointment was found to be illegal or invalid the order making the appointment should be quashed. As I have said earlier this contention is well founded. It is not enough for a person holding a public office, whose appointment is challenged in a quo warranto proceeding, merely to produce the warrant or the notification. He must go further and satisfy the Court that the appointment is legal and valid. It was

argued that an order of the Governor under Article 164 (1) appointing or dismissing a Chief Minister and a Council of Ministers must be a valid order according to the Constitution, namely, that the Governor in making the order must act on the advice of the Chief Minister, and if the Governor failed to act according to the advice of the Chief Minister in making an order purporting to be an order under Article 164 (1), such an order, it was argued, could not be treated to be a valid order made according to the Constitution, and for that reason it could be questioned in appropriate proceedings and quashed, if found to be invalid and illegal. In support of this contention, reliance was placed on a decision of this Court reported in (1967) 71 Cal WN 926. In other words, it was argued, that the order of the Governor dismissing Shri Ajoy Kumar Mukherjee as Chief Minister, and also the Council of Ministers headed by him, and the appointment of Dr. P. C. Ghose as the Chief Minister, not being an order in accordance with Article 164 (1) of the Constitution, the provision in Article 361 could not be invoked, and the validity of the order could be enquired into by this Court and set aside and quashed, if found to be invalid. This argument was based on Mr. Acharyya's contention that although Article 164 (1) provided that the Ministers held office during the pleasure of the Governor, the Governor could not act in his discretion and was bound in all circumstances to act on the advice of the Chief Minister, and in the absence of such advice, the only course left open to the Governor was to make a report to the President under Article 356 (1) of the Constitution. I shall revert to this contention of Mr. Acharyya later.

17. It was next contended by Mr. Acharyya that where the Constitution required the Governor to act in his own discretion, without the advice of the Council of Ministers, specific provision to that effect and for that purpose, was made in the Constitution. He argued that such provisions were to be found in Clause (2) of Article 239 of the Constitution, in Clause (2) of Item 9 and cl. (3) of Item 18 of the Sixth Schedule to the Constitution. It was submitted that beyond the powers specified in these provisions the Governor had no right to act in his own discretion in any other matter.

18. Reliance was next placed by Mr. Acharyya on a decision of the Supreme Court, *P. Joseph John v. State of Travancore Cochin*, AIR 1955 SC 160. Reliance was placed on the following observations of the Supreme Court at p. 165 of the report:

"It is an elementary principle of democratic Government prevailing in England

and adopted in our Constitution that the Rajpramukh or the Governor as head of the State is in such matters merely a constitutional head and is bound to accept the advice of his Ministers." This proposition, to my mind, is of no assistance to Mr. Acharyya's client in this case as the observations of the Supreme Court were made in connection with the questions raised in that case, namely, that it was only the Maharaja who could appoint a Commission of enquiry under the Travancore Public Servants (Inquiries) Act. 'Such matters' mentioned in the observations of the Supreme Court referred to the appointment of the commission of enquiry under the said Act.

19. The last case relied upon by Mr. Acharyya was also a decision of the Supreme Court, *Himanshu Kumar Bose v. Jyotiprakash Mitter*, AIR 1964 SC 1636. Reliance was placed on this decision in support of the contention that a rule nisi ought to be issued by this Court as arguable issues involving important questions had been raised by the petitioner. Mr. Acharyya submitted that the Governor had been charged with mala fide and such a charge required an investigation by this Court and such investigation could best be made after a rule nisi was issued, and parties had the opportunity of controverting or supporting the charges on affidavit. Mr. Acharyya concluded his arguments by submitting that as a prima facie case had been made out against dismissal of the Council of Ministers headed by Shri Ajoy Kumar Mukherjee and the appointment of Dr. P. C. Ghose as the Chief Minister and also of the other Ministers, a rule nisi ought to be issued in this case.

20. Mr. A. P. Chatterjee, learned Advocate for the respondent No. 22, adopted the arguments of Mr. S. K. Acharyya and supported the petitioner. He further argued that Article 164 was based on Section 51 (1) of the Government of India Act, 1935, but the framers of the Constitution, it was submitted, made a conscious departure from the provisions in Section 51 (1) of the Government of India Act. It was argued that under Section 51 (1) of the Government of India Act, the Governor was given the power to choose, summon and dismiss the Ministers, and therefore in so choosing or dismissing Ministers he was given a discretion which Article 164 (1) had denied to the Governor of the State. It was argued that this omission to give the Governor of the State the power to choose, summon and dismiss the Chief Minister, and the other Ministers, was a deliberate and conscious departure from the provisions in the Government of India Act 1935 because the choice of the Chief Minister under Article 164 (1) must

be confined to the leader of the party which commanded the support of the majority in the Legislative Assembly, and therefore the appointment of such a Chief Minister was, Mr. A. P. Chatterjee submitted, automatic. Mr. A. P. Chatterjee further sought to strengthen this contention by a reference to the preamble to the Constitution in which it is stated that the people of India solemnly resolved to constitute India into a sovereign democratic republic, and that being so, it was submitted, the Governor must appoint as Chief Minister a member of the Legislature who commanded the support of the majority in the Legislative assembly.

21. The next contention of Mr. A. P. Chatterjee was that the principle of harmonious construction should be followed in interpreting clauses (1) and (2) of Art. 164. It was argued that while clause (1) provided that the Ministers should hold office during the pleasure of the Governor, Clause (2) enjoined that the Council of Ministers should be collectively responsible to the Legislative Assembly of the State. The discretion of the Governor in appointing the Chief Minister, it was submitted, must be held to be fettered and restricted by the condition in Clause (2) namely, that the Council of Ministers must enjoy the confidence of the majority of the Legislative Assembly, and the Governor could not appoint a member of the Legislature as the Chief Minister, unless it was proved on the floor of the Legislative Assembly that the person appointed as the Chief Minister had the support of the majority in the Legislative Assembly. Mr. A. P. Chatterjee, however conceded that if the Chief Minister or the Council of Ministers lost the support of the majority in the Legislative Assembly, the Governor had the power to dismiss the Chief Minister and the Council of Ministers.

22. Mr. A. P. Chatterjee next relied upon several passages in the 9th Edition of Dicey on the Law of the Constitution. Reference was made firstly to a passage at pp. 426-427 where it is stated that to say that a Cabinet when outvoted on a vital question are bound to retire from office, is equivalent to the assertion, that the Crown's prerogative to dismiss its servants at the will of the King must be exercised in accordance with the wish of the Houses of Parliament. Reliance was next placed on a passage at p. 429 that the ultimate object and end of the conventions is to secure that the Parliament or the Cabinet shall in the long run give effect to the will of that power which in Modern England is the true political sovereign of the State — the majority of the electors or the nation. Reliance was next placed on another passage at p. 468 which is as follows:—

"The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagchot describes the power which can still legally be exercised by the Crown without consulting the Parliament; and should remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative Chamber which in its turn obeys the behests of the electors."

23. Relying upon these statements in Dicey relating to the prerogatives of the Crown and the conventions of the Constitution, Mr. A. P. Chatterjee contended that in a democratic republic like India the Governor in exercise of his powers under Article 164 (1) could not arbitrarily dismiss a Chief Minister or appoint someone as Chief Minister according to his own sweet will and without the sanction or approval of the Legislative Assembly. In support of this contention, reliance was placed on Clause (1) of Art. 189 of the Constitution.

24. Lastly, Mr. A. P. Chatterjee contended that there was no power in the Governor to act in his own discretion except those mentioned in Schedule VI to the Constitution to which reference has already been made earlier in this judgment and in support of this contention reliance was placed on a decision of this Court reported in AIR 1952 Cal 799.

25. Mr. A. P. Chatterjee also referred to the observations regarding King's pleasure in May's *The Law, Privileges, Proceedings and Usages of Parliament*, 5th Edition at p. 798.

26. Before concluding his contentions, Mr. A. P. Chatterjee submitted that his client had not filed any affidavit-in-opposition, but the allegation in the following paragraphs were denied and disputed by him:—

Regarding paragraph 1 he submitted that respondents Nos. 18 and 20 had not become members of the West Bengal Legislative Assembly as a result of the General Election, but that they were members of the Legislative Council.

Regarding paragraph 7, he submitted that the Governor was secretly informed of the claim of the respondent No. 1 and he disputed the allegations in the rest of the paragraph.

Regarding paragraph 13, the allegations in this paragraph were denied.

Regarding paragraph 25, the allegation that the United Front headed by the respondent No. 12 called upon the people of West Bengal to defy and to break the orders under Section 144 of the Code of

Criminal Procedure, with a view to oust the said Council of Ministers from office by force, is denied.

27. Mr Somnath Chatterjee for the respondent No 17 adopted the arguments of Mr S K. Acharyya and Mr A. P. Chatterjee and also supported the petitioner for issue of a rule nisi. He further argued that all that the petitioner was required to do at this stage was to establish a prima facie case for issue of a rule nisi and in support of this contention he relied upon a decision of the English Court of Appeal — *Auten v. Rayner*, (1958) 3 All ER 566. The question, however, in that case was whether a plaintiff in an action could successfully challenge the decision of the Secretary of State for Home Affairs to withhold from production certain documents specified in an affidavit. It was in that connection that it was held that by a prima facie case was meant no more than a case which called for an answer. The question whether a prima facie case had been made out in an application for a rule nisi in a writ proceeding, was not considered by the Court and that decision, therefore, in my view, is of no assistance to the petitioner. In support of the contention that a rule nisi ought to be issued Mr Somnath Chatterjee also relied upon the decision of the Supreme Court, AIR 1964 SC 1636 (supra).

28. On the same point reliance was placed on a decision of the Special Bench of this Court, *Jyoti Prokash Mitter v. The Hon'ble Mr Justice H. K. Bose*, AIR 1963 Cal 483. Reliance was placed on the observations of S. P. Mitra, J., at p. 496 of the report.

29. Mr. Somnath Chatterjee also referred to another decision of this Court reported in 71 Cal WN 205=(1968 Lab IC 731) for the proposition that where the petition disclosed a prima facie case or raised some arguable issue or made allegation of mala fide or the like, a rule nisi should be issued calling for a return upon the allegations made by the petitioner. Reliance was also placed on another decision of the Supreme Court, *British India Corporation Limited v Industrial Tribunal, Punjab*, AIR 1957 SC 354, for the proposition that where allegations of mala fide were made the Court should hear the parties after issuing notice to the respondents. This decision, to my mind, is of no assistance to the petitioner as in this case notice has been issued to all the respondents who have appeared in this matter and have advanced their respective contentions. Reliance was also placed on another decision of the Supreme Court — *Madhya Pradesh Industries Ltd. v Income-tax Officer, Special Investigation Circle*, (1965) 57 ITR 637 (SC) in which the Supreme Court held that it was

constrained to set aside the order of the High Court rejecting a petition for a rule nisi as no indication as to the grounds on which the High Court rejected the petition was given and a prima facie case was made out which might require investigation and trial. Before concluding his arguments Mr. Somnath Chatterjee submitted and I think rightly that the decision of the Judicial Committee in (1963) 3 All ER 544 (supra) had no application in the facts of this case as the decision in that case turned on the terms of the written Constitution of Western Nigeria which were entirely different from the terms of Art. 164 (1) of our Constitution.

30. Mr. S. N. Ghorai for the respondent No 14 adopted the arguments advanced by Mr S K. Acharyya, Mr A. P. Chatterjee and Mr Somnath Chatterjee. He, however, further argued that under Article 164 (1) the Chief Minister was to be appointed by the Governor and the other Ministers were to be appointed by the Governor on the advice of the Chief Minister. In this case the Governor appointed Dr P. C. Ghose as the Chief Minister and Shri Harendranath Majumdar and Dr Amir Ali Molla as the other Ministers by the same notification, namely, No 3778-A.R dated November 21, 1967. This Mr Ghorai argued, was clearly invalid as the Governor could appoint the other Ministers on the advice of the Chief Minister, only after he had been duly appointed. In this case, it was argued, the appointment of the Chief Minister and the two other Ministers were simultaneous and therefore the appointment was bad.

31. The learned Advocate-General for the respondents Nos 1 to 11, and 33 contended that the petitioner and the supporting respondents failed to make out a prima facie case for a rule nisi. He argued that in order to make out a prima facie case the petitioner must raise arguable issues and if he failed to do so, the Court should not issue a rule nisi. The question in this case, it was submitted, turned on the interpretation of Article 164 (1) of the Constitution and it was to be seen if the Governor had the power to appoint the respondent No 1 as the Chief Minister in exercise of his powers under Article 164 (1) of the Constitution. The pleasure of the Governor contemplated by Article 164 (1) was it was argued unrestricted and unlimited in its scope and extent. This pleasure, it was argued was not conditioned by any restrictions imposed by the Constitution. The provisions in Article 164 (2) that the Council of Ministers shall be collectively responsible to the Legislative Assembly did not in any way, it was argued, control or restrict the Governor's right to

act according to his pleasure under Article 164 (1)

32. It was next argued by the learned Advocate-General that Article 163 (2) provided that in the event of a question being raised if a matter was one with regard to which the Governor was under the Constitution required to act in his discretion, the Governor's decision in his discretion should be final and the validity of anything done by the Governor should not be called in question that he ought or ought not to have acted in his discretion. In order to appreciate this contention I set out below Article 163 (2) and Article 164 (1) and 164 (2)

"163(2). If any question arises whether any matter is or is not a matter as respect which the Governor is by or under the Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

164(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor;

Provided that in the State of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

164(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State." In this case a question clearly has been raised if the Governor could, in exercise of his power under the Constitution, act in his discretion in appointing the respondent No. 1 as the Chief Minister. It was, therefore, submitted that as the Governor had already decided that he had a discretion in the matter of appointing the respondent No. 1 as the Chief Minister, and in exercise of that discretion he made the appointment, the appointment could not be called in question on the ground that the Governor ought not to have acted in his discretion.

33. It was next contended by the learned Advocate-General that although the application was for a rule nisi for a writ of quo warranto the petitioner and the supporting respondents had also challenged the order of the Governor as set out in the Notification No 3777-A.R. dated November 21, 1967, whereby he directed that Shri Ajoy Kumar Mukherjee should cease to hold the office of Chief Minister, and the other Ministers also should cease to hold their offices. Ground (c) of the Grounds set out under

paragraph 28 is directed against the said order. It was argued by the learned Advocate-General that the said order of the Governor directing that Shri Ajoy Kumar Mukherjee and the other Ministers should cease to hold the office of Chief Minister and other Ministers could not be the subject of a writ of quo warranto. It was submitted that if the petitioner was aggrieved by the order removing Shri Ajoy Kumar Mukherjee and the Council of Ministers headed by him, from their offices, the proper remedy of the petitioner was by way of an action.

34. The next contention of the learned Advocate-General was based on Article 361 (1) of the Constitution. It was argued that the Governor of West Bengal not being answerable to any Court, for the exercise and performance of his powers and duties, or for any act done or purporting to be done by him in the exercise and performance of those powers and duties, the petitioner in this application could not challenge the validity of the appointment of Dr. P. C. Ghose and the other Ministers, as the appointments were made by the Governor in the exercise of duties conferred upon him by the Constitution. In support of this contention reliance was placed on a decision of this Court reported in 56 Cal WN 651=(AIR 1952 Cal 799). That was an application for a writ of mandamus directing the Governor of West Bengal to recall the nomination of nine members to the State Legislative Council of West Bengal and also for a further direction upon him to forbear from giving effect to the notification containing the nomination. It was held that the Governor was not answerable to the Court by reason of Article 361 and that the validity of the nominations could not be enquired into by the Court and the Governor not being liable to justify the nomination, was not bound to disclose any facts relating to such nominations.

35. The next contention of the learned Advocate-General was that there was no substance in the charge of mala fide and that in the petition no charge of mala fide had been laid by the petitioner.

36. The learned Advocate-General next referred to a passage at p. 77 of the Constitutional and Administrative Law, 4th Edition by Hood Phillips which is as follows.—

"Our suggested definition of constitutional conventions is, rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the Courts or by the Houses of Parliament."

It was argued that the conventions of the British Constitution required that the British Cabinet should remain in office so

long as it enjoyed the confidence of the majority in the House of Commons, but this convention could not be enforced in a Court of law. It was argued that even though this convention was applied in this country a writ of quo warranto could not be issued by this Court for enforcing such a convention.

37. Mr. S. Banerjee appearing for the respondent No 34 adopted the arguments of the learned Advocate General, and submitted that on the averments in the petition a Rule nisi could not be issued. He argued that some of the most material allegations in the petition, namely, those made in paragraphs 1 to 12, 14 to 21, 24, 25, 29, 38 and 41 were based on newspaper reports, and as no affidavit had been filed from the Editor of the newspaper in support of those allegations, no reliance could be placed on those allegations. This argument, though attractive, cannot be accepted. Notice of this application had been served upon the respondents and an affidavit disputing or denying those allegations could have been filed by Mr. Banerjee's client, but that had not been done. It is, therefore, not open to Mr. Banerjee to contend that no reliance should be placed on those allegations. Mr. Banerjee, however, advanced another argument based on the averments in the petition, which in my view has a good deal of force behind it. This argument was based on paragraph 13 of the petition which is as follows:

"(13) That meanwhile the State of West Bengal was passing through an acute condition of famine and lawlessness on a wide scale."

It was argued that the petitioner's case being that acute famine condition was prevailing in the State, which was also passing through lawlessness on a wide scale, the Governor was entirely right and justified, having regard to the information and materials in his possession, in demanding that Shri Ajoy Kumar Mukherjee should agree to the Legislative Assembly being summoned as early as possible to establish that he had the support of a majority of members of the Legislative Assembly. The Governor could not, it was argued, let the administration remain in the hands of a Council of Ministers, which according to the Governor's information lost the support of the majority, at a time when an acute condition of famine and lawlessness on a wide scale prevailed. It was argued that if Shri Ajoy Kumar Mukherjee, and the Council of Ministers headed by him, enjoyed the support of the majority in the Legislative Assembly, he should have readily agreed to an early meeting of the Legislative Assembly as suggested by the Governor. That being the case of the petitioner, it is not open to him, it was argued, to contend that the Gover-

nor should have allowed a Council of Ministers to remain in charge of the administration, though it had no right to do so. In my view, there is good deal of force in this contention of Mr. Banerjee.

38. These are all the contentions raised on behalf of the petitioner and the supporting respondent and also on behalf of the respondent opposing the issue of a rule nisi.

39. All that I am concerned with in this application is if a rule nisi ought to be issued on the materials set out in the petition and the contentions advanced by the learned Advocates for the petitioner and the supporting respondent. Notice of this application was directed by this Court to be served upon the respondents who appeared and advanced their contentions. The question, in my view, must depend on interpretation of Article 163 (2) and Article 164 (1) of the Constitution. The Governor has acted in the exercise of the powers under Article 164 (1) of the Constitution, which provides that the Chief Minister shall be appointed by the Governor. The question, therefore is: Is the Governor's power to appoint a Chief Minister conditioned by any restriction created by the Constitution? To my mind, on the answer of this question must depend the answer to the questions raised by the petitioner and the supporting respondents in this application.

40. As I read Article 164 (1) of the Constitution, I do not see anything in the language of Article 164 (1), which imposes any restriction or condition upon the power of the Governor to appoint a Chief Minister. As to the appointment of other Ministers, the Governor is required to act on the advice of the Chief Minister. In my view, to read into Article 164 (1), a condition that the Governor must act on the advice of a Council of Ministers as provided in Article 163 (1), in the matter of the appointment of the Chief Minister, would be reading into the Article a condition and a restriction which is not there, and for which there is no warrant in the Constitution itself. The question before me at the moment is if a rule nisi ought to be issued in this application for a writ of quo warranto to examine the validity of the appointment of the respondents Nos. 1, 2 and 3. The order of the Governor removing the Ministry, of which Shri Ajoy Kumar Mukherjee was the Chief Minister is, in my view, beyond the scope of this application. A good deal of time has been occupied in advancing arguments on the question of the pleasure of the Governor in the matter of the holding of the office by the Ministers. The question whether the Governor could

such officer to comply with such requisition.

(3) The authorised officer, may, where it is not practicable to seize any such book of account, other document, money, bullion, jewellery or other valuable article or thing, serve an order on the owner of the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

(4) The authorised officer, may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

(5) Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and S. 132-A referred to as the assets) is seized under sub-section (1), the Income-tax Officer, after affording a reasonable opportunity to the person concerned for being heard and making such enquiry as may be prescribed, shall, within ninety days of the seizure, make an order, with the previous approval of the Commissioner,—

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income-tax Act, 1922 (11 of 1922), or this Act;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of Section 230-A in respect of which such person is in default or is deemed to be in default, and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized;

Provided that if, after taking into account the materials available with him, the Income-tax Officer is of the view that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he may calculate the tax on such income

or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized:

Provided further that where a person has paid or made satisfactory arrangement for payment of all the amounts referred to in clauses (ii) and (iii) or any part thereof, the Income-tax Officer may, with the previous approval of the Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case.

(6) The assets retained under sub-section (5) may be dealt with in accordance with the provisions of section 132-A.

(7) If the Income-tax Officer is satisfied that the seized assets or any part thereof were held by such person for or on behalf of any other person, the Income-tax Officer may proceed under sub-section (5) against such other person and all the provisions of this section shall apply accordingly.

(8) The books of account or other documents seized under sub-section (1) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained:

Provided that the Commissioner shall not authorise the retention of the books of account and other documents for a period exceeding thirty days after all the proceedings under the Indian Income-tax Act, 1922 (11 of 1922) or this Act in respect of the years for which the books of account or other documents are relevant are completed.

(9) The person from whose custody any books of account or other documents are seized under sub-section (1) may make copies thereof, or take extracts therefrom, in the presence of the authorised officer or any other person empowered by him in this behalf, at such place and time as the authorised officer may appoint in this behalf.

(10) If a person legally entitled to the books of account or other documents seized under sub-section (1) objects for any reason to the approval given by the Commissioner under sub-section (8), he may make an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents.

(11) If any person objects for any reason to an order made under sub-section (5), he may, within thirty days of the date of such order, make an application

to such authority, as may be notified in this behalf by the Central Government in the Official Gazette (hereinafter in this section referred to as the notified authority), stating therein the reasons for such objection and requesting for appropriate relief in the matter.

(12) On receipt of the application under sub-section (1) the Board, or on receipt of the application under sub-section (11) the notified authority, may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit.

(13) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898) relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1).

(14) The Board may make rules in relation to any search or seizure under this section; in particular, and without prejudice to the generality of the foregoing power, such rules may provide for the procedure to be followed by the authorised officer—

(i) for obtaining ingress into such building or place to be searched where free ingress thereto is not available;

(ii) for ensuring safe custody of any books of account or other documents or assets seized.

EXPLANATION 1.—In computing the period of ninety days for the purposes of sub-section (5), any period during which any proceeding under this section is stayed by an order or injunction of any Court shall be excluded.

EXPLANATION 2.—In this section, the word 'proceeding' means any proceeding in respect of any year, whether under the Indian Income-tax Act, 1922 (11 of 1922) or this Act, which may be pending on the date on which a search is authorised under this section or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year."

5. Section 131, which had section 37 (1) as its predecessor in the Indian Income-tax Act, 1922, gives power to the Income-tax Officer, Appellate Assistant Commissioner, and Commissioner of Income-tax, regarding discovery and production of evidence etc. Section 132-A prescribes the mode of application of the assets retained by the Revenue under section 132 (5) Section 135 provides that the Director of Inspection, the Commissioner and the Inspecting Assistant Commissioner shall be competent to make any enquiry under this Act, and for this purpose shall have all the powers that an Income-tax Officer has under this Act in relation to the making of enquiries. Section 37 (2) of the Indian Income-tax Act, 1922, conferred powers on the Income-tax Officers specially authorised by the Commissioner to search any

building or place and seize any books of account or documents, Section 37 (2) was as under:

"(2) Subject to any rules made in this behalf, any Income-tax Officer specially authorised by the Commissioner in this behalf may,—

(i) enter and search any building or place where he has reason to believe that any books of account or other documents which in his opinion will be useful for, or relevant to, any proceeding under this Act may be found and examine them, if found;

(ii) seize any such books of account or other documents or place marks of identification thereon or make extracts or copies therefrom;

(iii) make a note or an inventory of any other article or thing found in the course of any search under this section which in his opinion will be useful for, or relevant to, any proceeding under this Act;

and the provisions of the Code of Criminal Procedure, 1898, relating to searches shall apply so far as may be to searches under this section."

6. Mr. Veda Vyasa, the learned counsel for the petitioners, presented two alternative arguments regarding the scope of the expression "has reason to believe" in Section 132. He said:

(1) In view of the fact that provisions of the Criminal Procedure Code relating to searches and seizures apply "so far as may be" to searches and seizures under sub-section (1) of section 132, even the sufficiency of the grounds leading to the reason to believe are justiciable; and

(2) in any case, even if the scrutiny by Courts as to the existence of reason to believe is limited in any manner the Courts can still strike down search and seizure carried out in pursuance of an authorisation if the Court finds that—

(a) the reason to believe was not bona fide;

(b) there are no grounds justifying the existence of the reason to believe;

(c) the grounds given in support of such existence of the reason to believe are extraneous to the cause; and

(d) at least some of such grounds are irrelevant or extraneous to the matter in issue.

7. The arguments on the justiciability of the sufficiency of grounds were put by Mr. Veda Vyasa thus: Under sub-section (13) of section 132 of the Income-tax Act, 1961, the provisions of the Code of Criminal Procedure, relating to searches and seizure, apply, so far as may be, to searches and seizure, under section 132 (1). Sub-section (2) of section 4 of the Criminal Procedure Code provides that

"all words and expressions used here-in and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code." The expression "reason to believe" has not been defined in section 26 of the Indian Penal Code which section reads—

"A person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise." Whether or not a person has reason to believe is fully justiciable and even the sufficiency of grounds can be gone into by Court where such question arises under the Indian Penal Code, and consequently the same meaning should be attributed to the said expression in section 132 (1). This argument of Mr Veda Vyasa suffers from several fallacies—

(1) "Reason to believe" in section 26 of the Indian Penal Code and the various provisions thereof, such as Ss 202, 411, 412, 413 and 414, has been used in the Penal Code in a different context, that is to say, in the context of mens rea for the purpose of finding out whether or not a person has committed an offence, while in section 132 of the Income-tax Act, 1961, power has been given to an authority to authorise the search and seizure subject to certain conditions if he has reason to believe that it is necessary so to do under section 132

(2) Under section 26 of the Indian Penal Code a person is said to have reason to believe a thing if "he" has sufficient cause to believe that thing. In this context, therefore, the Courts have to see whether the person concerned had sufficient cause to believe. Take a case where grounds exist on which two views may reasonably be possible. The Court will not hold a person guilty if it comes to the conclusion that though the grounds may provide to the offender sufficient cause to believe but the Court holds a different opinion. This section, therefore, is confined to finding out whether an alleged offender could have sufficient cause to believe and, therefore, could be said to have "reason to believe". Such a provision cannot obviously be equated with a provision like section 132 (1); and

(3) the search and seizure provisions of the Criminal Procedure Code apply only "so far as may be", which means that those provisions should be applied only consistently with the scheme and the purpose of section 132 of the said Act. When so applied the power to issue search warrants has been, subject to fulfilment of certain conditions, made dependent on the reason to believe of the specified authorities.

8. Mr. Veda Vyasa referred to K. Hoshide v. Emperor, AIR 1940 Cal 97,

and said that even the adequacy of the grounds on which Courts issue search warrants under section 96 of the Criminal Procedure Code is justiciable. I prefer not to express any opinion on the question whether the adequacy of grounds on which the Court issues search warrants under the Code of Criminal Procedure is open to scrutiny by Courts particularly in such collateral proceedings and I would rather decide this question assuming that it is so. For the purposes of this case, it is sufficient to say that the language of section 132 does not permit the interpretation suggested by Mr Veda Vyasa. I cannot also lose sight of the fact that we are not sitting in appeal over the decision of the Director of Inspection regarding the existence of the reason to believe for none has been provided and when exercising writ jurisdiction the Courts cannot, in my opinion, test the adequacy of grounds as a court of appeal. The existence of "reason to believe" in section 132 is subject only to a limited scrutiny and the Courts cannot substitute their own opinion for that of the Director of Inspection. Of course, the Director of Inspection must not lightly or arbitrarily invade the privacy of a subject. Before he acts, he must be reasonably satisfied that it is necessary to do so but the decision must still remain his and not that of the Courts. If the grounds on which reason to believe is founded are non-existent or are irrelevant or are such on which no reasonable person can come to that belief, the exercise of power would be bad, but short of that, the Courts cannot interfere with the reason to believe bona fide arrived at by the Director of Inspection. It is also open to the Courts to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief. In that sense the expression "reason to believe" is both subjective and objective but the area of objectivity is limited.

In *S. Narayanappa v. Commissioner of Income-tax* (1967) 63 ITR 219 (AIR 1967 SC 295) their Lordships of the Supreme Court while dealing with the same expression as used in section 34 of the Indian Income-tax Act, said—

"Again the expression 'reason to believe' in section 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith; it cannot be merely a pretence. To put it differently, it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of

the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under section 34 of the Act is open to challenge in a Court of Law."

In *Barium Chemicals Ltd v. Company Law Board*, AIR 1967 SC 295, Hidayatullah, J. (as he then was) observed—

"No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exist, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:

"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist... Since the existence of 'circumstances' is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness."

Similarly, Shelat, J., while dealing with the expression "reason to believe", observed—

"Therefore, the words, 'reason to believe' or 'in the opinion of' do not always lead to the construction that the process of entertaining 'reason to believe' or 'the opinion' is an altogether subjective process not lending itself even to a limited scrutiny by the court that such 'a reason to believe' or 'opinion' was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

9. Mr. Veda Vyasa also referred to *Shibban Lal Saksena v. State of Uttar Pradesh*, 1954 SCR 410: (AIR 1954 SC 179) and said that even if some of the grounds leading to the formation of the opinion are extraneous or irrelevant, the exercise of power must be struck down. It is unnecessary to resolve this controversy as I am satisfied on perusal of the ground that there is no extraneous ground on which the opinion has been formed. I, therefore, propose to scrutinise these grounds within the area of objectivity mentioned by me.

10. The Director of Inspection has filed his affidavit supported by the

charts about which I have mentioned already. In the said affidavit, it is stated that—

(a) the statements of account filed before the Income-tax Officer in support of the income-tax returns of the petitioners who were being assessed clearly show that the books of account containing their complete and true financial affairs and income have never been produced before the Income-tax Officer;

(b) the petitioners, who were being assessed, had been filing returns and getting assessed by giving a fictitious address at Calcutta though their principal place of business was in Delhi;

(c) a person connected with the affairs of the petitioners gave information making various allegations of extensive tax evasion and he made the following points—

(i) The petitioners have acquired wealth, and have been spending, on a scale quite disproportionate to their declared incomes;

(ii) The petitioners have filed returns before an Income-tax Officer of Calcutta though they do not have their business at the address given at Calcutta and have extensive business in Delhi and elsewhere;

(iii) The petitioners have not disclosed large transactions through bank accounts;

(iv) The petitioners have not disclosed business activity in various names; and

(v) the petitioners have been closely connected with other persons for making manipulations by virtue of which they could make extensive secret profits for themselves and such other persons;

(d) the assessment records of the petitioners 1, 2, 3 and 4 disclosed certain peculiar features such as declaration of income almost entirely from brokerage, denial of any bank accounts and failure to disclose assets proportionate to apparent wealth;

(e) the ghost address in Calcutta was adopted so as to keep the Income-tax authorities in the dark as to the real extent of their financial activities and income;

(f) "independent enquiries were also made by the officers of the Directorate of Inspection (Intelligence), New Delhi which showed the following.

(i) The petitioners were carrying on extensive business at various places which had apparently not been disclosed;

(ii) The petitioners had acquired several licences in several scarce commodities and had disposed them of secretly and at fantastic profits;

(iii) The petitioners had been incurring lavish expenditure which was quite inconsistent with their declared resources;

(iv) The petitioners had acquired assets worth several lakhs of rupees which is also inconsistent with their declared resources;

(v) The petitioners were co-accused in a certain case filed by the Special Police Establishment, Central Bureau of Investigation and some of their books of account were still in the custody of the Special Police Establishment, Central Bureau of Investigation. Scrutiny of these books of account had disclosed that while the petitioners had acquired quotas in Stainless Steel in a number of trading names and the books of account kept for this purpose showed substantial profits, these activities and this income had not been disclosed to the Income-tax authorities. Moreover, there were hundi loans of about Rs 10,50,000/- introduced in these books of account and there was reason to believe that these were really a disguise for introduction of secret monies of the petitioners; and

(vi) It was gathered that Shri Balwant Singh in particular had been instrumental in organising affairs in such a manner that in violation of normal laws and rules secret profits could be made by him and a number of persons associated with him in the matter of import of 'Nylon' yarns in Bombay against entitlements for export promotion quota, and import of motor spare parts, brandy, pharmaceutical goods etc., against Customs Clearance Permits obtained by various persons of Pondicherry. The profits made by the syndicate formed for such purposes were reported to be enormous; running into crores of rupees. Enquiries also showed that the petitioners, their brothers, their mother and other relatives had been freely intermingling their financial affairs and adopting one another's name for various activities of benami trade names";

(g) On the basis of the information mentioned above, the 1st respondent came to the following conclusion:

i) The petitioners had been completely misleading the Income-tax authorities and there was no occasion for the assessing Income-tax Officer to suspect that the real state of financial affairs and the real books of account and documents which would show, the same were being withheld from his knowledge. There was no occasion, therefore, for the Income-tax Officer to call for any such books of account or documents;

ii) The petitioners had been deliberately following the policy of not producing before the Income-tax Officer, the books of account and documents which would show their real state of financial affairs and their income. It was also evident that if called upon to produce such books of account and documents, the

petitioners would not comply and would, on the contrary, destroy all such evidence; and

iii) the petitioners were in possession of money, bullion, jewellery and other valuable articles and things which represent wholly or partly the income or property which was not disclosed for the purpose of assessment to income-tax."

11. Mr. Veda Vyasa strenuously urged that "reason to believe" must exist when authorisations were issued under S. 132 and formulation of the reasons in the counter-affidavit could be of no avail to the Revenue. It was for this reason that we directed the Revenue to file the grounds in Court and Mr. Desai, the learned Counsel for the Revenue, immediately, on our enquiry, expressed complete willingness to do so. We were taken through the grounds and I find that they are such as could lead any reasonable man to believe that action under Section 132 was called for. It is not necessary to discuss them in detail as they are now part of the record and it is sufficient to say that the reasons would meet even the scrutiny of adequacy. Reasons and the counter-affidavit further show that the Director of Inspection fully applied his mind to the matter before issuing the authorisations.

12. Mr. Veda Vyasa next contended that the Director of Inspection and the Income-tax Officers did not apply their minds to the various aspects which required their attention. Before I deal with this argument, it is necessary to consider the scope of Section 132 in so far as this has a bearing on this question. Under Section 132, the Director of Inspection or the Commissioner can authorise search and seizure, if he has reason to believe that any person to whom a summons or notice under any of the provisions of Income-tax Act, 1961, mentioned in subsection (1) (a), has been or might be issued, will not or would not, produce or cause to be produced, any books of account or documents which will be useful for or relevant to any proceedings. The reason to believe must, therefore, be that the person concerned will not produce any books or documents and those books and documents will be useful or relevant to any proceedings. This aspect of the matter will be considered further when dealing with the argument regarding specification of documents in the authorisations. The authorisation may authorise certain officers specified in the section to enter and search any building or place where the authorised officer has reason to 'suspect' that such books of account or other documents etc., that is to say, books of account and documents etc. which will be useful for or

relevant to any proceedings are kept. While conducting the search the authorised officer has, therefore, necessarily to apply his mind and look for only such books of account and documents which will be relevant or useful to any proceedings. This scheme of the section shows that mind has to be applied by two officers at two different stages—

(1) by the Director of Inspection or the Commissioner when authorising an officer to search. Such application of mind extends to two matters— (a) that the person concerned will not produce the books of account; and (b) he will not produce the books which will be useful or relevant to any proceedings and (2) by the authorised officer that the books searched or seized will be useful or relevant to any proceedings. That follows from the use of the words "such books of account" etc. in clauses (i) and (iii) of sub-section (1) of Section 132. The question, therefore, is, whether or not, the Director of Inspection in this case applied his mind as expected of him under the provisions of sub-section (1) of Sec. 132. The extracts from the Counter-affidavit of the Director of Inspection and the reasons for search quoted above clearly show that the Director of Inspection did apply his mind and could have reason to believe that search and seizure was necessary.

13. Mr. Veda Vyasa, the learned counsel for the petitioner, emphasised two aspects in this behalf— (1) the assessments up to 1962-63 having been completed there could have been no occasion to issue any notices under Section 37 of the Indian Income-tax Act, 1922 or sub-section (4) of Section 22 of the Income-tax Act and yet in the authorisation quoted above these sections have been mentioned which shows that the Director of Inspection blindly quoted the authorisation form, being Form No 45, prescribed under the Rules without applying his mind as to which provisions could be attracted in the case. Mr. Veda Vyasa drew our attention to Section 297 of the Income-tax Act, 1961, and said that even if action is to be taken against any persons for escaped assessment the sections applicable would be Sections 147 and 148 of the 1961 Act and, therefore, Sections 37 and 22 (4) of the 1922 Act could, in no case, apply. And (2) the respondents had failed to show that the Director applied his mind and came to the conclusion that relevant or useful books existed and were likely to be withheld.

14. Mr. Desai, the learned counsel for the Revenue, on the other hand, drew our attention to the following:—

(a) The authorisation has been issued in Form 45, the prescribed form;

(b) sub-rule (14) of rule 112 provides that the authorisation "shall be in Form 45" and

(c) in the cyclostyled form of authorisation two inapplicable clauses have been struck off indicating the care bestowed upon the matter by the Director of Inspection;

(d) even in the part of authorisation retained the section cyclostyled is "137" but figure "1" has been struck off; and

(e) merely because Sections 37 and 22 have been added to avoid the possibility of any omission, it does not show that the Director of Inspection did not apply his mind.

The fact that authorisation has been issued in the statutory form in accordance with the requirements of sub-rule (14) of rule 112 does not, however, necessarily lead to the conclusion that the Director of Inspection applied his mind as the mandate of sub-rule (14) of R. 112 extends to no more than reciting only the applicable provisions in the Form. But the other factors pointed out by Mr. Desai read with the grounds and the counter affidavit do lead me to the conclusion that the Director of Inspection applied his mind. On the second aspect also there is abundant material on the record to show that the Director considered the matter and came to the conclusion that search and seizure was necessary.

15. So far as the authorised officers are concerned, various circumstances were relied on by both sides in support of their respective pleas Mr Veda Vyasa said that— (1) the seizure list showed that bundles of papers were seized without scrutiny, (2) papers like medicine bills, prescriptions, writ petitions, and copies of the judgments of Courts had been seized, although merely signing them or putting on them marks of identification and leaving them with the petitioners would have served the purpose because such like records could never have been destroyed or withheld by the petitioners and (3) even plan of a building to be made in Faridabad was seized, showing that the authorised officers searched and seized all the papers upon which they could lay their hands without considering whether or not they were useful or relevant. According to Mr Veda Vyasa it was impossible for an authorised officer to scrutinise thousands of papers in one day. The authorised officers have filed affidavits in which they say that the seizure was made under a reasonable belief that the papers seized belong to the petitioners and were relevant or useful for the "income-tax purposes". They have also denied that the seizure was indiscriminate.

16. Shri Rajinder Mohan, respondent No 2, in his affidavit also stated that petitioners Nos 2 and 3 were present at the time of the search, the authorisations were shown to them and he took their signatures thereon. The fact that the authorisations are signed by them has not been denied.

17. Mr Desai, the learned counsel for the respondents, in support of his plea that there was a proper application of mind, mainly relied on the circumstance that some of documents were not seized while on some, marks of identification were put and the documents left with the petitioners and that showed that the authorised officers considered their relevance or usefulness before seizing them. With respect to the bundles of papers and several files, Mr. Desai contended that it was sufficient compliance with the Act and the Rules if the authorised officer broadly looked into the files and found that some of the papers, in any event, were relevant or useful and the entire file should be taken so that the order of the papers of the petitioners was not disturbed and the files not dismantled. Mr. Desai conceded that looking into the contents of each and every paper was practically impossible but said that the authorised officers did broadly look into every file and bundle and seized the same only when satisfied that they had a bearing on the proceedings pending or proposed to be taken.

18. Before I proceed to answer the question, it is important to mention the particular papers seized which, according to Mr Veda Vyasa, would have not even a remote connection with any assessment proceedings taken or even to be taken. He underlined in the list of seizures the following:—

(1) One file styled Dass Commission Inquiry containing some correspondence in the case regarding A. S Kalia.

(2) Papers regarding Mars, Rubber and General Industries—Shifting of factory.

(3) File — Metro Engineering and Metal works — Electricity.

(4) Metro Engineering and Metal Works writ petition.

(5) List of photostat copies 12 — Import licence application.

(6) Several files containing statements and documents in the case—N. S. Giani.

(7) Petition under Article 226 in the Punjab High Court — Baldeo Singh v. Director General, Development Wing.

(8) File containing correspondence with Chief Settlement

(h) One bundle of papers showing transactions of Roshan Lal Jali for the years 1952-56, which includes general power of attorney and various petitions

addressed to civil Court and share certificates; and

(i) copy of the letter from Chief Controller of Imports and Exports addressed to Shri Sadhu Singh, Advocate.

19. Mr. Desai said that in the petition there was only a general allegation that some irrelevant papers were seized and, therefore, the respondents had no opportunity to deal with specific items. He, however, sought to justify the seizure of each and every document. He said that, for instance, A. S. Kalia was an ex-partner of the petitioners. Similarly, petitioners 1 and 3 and N. S. Giani are being prosecuted in connection with Stainless Steel quota Files containing the names of different firms would be relevant to show that the petitioners were engaged in business under the name and style as one of the allegations against the petitioners is that they have been carrying on business in various names without disclosing the income therefrom. Books of 1949 and of other earlier years as well as the note-book relating to poultry would be relevant to arrive at the capital structure of the petitioners and find out whether the expenses on their living are within their available disclosed resources.

20. According to Mr. Veda Vyasa, however, it was enough for the petitioners to allege that irrelevant papers were seized and it was always for the respondents to justify the seizure of each and every document. Once I am satisfied that the authorised officers applied their mind to the usefulness or relevance of the documents the matter assumed a different shape. For, then the decision will have to be left to the authorised officers to see, whether or not, the documents were useful or relevant.

If the conclusion is that a reasonable man acting bona fide could believe that the documents were useful or relevant, it will not be open to the Courts to substitute their own opinion or sit in appeal over the judgment of the authorised officer. Of course, if the Courts come to the conclusion that the documents have no connection with any proceedings the seizure would be bad. Similarly if the seizure is held to be not bona fide it will be struck down. Looking from that angle, a reasonable man acting bona fide could, in the circumstances of this case, come to the conclusion that books and files relating to several years back would be useful and relevant for constructing the capital structure or the income accumulations of the petitioners. Similarly, the writ petitions and judgments of the Courts may be useful sources of information. Papers relating to quota licences would also indicate the extent of business done by the petitioners or other concerns

in which they were interested. Even the signatures of some persons on blank papers may serve a useful clue to several relevant matters. There may be a few documents — one or two — like prescriptions and medicine bills which may have no bearing, but such seizure cannot and does not go to show that there was a complete absence of the application of mind. At the most the appropriate order may be in such cases to return those documents. Mr. Veda Vyasa also showed us some of the documents which have been returned and used that fact to show that even the department did not consider those documents relevant or useful. That may not be necessarily so, for they may have returned them after gathering the necessary information. In any case, where, by and large, all the documents seized appear to be such as could lead a reasonable man to believe that they were useful and relevant, the search and seizure itself cannot be struck down on the ground of absence of application of mind. Mr. Desai expressed his inability to show the relevance of each and every document by reference thereto as the documents are lying sealed under the orders of this Court. In these circumstances, it must be held that the authorised officers also properly applied their minds.

21. Mr. Veda Vyasa then contended that although a few Income-tax Officers had been authorised yet a large number searched and seized the documents. This argument bears no merit because the affidavits filed by the authorised officers show that they conducted the search and seizure and applied their minds to the documents to be seized. Regarding the contention that even copies of the official records such as writ petitions and judgments were seized showing the arbitrariness at the hands of the authorised officers Mr. Desai contended that it was entirely for the authorised officers under clause (3) of sub-section (1) of Section 132 to decide which of the relevant or useful books and documents should be seized and which left with the petitioners by only placing marks of identification. I am not prepared to accept that broad proposition. Search and seizure is a serious invasion on the rights of the subjects. The search and seizure was really not known at earlier stages to common law. When it was for the first time, introduced it was confined only to stolen goods, but its usefulness soon forged its recognition and was, from time to time, extended to such like searches and seizures. It is true that sometimes the overzealousness of the authorities led to its abuse and it appears that for this reason the Fourth Amendment was introduced in the American Constitution in recognition of the fact that a man's house is his castle not to be invaded by any general autho-

rity to search and seize his goods and papers. The only legal means that can be applied to search a person's abode is a search warrant and in the absence thereof neither any private person nor any officer can invade the privacy of a home and subject its occupants to indignity. It is, therefore, imperative that seizure should not be allowed to exceed the limits of absolute necessity and the overzealousness of the searching officers is not permitted to cross the permissible limits. Such provisions must, therefore, be necessarily construed in the light of this background and when two alternatives, namely, to seize the books or place or place marks of identification and leave them with the persons concerned are available, the seizure will be struck down on the ground that it is arbitrary and not in the public interest. I say so because every provision of the Act has to be construed in the light of Article 19 of the Constitution. My conclusion is that when two alternatives are equally possible, namely, either to seize the books or to leave them with the petitioners after placing marks of identification, the latter course must be resorted to. But whether or not seizure is the only alternative depends on the facts and circumstances of each case. For instance, there may be cases where immediate information is necessary to avoid destruction of relevant materials by the assessee, or to avoid any assessments becoming time-barred. In that situation, even the seizure of such like documents would be justified. Similarly, if the authorised officers are of the opinion that obtaining records from different Courts will be difficult and/or would cause delay thereby frustrating the object of search, they may seize the documents. Mr. Veda Vyasa did not press for the return of any particular document possibly because both the parties were handicapped in view of the fact that the documents are lying sealed with the Commissioner of Income-tax and none of them could have access thereto. He merely underlined certain documents to show that the search was arbitrary, high-handed and without the authorised officers applying their minds.

Mr. Veda Vyasa strongly relied on a decision of the Punjab High Court in *N. K. Textile Mills v. Commissioner of Income-tax, New Delhi* (1966) 62 ITR 58 (Punj). In the circumstances that obtained in that case it was held that the search and seizure was illegal as being arbitrary and an abuse of power. That case was decided having regard to the fact that all documents were seized indiscriminately and there was no proper affidavit showing that the authorised officers applied their minds. That is not the case here. In the circumstances of this case and in the light of the dis-

cussion hereinbefore it must be held that the authorised officers did apply their minds. In searching or seizing the documents they may have erred slightly here or there and seized the documents which on closer scrutiny may ultimately turn out to be irrelevant but that cannot vitiate the search.

22. That takes me to the next contention of Mr. Veda Vyasa that search and seizure under section 132 (1) can be resorted to only if there are pending proceedings and not merely a remote possibility of some proceedings being taken at a later stage. The argument of Mr. Veda Vyasa was this:

Section 131 applies only to pending proceedings and so does section 132 (1) (a). Clause (b) of sub-section (1) of S. 132 is only in aid of section 131 and S. 132 (1) (a) and must necessarily be limited within the area of sections 131 and 132 (1) (a). When faced with the second Explanation to section 132 that the word "proceeding" includes proceedings which may be pending on the date of the search or which may have been completed on or before such date and includes also all proceedings which may be commenced after such date in respect of any, Mr. Veda Vyasa sought to overcome this difficulty by suggesting that though the proceedings might be commenced after the date of the search but those proceedings must be in a pending case. That, in my opinion, would be cutting down the scope of the second Explanation. From the Explanation it is obvious that the proceedings may not be pending. In terms the Explanation expands the meaning of the word "proceeding" and extends the power to issue search warrants where proceedings "have been completed". The words "have been completed" obviously show that there may be no proceeding pending when the search warrant is issued. Mr. Veda Vyasa emphasized the words "a summons or notice as aforesaid has been or might be issued" and said that the summons or notice refers to summons or notices mentioned in clause (a) of sub-section (1) of section 132 which are all in pending proceedings. That again is not the correct reading of clause (b) of sub-section (1) of section 132. Clause (a) refers to, for instance, a notice under S. 142 (1). That notice may be issued not only when proceedings for assessment are pending with respect to a particular assessment year but even when action is taken for reassessment for that assessment year by resort to sections 147 and 148. Consequently, even if assessment for a particular year has been made a notice under section 142 may still issue for that very year after reopening of the assessment. Similarly, there may be

cases where a person has not filed a return and the income has escaped assessment as a result thereof. In that case also a notice under section 148 may have to be issued followed by a notice under section 142. Read with the second Explanation clause (b) of section 132 (1) would necessarily mean that a warrant for search or seizure can issue even in a case where any proceedings have been closed or may be commenced later. Mr. Dang, who followed Mr. Veda Vyasa for a short while, suggested that, in any case, the proceedings must be imminent and a remote possibility of the taking of proceedings will not suffice. The section, however, does not require that the proceedings should be imminent. All that is necessary is that the Director of Inspection or the Commissioner must in consequence of the information have reason to believe that the notices or summonses as mentioned in clause (a) of sub-section (1) of section 132 might have to be issued. If there is only remote possibility of such summonses or notices being issued the section would not be satisfied not because there are no proceedings imminent but because a reasonable person could not have, in those circumstances, reason to believe that the person concerned will not produce the documents if summonses or notices are issued to him. In that sense it may be said that search warrants cannot be issued merely with a view to making a roving or fishing enquiry, but can be issued only when there exists a good ground for believing that further proceedings may have to be taken. Having regard, however, to the facts of this case it cannot be said that search warrants were issued when there was not even a remote possibility of further proceedings.

23. The next argument urged on behalf of the petitioners was that the Director of Inspection or the Commissioner must specify the documents to be searched or seized. This argument was based again on the existence of the words "to whom a summons or notice as aforesaid has been or might be issued" in clause (b) of sub-section (1) of S. 132. Mr. Veda Vyasa said that the reason to believe must be that the assessee concerned will not produce relevant or useful books of account etc. when summoned to do so under any of the provisions mentioned in section 132 (1) (a) and since notices and summons mentioned in section 132 (1) (a) must necessarily specify the books and documents the authorisation must also do so and that the authorisation has to be confined only to useful and relevant books and documents etc. and therefore, the authorised officer must be told exactly what those useful and relevant books and documents are.

According to Mr. Veda Vyasa, the Director of Inspection or the Commissioner must firstly be satisfied having regard to the particular documents that they will be useful or relevant to any proceedings and are such as could be called for by notices or summonses mentioned in clause (a) of sub-section (1) of S 132. Mr Veda Vyasa sought to seek further support from the use of the expression "such books of account" in S 132 (1) (i). I am not convinced that any such specification is necessary. Sections 22 (4) and 142 (1) themselves do not require precise specification of the documents, to be produced. For instance, under section 142 (1) the Income-tax Officer may require an assessee to produce all books of account and even require the production of documents generally showing that the assessee was carrying on business in a particular name and style. Such notice would be in compliance with Section 142 (1). That apart, it appears to me that Section 132 has been made wider still and the Director of Inspection or the Commissioner is expected only to have reason to believe that the person concerned will not, or would not, produce or cause to be produced any books or documents, which will be useful for or relevant to any proceedings. In other words, the authority concerned must show that he had reason to believe on the materials before him that the person concerned is likely to withhold books and documents and those books and documents will be useful or relevant to the proceedings. Take a case where the Director of Inspection or the Commissioner of Income-tax has information that some one is carrying on business in 20 different names and that he has not disclosed those businesses to the Revenue. There can be no doubt that section 132 is intended to meet such a situation as well and yet it will be impossible for the authorities to specify the documents. All that the authority issuing authorisation must believe is that there are useful and relevant documents available in the premises to be searched. In *Durga Prasad v. Supdt. (Prev.) Central Excise, Nagpur*, AIR 1966 SC 1209, the Supreme Court construed section 105 of the Customs Act, which reads—

"105. (1) If the Assistant Collector of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provision of the Code of Criminal Procedure 1898, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate" wherever it occurs, the words "Collector of Customs" were substituted."

Their Lordships observed—

"It was further submitted on behalf of the appellant that the power of search under section 105 of the Customs Act cannot be exercised unless the authorisation specifies a document for which search is to be made. In other words, it is contended that the power of search under section 105 of the Customs Act is not of general character. We do not accept this argument as correct. The object of grant of power under section 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act. At that stage it is not possible for the officer to predict or even to know in advance what documents could be found in the search and which of them may be useful or necessary for the proceedings. It is only after the search is made and documents found therein are scrutinised that their relevance or utility can be determined. To require, therefore, a specification or description of the documents in advance is to misapprehend the purpose for which the power is granted for effecting a search under section 105 of the Customs Act. We are, therefore, of opinion that the power of search granted under section 105 of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched. We have already mentioned the reasons for holding that this condition has been satisfied in the present case." Mr Veda Vyasa relied on *R. S. Seth Gopikisan Agarwal v. R. N. Sen, Assistant Collector of Customs and Central Excise, Raipur*, AIR 1967 SC 1298, which was again a case inter alia under section 105 of the Customs Act, and referred to the following observation:

"Doubtless he has to indicate broadly the nature of the documents and the goods in regard to which the officer authorised by him should make a search, for without that his mandate cannot be obeyed."

The above observation has to be read in the context. Their Lordships said—

"Obviously, no question of giving of particulars arises if he himself makes the search, but if he authorises any officer to do so, he cannot give the particulars of the documents, for they will be known only after the search is made. Doubtless he has to indicate broadly the nature of the documents and the goods in regard to which the officer authorised by him should make a search for without that his mandate cannot be obeyed. The authorization issued by the Assistant Collector of Customs in this case clearly mentioned that on information received it appeared that the appellant was in possession of contraband goods and documents relating thereto and also described the office and the residential premises wherein those goods and documents would be found. In the circumstances of the case we are satisfied that the specifications are sufficient to enable the officer authorized to make the search."

In this case also the authorization said that the person concerned will not produce or cause to be produced books of account or other documents which will be useful for or relevant to the proceedings under the Income-tax Act, 1922, or the Income-tax Act, 1961. That specification was, in any case, sufficient so far as the requirements of section 132 go.

24. Mr. Veda Vyasa then contended that provisions of section 165 of the Criminal Procedure Code had not been complied with inasmuch as—

(1) the search and seizure was not conducted in the presence of Panchas as required by sub-section (4) of section 165;

(2) Copies of the records made at the time of search and seizure were not sent to the nearest Magistrate as required by sub-section (5) of section 165

In the alternative, Mr Veda Vyasa said that even if under the Income-tax Act, 1961, the copies may not be required to be sent to the nearest Magistrate, sub-section (5) must be applied mutatis mutandis to the searches under the Income-tax Act and, therefore, copies of the record made should have been sent to some higher authority such as the Director of Inspection or the Commissioner of Income-tax; and

(3) no reasons were recorded by the authorised officer.

25. Regarding the search being conducted in the presence of witnesses, Mr. Veda Vyasa relied on the various affidavits filed by the witnesses to the search. There is no firm allegation in the petition that the search or seizure was not conducted in the presence of the

witnesses. Subsequently, however, affidavits were filed on behalf of the witnesses to the search wherein it has been stated that at the time of the search the witnesses were made to sit in one room from where it was practically impossible to keep a watch on the search and that the members of the search party were constantly coming in and going out of the premises searched. The facts alleged in these affidavits have been denied and on the basis of the material it is impossible to conclude that the petitioners are right, particularly having regard to the fact that there is no controversy between the parties that the list contains an accurate statements of the documents searched and seized. Regarding the reasons to be recorded by the authorised officers, there is no such requirement in S 132 or R 112. The section and the rule merely require the authorising officer to give reasons. Mr. Desai did not dispute that having regard to the provisions of section 165 Criminal Procedure Code, and rule 112 the authorising officer must record reasons. He, however, disputed the contention that even the authorised officer must record reasons. Mr Veda Vyasa suggested that under section 165 (1) of the Criminal Procedure Code the officer in charge of a police-station etc. is required to record in writing the grounds of his belief and applying section 165 it must be held that the authorised officers must also record reasons in writing.

There is no warrant for this proposition. Under section 132 of the Income-tax Act the search warrants can be issued upon reason to believe by the Director of Inspection or the Commissioner. The section does not require the Director or the Commissioner to record reasons though he may have to do so because if the action is challenged in court the authorising officer will have to justify his action within the limited area of objectivity. Rule 112, however, provides this safeguard in terms and requires the Director of Inspection or the Commissioner to record reasons for authorising the search or seizure. Section 165 of the Criminal Procedure Code applies only "so far as may be" and at the most it can be said that the effect of section 165 (1) is that the person issuing the authorization must record reasons. The said section 165 cannot be held to require the authorised officer to record reasons. Under the said section the police officer concerned may either make the search or cause it to be made. Even there the officer, who is authorised to make the search by the police officer concerned, need not record reasons. All that is to be seen under section 132 of the Income-tax Act is that the authorised officer searches or seizes only such documents

and books of account etc. which are useful or relevant to any proceedings.

So far as sending of the copies of the record to the nearest Magistrate or to a senior official of the Income-tax Department is concerned, sub-section (5) of section 165 cannot in terms apply because that sub-section requires copies of the record made under sub-section (1) of section 165, that is, record of search or seizure conducted in pursuance of the belief that anything is necessary for the purpose of an investigation into any offence to the court. In investigations like the present there is no investigation into any offence. Under sub-rule (2) of R. 112 a list of all the things taken possession of has to be prepared and copies thereof sent to the Director of Inspection or the Commissioner, as the case may be. There is no allegation on behalf of the petitioners that this sub-rule was not obeyed and even if the argument of Mr. Veda Vyasa is to be accepted that by applying section 65 *mutatis mutandis* the copies must be sent to a senior official, it must be held that that was complied with. Again, in sub-section (5) of section 165 of the Criminal Procedure Code the copies of the record have to be forwarded to the nearest Magistrate empowered to take cognizance of the offence. For this reason also no copies can be sent to any Magistrate. This argument of the learned counsel for the petitioners must also, therefore, fail. It may, however, be pointed out that search being carried out in the presence of witnesses and the reasons to be recorded by the authorising officer are the requirements of rule 112 itself and, therefore, it is unnecessary to take recourse to section 165 of the Criminal Procedure Code for that purpose.

Mr. Desai wanted leave to file an affidavit, which he actually did, showing that the authorised officers were properly briefed on the merits of the case so that they could apply their minds to the documents to be searched or seized. The petitioners filed a counter-affidavit and then Mr. Desai stated that "in view of the lengthy and irrelevant contents of the counter-affidavit I do not press for filing of the affidavit and want to withdraw the same." Mr. Veda Vyasa contended that the affidavit having been placed on the record it could not be withdrawn and relied on *In re Quartz Hill & C. Company*; *Ex parte Young*, (1882) 21 Ch. D 642. No permission was given to Mr. Desai to place the affidavit on the record and the matter had yet to be decided when the affidavit was withdrawn. In view of my decision that the authorised officers did apply their minds it is unnecessary to go into this question. Mr. Veda Vyasa also pressed on us to permit him to cross-examine the

deponents on behalf of the respondents. He said that apart from the fact that the affidavits were vague and not properly verified he would be able to show that the statements made therein are not correct and neither had the Director of Inspection reason to believe nor did the authorised officers apply their minds. I see no justification for allowing that request. Paragraph 10, sub-paragraphs (a), (c) and (e) of paragraph 13, and sub-paragraphs (e) and (g) of paragraph 14 have been sworn by R. D. Shah as true to his knowledge. Paragraph 10 of the affidavit deals with the protest letters etc. by the petitioners and the offer by respondent No. 1 that the petitioners might approach the officers concerned for inspecting the books and documents. In sub-paragraph (c), which has been mentioned in detail above, respondent No. 1 swears to the conclusions that he arrived at on the basis of the information mentioned in the earlier paragraphs. In sub-paragraph (e) of paragraph 13 he says that he had sufficient information in his possession to give him reason to believe that action under section 132 was necessary, and these paragraphs have been sworn as true to the knowledge of the Director of Inspection. Having regard to the nature of scrutiny by the Court into the question of reason to believe, these are the relevant paragraphs and have been properly sworn.

26. Mr. Veda Vyasa's principal objection was that the Director of Inspection had, with respect to some of the paragraphs, stated that "they are true to my knowledge based on official record and believed to be true" without disclosing the said records. We have been taken through those paragraphs at length and I am not satisfied that cross-examination should be allowed. Similarly, in the affidavits by Rajinder Mohan, V. S. Rastogi, V. P. Mital, P. N. Malik and R. C. Narang, the facts have been sworn as true to their knowledge. I am not unmindful of the fact that if a proper case is made out, this Court has power to direct cross-examination of the deponents but in the light of the discussions on various aspects I am satisfied that this is not a case where such permission should be accorded.

27. I then proceed to discuss the contention of Mr. Veda Vyasa that section 132 of the Income-tax Act is unconstitutional being violative of Articles 14 and 19. In support of this contention he relied on the majority judgment of the Assam High Court in *S. Doongarmal Agency v. K. E. Johnson*, AIR 1964 Assam 1 (FB). In that case a majority of their Lordships held that section 37 (2) of the Indian Income-tax Act, 1922, was violative of Articles 14 and 19 (1)

(g) of the Constitution. The majority of the learned Judges in coming to that conclusion expressed dissent from Surajmull Nagarmull v. Commissioner of Income Tax, AIR 1961 Cal 578 (SB). So far as Article 14 is concerned, the ratio of the Assam decision is that section 37 (1) and section 37 (2) are two distinct, different and independent powers and the power under S. 37 (2) is much more drastic and onerous with the result that if action is permitted under section 37 (2) instead of section 37 (1), it would involve discrimination. Regarding Article 19 the majority view is that there were no guide-lines provided as to when and in what circumstances the power in question was to be exercised or for the purpose or object of the exercise of the power. The power could be exercised without notice to the person concerned and there was no provision for an aggrieved party to make a representation and, therefore, the restriction imposed on the fundamental rights was not reasonable. In AIR 1961 Cal 578 (SB), the Special Bench of the Calcutta High Court, however, came to the conclusion that section 37 (2) did not violate either Article 14 or Article 19 of the Constitution. In Board of Revenue, Madras v. R. S. Jhaver, AIR 1968 SC 59, their Lordships of the Supreme Court upheld the validity of section 41 (2) and (3) of the Madras General Sales Tax Act relating to search and seizure of accounts and documents on the ground that there were sufficient safeguards provided particularly in view of the applicability of section 165, Criminal Procedure Code, and, therefore, Article 19 was not violated. One of the factors taken by their Lordships of the Supreme Court into consideration was that the officer seizing the books of account etc. had to record his reasons. I have mentioned this fact specifically because Mr. Veda Vyasa sought to distinguish this decision on the ground that if the authorised officers are not expected to record their reasons that safeguard, which existed in section 41, did not exist in section 132. Again, in AIR 1967 SC 1298, their Lordships of the Supreme Court held that section 105 of the Customs Act, 1962, did not violate Article 14 of the Constitution and observed—

"The legislative policy reflected in the section is that the search must be in regard to the two categories mentioned therein, namely, goods liable to be confiscated and documents relevant to a proceeding under the Act. No doubt the power can be abused. But that is controlled by other means. Though under the section the Assistant Collector of Customs need not give the reasons, if the existence of belief is questioned in any collateral proceedings, he has to

produce relevant evidence to sustain his belief. That apart, under section 165 (5) of the Code of Criminal Procedure, read with section 105 (2) of the Act, he has to send forthwith to the Collector of Customs a copy of any record made by him. The Collector would certainly give necessary directions if the Assistant Collector went wrong, or if his act was guided by mala fides."

28. In C. Venkata Reddy v. Income-tax Officer (Central) I. Bangalore, (1967) 66 ITR 212 (Mys) a Division Bench of the Mysore High Court held that S. 132 of the Income-tax Act, 1961, did not violate Article 14 or 19 of the Constitution. Mr. Veda Vyasa contended on the lines of the Assam decision AIR 1964 Assam 1 (FB) that section 132 violated Articles 14 and 19 of the Constitution because it had been left to the absolute discretion of the authorities concerned to either take recourse to section 131 or to section 132, which is more drastic provision and no criterion had been laid down as to in which cases section 132 had to be applied. Section 131 is a general power given to the Income-tax Officer etc. for enforcing the attendance of persons, for issuing commissions or compelling the production of accounts or other documents. Under section 131, for instance, the Income-tax Officer may even compel a witness to produce books of account and other documents which he may consider to be helpful to the enquiry. Section 132, on the other hand, is directed to compel compliance with notices already issued or which may be issued. Section 131, therefore, gives power to compel production of persons and books while section 132 is intended to give power to search or seize documents which the persons concerned are likely to withhold. There is, therefore, a valid classification and a distinction based on the reason to believe by senior officials, which reason is to a certain extent subject to judicial scrutiny, that the books will not be produced, cannot be struck down as discriminatory particularly when sufficient safeguards have been provided. The object of the Legislature in enacting section 132 is both to avoid tax evasion and facilitate enquiry in proceedings. Search warrants may be issued against an assessee who has filed a return or has failed to file a return and the apprehension is that he will destroy the books so that the proper income-tax is not assessed against him. It can also be issued to witnesses who are possessed of books and documents which may help the assessee in arriving at a correct assessment but it is apprehended that inter alia out of vindictiveness or ill-will or even indifference towards the assessee such person, if summoned as a witness, will not produce

the documents or may destroy the same. There is, therefore, in my opinion, a valid classification of persons against whom proceedings under section 132 may be taken.

29. It was then contended by Mr. Veda Vyasa that search and seizure may be ordered at the sweet will of the Director of Inspection or the Commissioner. That is not so. The Director of Inspection and the Commissioner are very senior officials. They must have reason to believe that relevant or useful books or documents will not be produced. The existence of reason to believe is, to a certain extent, justiciable, as discussed hereinbefore. The search and seizure is confined to relevant or useful books of account. The provisions of the Criminal Procedure Code have been made applicable and by virtue thereof and of rule 112 the search has to be conducted in the presence of witnesses and the Director of Inspection or the Commissioner has to record reasons. No official below the rank of Income-tax Officer can be authorised to search or seize and that also only the useful and relevant books. Under sub-section (8) of section 132 the books of account or other documents cannot be retained by the authorised officer for a period exceeding 180 days except after recording reasons in writing and taking the approval of the Commissioner, and the Commissioner cannot authorise the retention for a period exceeding 30 days from the completion of the relevant proceedings. The persons concerned are entitled to object to the order of the Commissioner by an application to the Board of Direct Taxes. They are also entitled to make copies or take extracts from the books or documents seized. Search of a premises by itself no doubt offends the right of a subject to hold property guaranteed under article 19 but searches necessitated for avoiding tax evasion or facilitating the making of assessment cannot but be termed as reasonable restrictions on the rights of the subjects. Similarly, seizure of documents for a limited period for the purposes of assessment would also constitute reasonable restriction. It follows that the section is not hit either by Article 14 or by Article 19 of the Constitution.

30. Having come to the conclusion that the search and seizure in this case was legal I need not decide the question as to whether the documents searched and seized in violation of Article 19 or of section 132 can be retained or not. It is, however, necessary to decide one other question, namely, whether the information collected by the Department in pursuance of an illegal search can be used as evidence and this is so because in two other writ petitions, being writ

petitions Nos 798-D of 1966 and 800-D of 1966, we heard arguments only on this question and not on the question whether the search or seizure in those cases was legal or illegal, while Civil Writ No. 58 of 1966 was compromised without prejudice to the contention of the petitioners that such evidence cannot be used, and, therefore, if the conclusion is that such documents can be used, it will be unnecessary to decide the question of legality of the search in those cases.

In *Weeks v. United States*, (1914) 232 U. S. 383, it was held that the Federal Court could not use as evidence something unreasonably seized by a Federal Officer. In *Burdeau v. McDowell*, (1921) 256 U. S. 465 however, it was decided that if something was seized by someone acting without complicity on the part of the United States and gives that to the Government the prosecution was entitled to use it. The exception made to the Federal exclusionary rule in *McDowell's case*, (1921) 256 U. S. 465 to the effect that the evidence obtained by an illegal search made by the State officers without Federal participation is admissible was, however, repudiated in a later decision. Similarly, it has been held in several cases that documents or things seized in violation of the Fourth Amendment could not be used in evidence even in State Courts. Mr. Veda Vyasa relied on *Dollree Mapp etc. v. Ohio*, (1961) 6 L. Ed. 2d. 1081, and *Winston Massiah v. United States*, (1964) 12 L. Ed. 2d. 246, in support of his proposition that any document seized in violation of the Fourth Amendment in United States and Articles 14 or 19 in India could not be used in evidence. The reason of the rule, according to Mr. Veda Vyasa, is that unless forbidden, the overzealous prosecutors or the investigators will cease to have any regard for the Constitution and seize documents in violation thereof believing that even if the seizure is held to be illegal, they will at least be entitled to use the evidence. It was, therefore, necessary, according to Mr. Veda Vyasa, to exclude such evidence wherever the seizing officer blundered so that the Constitution and the laws were obeyed. Mr. Veda Vyasa reminded us that the Courts are the guardians of the Constitution and protection against arbitrary searches and seizures was to give effect to the determination by the people that they would for ever be secure in the persons and effects from intrusion by the State except under a proper warrant and if use of such evidence were to be allowed it will create a big hole in the Constitution.

Mr. Desai, on the other hand, relied on *Kuruna v. Queen*, (1955) A. C. 197, where it was held that the law did not

reject relevant evidence on the ground that it had been obtained by illegal means. Lord Goddard C. J., referring to some of the American decisions, said—

"Certain decisions of the Supreme Court of the United States of America were also cited in argument. Their Lordships do not think it necessary to examine them in detail. Suffice it to say that there appears to be considerable difference of opinion among the judges both in the State and Federal Courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution. At any rate, in *Olmstead v. United States*, (1928) 277 U. S. 438, the majority of the Supreme Court were clearly of opinion that the common law did not reject relevant evidence on that ground."

31. Though in *Ohio's case*, (1961) 6 L. Ed. 2d 1081 the Supreme Court of the United States said that the rule which excludes unconstitutional evidence from being admitted is an essential part both of Fourth and Fourteenth Amendments, Mr. Veda Vyasa suggested that the said rule as developed in the United States was not only a command of the Fourth Amendment but also a judicially created rule of evidence and there was no reason why the same rule of evidence should not be created by the Courts in India because Article 19 in our Constitution is intended also to serve the same purpose as the Fourth Amendment in the United States. There are two ways of looking at the American decisions. One way of looking at those decisions may be, as suggested by Mr. Veda Vyasa that the exclusionary rule is a judicially created rule of evidence. If that be so then it would be open to the Legislature to override that rule and permit use of evidence illegally obtained. In that situation the matter will depend on the provisions of the Indian Evidence Act. Of course, it would be a different matter as to what value should be attached to an evidence illegally seized. No provision of the Evidence Act has been shown to us by Mr. Veda Vyasa which excludes such evidence. It is the other angle which creates difficulty. If it be held that the exclusionary rule is based on the Fourth Amendment then an illegal seizure would be inasmuch violation of Article 19 in India as it would be in violation of the Fourth Amendment in the United States.

Even so Article 19 does not, in my opinion, forbid the use of evidence obtained as a result of an illegal search. It may be argued in support of the exclusionary rule that the Article 19 makes the right to acquire and hold property sacred and any property seized in viola-

tion of Article 19 should be completely restored. There is no restoration unless the parties are placed in a position in which they stood before the seizure and that unless such evidence is completely excluded there will not be any perfect restitution. It is true that in appropriate cases the Court may order restoration of the property illegally seized but so far as the use of information gathered as a result of such seizure is concerned, the Court, or the appropriate authority, has in any case, acting within the law, the power to call for such information and property and use the same in evidence. If it is done in accordance with law, no violation of Article 19 arises. The information gathered, therefore, can otherwise be reached by the Courts or other concerned authorities. That information gathered serves as a check on the person subjected to search and seizure that he will not destroy the records or conceal the information. If he produces it in pursuance of summons or notice it can undoubtedly be used. If, on the other hand, he withholds it, it cannot be said that Article 19 will exclude such evidence because he has no fundamental right to withhold the records and information. My conclusion, therefore, is that information gathered as a result of illegal search and seizure can be used subject to the value to be attached to it or its admissibility in accordance with the law relating to evidence.

I will take an extreme case where documents are illegally seized and not only is the information kept in the minds of the concerned authorities but complete copies thereof are kept. On the one hand, Article 19 may be construed to mean that complete restitution of property would require restitution of those copies as well. On the other hand, it may be said that since the Court or the authority has still the power to call for that information, the authority may use those copies if the information or the documents are not produced. In that situation it cannot be argued that Article 19 forbids the use of such copies completely. What will be the situation if there is no power in law in the authority concerned to call for such information or documents does not arise before us and I need not consider that. I would like to make it clear that I am expressing no opinion on the impact of article 20 on the use of such information.

32. In the circumstances, this petition fails and is dismissed but with no order as to costs.

33. S. N. ANDLEY, J.: I entirely agree.

RSK/D.V.C.

Petition dismissed.

AIR 1969 DELHI 112 (V 56 C 17)

HARDAYAL HARDY, J.

Hardit Singh Giani, Appellant v. Registrar of Companies, New Delhi, Respondent.

F. A. O No. 47-D of 1966, D/- 6-11-1967, from order of Dist. J., Delhi, D/- 21-12-1966.

Companies Act (1956), Ss. 524, 515 and 647 (as amended in 1960) — Applicability — Winding up subject to supervision of court — Removal of liquidator — Power of Court — Liquidator can be removed 'on cause shown'.

Unlike section 515 under which the court can remove the liquidator in voluntary winding up on cause being shown, section 524 confers plenary power of appointment and removal of liquidator on the court in the case of winding up subject to its supervision. Although the extent of Court's power is not delimited by the section it is implicit in the section that an order of removal of liquidator can only be passed or at any rate should be passed only for good cause shown and not in an arbitrary manner. It cannot therefore be said that section 524 confers absolute discretion on the Court and as such the court is not bound to give any reasons in support of the order made by it and that in any case the correctness of those reasons cannot be canvassed before the High Court. Consequently an order for removal of a liquidator can only be passed "on cause shown" and not without justifiable reasons (1867) 4 Eq 692 and (1872) 14 Eq 492, Ref.; (1879) 12 Ch. D. 325 and (1880) 16 Ch. D. 107 and (1887) 36 Ch. D. 299 and 1936-6 Com Cas 422 (Cal) and AIR 1924 Bom 339, Rel. on.
(Paras 28, 29, 30)

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(1924) AIR 1924 Bom 339 (V 11)= ILR 48 Bom 471, Kaikhushru Nusservanji v. Tata Industrial Bank Ltd.	36
(1887) 36 Ch. D. 299=57 LJ Ch 127, In re Adam Eyton Ltd. Ex parte Charlesworth	35, 36
(1880) 16 Ch. D. 107=44 LT 259, Ex parte, Sheard; In re Pooley	24
(1879) 12 Ch. D. 325=28 WR 203, In re, Sir John Moore Gold Mining Co.	33, 35, 36
(1872) 14 Eq 492, In re, British Nation Life Assurance Associa- tion	32, 33
(1867) 4 Eq 692=17 LT 61, In re, Marseilles Extension Railway and Land Co	13, 31

H. R. Sawhney, Sr. Advocate with R. C. Beri, for Appellant; Dipak Chaudhry and Satish Chander Saxena, for Respondent.

JUDGMENT: I have found it difficult to decide this case. Both during the course of counsel's arguments and afterwards my mind has undergone several modifications and changes of opinion. Even today, I find it a difficult question of jurisdiction and discretion.

2. The appellant Dr. Hardit Singh Giani was Liquidator of National Planners Limited which is now in liquidation. The company was incorporated on 23-2-1946 as a private company limited by shares under the Indian Companies Act 1913, but was soon converted into a public company by a special resolution passed on 5-6-1946. The nominal capital of the company was Rs. 20,00,000/- divided into 100,000 preference shares of Rs 10/- each and 20,000 ordinary shares of Rs 5/- each, while its paid up capital according to the latest balance-sheet of the company as on 30-6-1949 filed in the office of the Registrar of Companies Delhi was Rs. 96,394/50 One Roshan Lal (since deceased) was its Managing Director while his brother Kundan Lal was one of its Directors.

3. The main object for which the company was established was to carry on at Ghaziabad in the State of U. P. the business of land development and colonising. But its dealings with the public appear to have attracted the attention of the police and criminal prosecutions were launched in the State of Uttar Pradesh against all the Directors of the company on charges of cheating etc.

4. At a general meeting of the shareholders of the company held on 26-10-1953 it was resolved to wind up the company voluntarily and Dr Hardit Singh Giani was appointed as a Liquidator. The winding up was subsequently brought under the supervision of the Court by an order made by the then District Judge Delhi, on 26-3-1954 and Dr. Hardit Singh continued to act as Liquidator. On 25-4-1955 the Liquidator settled the list of contributories and the examination of the Managing Director was also concluded by him on 4-11-1955. The Liquidator also filed 25 petitions in the court of the District Judge Delhi for recovery of amounts due from the contributories. Meanwhile on 1-4-1956 the Companies Act 1956, came into force and the District Judge forwarded the record to the High Court of Punjab in the belief that the High Court alone had jurisdiction to deal with the winding up proceedings. The High Court

by its order dated 20-11-1957 directed the record to be sent back to the District Judge, Delhi. But it appears that the record was not received in the Court of District Judge till August 1958. Meanwhile on an application filed by Shri Roshan Lal in the court of a Magistrate at Aligarh, where he was being prosecuted, the record was summoned by the learned Magistrate which resulted in a stalemate.

5. The trial of the criminal case pending against Shri Roshan Lal and other Directors of the company ended sometime in 1960 resulting in their conviction and imposition of sentences of imprisonment on them. In the following year the appeals filed by them were disposed of by the High Court of Allahabad.

6. On 26-10-1961 the Liquidator applied for the return of the books and started liquidation proceedings in right earnest. According to his learned counsel, Mr. H. R. Sawhney, the Liquidator had to prosecute or defend 347 cases in various courts in and outside Delhi, out of which 105 cases were hotly contested. The company owned 74,000 sq. yards of land in Ghaziabad and about 700,000 sq. yards of land in Meerut. Due to mismanagement on the part of the Directors of the company land belonging to it was trespassed upon by strangers and the Liquidator had to take action under section 456 (1) of the Companies Act and eventually succeeded in obtaining possession of 74,000 sq. yards of land in Ghaziabad on 31-5-1962. But the possession of the land in Meerut has not been obtained by him till today as the persons in possession thereof have claimed ownership rights therein under the U. P. Abolition of Zamindari Act. The Liquidator, who will hereafter be referred to as "the appellant" alleges that the proceedings relating to the said land are still pending.

7. In April, 1963, the appellant with the permission of the District Judge Delhi agreed to sell 68,000 sq. yards of land out of the company's land in Ghaziabad to one Prem Parkash Bhutani at the rate of Rs. 312 per sq. yard and received a sum of Rs. 100,000/- as earnest money from the purchaser. He alleges that the completion of the sale transaction was however stalled by the obstruction created by Shri Roshan Lal who had unauthorisedly sold out of the said land 27000 sq. yards at the rate of 10 annas per sq. yard thereby making it impossible for the appellant to fulfil his commitment with Shri Prem Parkash Bhutani. The latter moved the court of the learned District Judge and asked for the refund of his money on the ground that the company was not in a position to convey a valid and subsisting title in

respect of the land agreed to be sold to him.

By his order dated 12-3-1965, the learned District Judge, directed that out of the amount received from Shri Bhutani, the appellant should return Rupees 90,000/- to him in two instalments. The appellant alleges that the said amount has since been returned to the purchaser as directed by the learned District Judge. He further alleges that he filed two applications in the court of the District Judge Delhi against the persons to whom land had been unauthorisedly transferred by Shri Roshan Lal for restoration of possession to the appellant and that by an order dated 8-3-1966 the learned District Judge ordered restoration of possession of the said land to the appellant and proceedings for contempt being initiated against Shri Roshan Lal. Against the order passed by the learned District Judge, appeals (being F.A.O. Nos 67-D of 1966 and 102-D of 1966) have been filed by the transferees which are pending in this Court and the appellants have obtained stay orders in those appeals.

8. The appellant further alleges that as a result of Shri Roshan Lal's examination several cases of criminal breach of trust were filed against him. He was convicted in five of these cases and sentenced to varying terms of imprisonment and fine while several other cases were still pending when he died.

9. The appellant submits that although Shri Roshan Lal was now beyond the reach of law, misfeasance proceedings against his brother Shri Kundan Lal were still pending. These proceedings, the appellant alleges had naturally created a great deal of resentment in their minds against him and they had started action for his removal from the office of liquidator. The first attempt in this behalf was made by Shri Kundan Lal and his nephew Sudershan Kumar in the year 1954 when they applied for his removal in the Court of the District Judge, Delhi. The application was however dismissed by Shri S. B. Kapoor (now Hon'ble Mr. Justice S. B. Kapoor of the High Court of Punjab and Haryana) by his order dated 20-8-1954.

The second application was filed by Shri Roshan Lal in the year 1958 before Shri H. R. Khanna (now Hon'ble Mr. Justice H. R. Khanna of this Court). The application remained under inquiry for two years till it was dismissed by an order dated 3-6-1960. The dismissal of this application was followed by a third application filed by Shri Kundan Lal and his associate Shri Kanti Prashad which was again dismissed by Shri H. R. Khanna on 22-7-1960. The fourth application was by one Lakshman Uppal along with Shri Roshan Lal and Kun-

dan Lal; but this too was dismissed on 6-1-1961.

10. Undaunted by the dismissal of their repeated applications, Shri Kundan Lal and his brother set up one Maya Ram to move an application for the removal of the appellant but his application was also dismissed by Shri P. P. R. Sawhney, the then District Judge Delhi on 31-1-1963. Two more applications were then filed by Shri Kundan Lal and others, but both of them were dismissed on 21-2-1963 and 9-5-1963 respectively.

11. In 1966, Shri Kundan Lal addressed a lengthy complaint to the Chairman, Company Law Board and sent its copies to the Registrar of Companies, the Superintendent of Police, C.I.D. and the District Magistrate Delhi.

12. It appears that Shri Kundan Lal's efforts bore fruit at last and on 28-5-1966 the Registrar of Companies, filed an application in the court of the District Judge Delhi under sections 515 (2) and 524 (4) of the Companies Act, 1956, read with sections 213 (2) and 224 (3) of the Indian Companies Act, 1913, praying for the removal of the appellant as Liquidator of the company and for the appointment of the Official Liquidator attached to the High Court as Liquidator in his place. A notice of the application was issued by the learned District Judge to the appellant who was impleaded as sole respondent in the said application. The appellant filed a lengthy reply accompanied by copies of documents and raised several preliminary objections besides replying to the allegations on merit.

13. Learned District Judge (now Hon'ble Mr. Justice Jagjit Singh of this Court) relying upon the judgment of Malins V. C. in re: Marseilles Extension Railway and Land Company, (1867) 4 Eq 692 held that it was not necessary to take any evidence with regard to the allegations of misappropriation and misconduct on the part of the appellant because on a consideration of all the circumstances, it was advisable and in the interest of the creditors and contributories of the company that the appellant should be removed from his office and that his removal would help in putting more speed into the winding up proceedings. What the learned District Judge said, may better be reproduced in his own words:

"It seems to me that there are sufficient grounds for removing the Liquidator and it is not necessary to take evidence regarding any alleged act of misconduct or personal unfitness of the Liquidator. In that view of the matter, it is also unnecessary to consider as to whether or not from the written statement of the Liquidator any adverse inference can be drawn. The undisputed

acts go to show that continuance of Dr. Hardit Singh Gianly as Liquidator is not desirable and in the interest of the Creditors and the Contributories of the Company. I would like to make this clear that his removal will not imply that any allegation of misconduct, misappropriation or unfitness has been established against him. That will be matter for determination in other appropriate proceedings."

14. The present appeal is directed against the aforesaid order of removal passed by the learned District Judge, Delhi.

15. In the earlier part of this judgment I have given a somewhat lengthy account of the various proceedings initiated by and against the appellant. My main object in doing so was to show that there is a considerable amount of animosity and bitterness against the appellant on the part of Shri Kundan Lal who appears to be the prime mover behind the action taken by the Registrar against him. It is, therefore, natural that there should be a great deal of exaggeration in the charges levelled against the appellant. This, however, does not mean that the appellant's own conduct is entirely free from blemish. The winding up proceedings which commenced 14 years ago are nowhere near their end. Neither the creditors nor the contributories have been paid anything out of the assets of the company. Three different firms of auditors and accountants, namely, Messrs. Walker Chandiok and Company, Messrs. H. L. Gupta and Company and Messrs. R. N. Bhatnagar and Company have made several qualifications and reservations in their audit reports on the Liquidator's statements of accounts for the period ending 26-10-1953 to 31-10-1965. Net realisation of assets by the appellant during this period was stated to be Rs. 1,52,433/09 as against disbursement of Rs. 1,64,888/31 out of which nothing has been paid to the creditors or contributories of the company.

It is true, as has been contended by Mr. H. R. Sawhney, learned counsel for the appellant, that the realisations and disbursement included the sum of Rupees 1,00,000/- received by the appellant from Shri Prem Parkash Bhutani returned by him under the orders of the District Judge, Delhi. But the fact still remains that whatever amount has been realised, the whole of it has been spent by the appellant on litigation, general charges, establishment and entertainment. Mr. Sawhney has also taken me through the various orders made by the successive District Judges in which the charges of misconduct and misappropriation levelled against the appellant have been held to be either un-

proved or baseless. He has also taken me through the reports of the auditors on the statements of accounts filed by the appellant and has strenuously argued that the various objections raised therein were objections of a routine nature which were to be found in the audit reports of almost every company. He has also endeavoured to show that the appellant could not be held responsible for some of the shortcomings to which attention has been drawn by the auditors in their reports.

16. Mr. Sawhney has also vigorously argued that the order under appeal suffered from a grave infirmity inasmuch as one of the grounds on which the learned Judge has based his conclusion is factually incorrect, while the other three, even if they were correct, did not justify the order of removal. As this was the main ground of attack against the order, I should like to deal with it at some length before I come to deal with the cases to which reference has been made by the learned counsel on both sides. The learned District Judge has observed that out of the numerous allegations made against the appellant there can be no doubt regarding the following facts:

"(a) Majority of the creditors of the Company in a meeting held on 30/3/1963 made very serious allegations against the liquidator which amounted to their having no faith in him.

(b) The winding up proceedings have been dragged on for over 12 years without the creditors and contributories being paid anything.

(c) One of the alleged creditors of the company was appointed as his clerk by the liquidator which appointment was to say the least, undesirable.

(d) The assets so far realized have been spent on Litigation, Office, Traveling and conveyance expenses."

17. Mr. Sawhney has challenged the factual basis of the statement that the majority of the creditors of the company in a meeting held on 30-3-1963 had made serious allegations against the liquidator which amounted to their having no faith in him. In this connection he invited my attention to the minutes of the proceedings of the meeting of the creditors held on 30-3-1963 under the Chairmanship of the Official Liquidator, as recorded at pages 63 to 79 of the Liquidator's Minutes Book. According to these minutes the meeting was attended by 9 creditors of the company including the appellant himself. The names of the creditors mentioned therein are as follows:

1. Shri Amar Singh Bhalla,
2. Shri Kajori Lal,
3. Shri K. P. Aggarwal,
4. Shri Gopal Dass Dhingra,
5. Shri Sahib Dayal Kapur,

6. Shri Inder Sain Jain,
7. Shri Sher Singh Yadav (Clerk of Liq.)
8. Shri Nand Lal Bajaj,
9. Shri Hardit Singh Giani, Liquidator.

17A. The first objection was raised at the meeting by Shri K. P. Aggarwal who objected to the presence of Shri Amar Singh Bhalla and Shri Sher Singh Yadav and alleged that both these persons were not creditors of the company. His allegation against Shri Amar Singh Bhalla was that he was in collusion with the Liquidator and had got his name falsely entered in the Schedule of Creditors with the object of inflating the liabilities of the company. As regards Shri Sher Singh Yadav his allegation was that he was merely a clerk of the Liquidator and was not a creditor of the company. He alleged that the Liquidator Dr. Hardit Singh Giani was himself also not a creditor of the company. He, therefore, objected to the participation of these three persons in the proceedings of the meeting. The contention of Shri K. P. Aggarwal was supported by the remaining five creditors, namely Sarvshri Kajori Lal, Gopal Dass Dhingra, Sahib Dayal Kapur, Inder Sain Jain and Nand Lal Bajaj. The appellant's reply to the objection raised by Shri K. P. Aggarwal was that the names of Shri Amar Singh Bhalla and Shri Sher Singh Yadav and his own appeared in the list of creditors. Their claims having been admitted by him as Liquidator, they had a right to participate in the meeting and that Shri Jagat Dhish Bhargava, Official Liquidator, who was Chairman of the meeting had no authority to question as to whether certain person was or was not a creditor.

18. The appellant's reply to Shri K. P. Aggarwal's objections was followed by an objection raised by Shri Amar Singh Bhalla who maintained that he was a creditor of the company and had a right to participate in the meeting. He, however, stated that at the meeting of the creditors held on 2-3-1963 it had been decided that a notice of the meeting should be given to all the creditors for 30-3-1963 but no such notice having been sent at the expense of the creditors, the meeting could not be held. The objection raised by Shri Amar Singh Bhalla was supported by the appellant and Shri Sher Singh and Shri Inder Sain Jain.

19. The Chairman, however, ruled that the question whether a particular person was or was not a creditor could not be gone into by him as the list of creditors was final and binding so far as he was concerned and if according to the objecting creditors the name of any person had been wrongly entered in the list

their remedy was to take appropriate proceedings in a court of law. The Chairman also overruled the objections raised by Shri Bhalla.

20. As regards the accounts placed before the meeting of the creditors the same were supported by Shri A. S. Bhalla, Shri Sher Singh, Shri Inder Sain Jain and the appellant himself, and the only persons who opposed the accounts and alleged that the same had been fabricated and falsified in order to diminish the assets of the company and that large sums of money had been taken away by the Liquidator and misappropriated by him under the cloak of expenses, were Shri K. P. Aggarwal, Shri G. D. Dhingra, Shri Kajori Lal and Shri Nand Lal.

21. According to the Schedule of Creditors Shri K. P. Aggarwal and Shri G. D. Dhingra were creditors to the extent of Rs. 800/- and Rs. 750/- respectively, while Shri Amar Singh, Shri Sher Singh and Shri Inder Sain were creditors to the extent of Rs. 3048/9/-, Rupees 3942/15/9 and Rs. 5260/- respectively. Even if the appellant's name is not to be included in the list of creditors, the contention urged by Mr. Sawhney is that it was incumbent upon the learned District Judge to have gone into the question as to whether Shri Amar Singh Bhalla and Shri Sher Singh and the appellant were in fact the creditors of the company before coming to the conclusion that the majority of the creditors had made serious allegations against the appellant which amounted to their having no faith in him. The Schedule of Creditors had been prepared as far back as 1955 and had been produced from time to time during the course of the various applications filed against the appellant before successive District Judges without any objections having been raised as to its correctness. Mr. Sawhney contended that it was only a small (number of?) creditors in value who had made allegations against the appellant and expressed lack of faith in him.

22. Mr. Sawhney further contended that it was true that the winding up proceedings had remained pending for over 12 years without the creditors having been paid anything. He however submitted that there was scarcely any justification for fastening responsibility for the delay on the appellant who, according to the learned counsel, had done everything in his power to make recoveries and to bring the persons responsible for mismanagement of the affairs of the company to book. He had also striven hard to take under his control the property of the company and had taken steps to sell at a profitable price whatever land he was able to secure. He was however faced with stubborn opposi-

tion at the hands of Shri Roshan Lal and his brother. Mr. Sawhney further contended that whatever suits and proceedings had been filed by the appellant, and there were scores of them, the same were filed with the permission of the District Judge and were prompted by a desire to advance the interest of the company. Legal proceedings necessarily entailed expense, inconvenience and a great deal of travelling and moving about. If the learned District Judge was inclined to hold that any of those expenses were unjustified he should have gone into the matter and allowed the appellant to lead evidence in support of the claim made by him.

23. As regards the appointment of Shri Sher Singh Yadav as a clerk by the appellant, Mr. Sawhney contended that Shri Sher Singh had been Manager of the company from 1-4-1948 to 25-4-1952. He was therefore aware of the misdeeds of the Managing Director and his confederates and had helped the appellant in their prosecution. He was previously getting Rs. 100/- per mensem as his salary but after the company went into liquidation his salary was reduced to Rs 50/- per mensem only plus one per cent commission on realisation of assets. Mr. Sawhney submitted that the total commission earned by this employee during a long term of 12 years came to a modest sum of Rs. 1000/- only. Mr. Sawhney strongly urged that the very foundation on which the learned District Judge had based his order was shaky and therefore the order for the removal of the appellant did grave injustice to his client who had honestly and sincerely devoted 14 years of his life to the job of winding up of this company and now when the opposition of his enemies to his efforts to complete the proceedings, was on its last legs (Shri Roshan Lal having died and his brother Kundan Lal having been involved in misfeasance proceedings), it was iniquitous to remove the appellant and thereby subject him to the stigma and ignominy of removal from office, besides depriving him of the remuneration to which he would be justly entitled under the law.

24. Mr. Deepak Chaudhry, learned counsel for the Registrar of Companies argued on the other hand that according to law the District Judge had absolute discretion to appoint or remove a liquidator and unless it was shown that discretion had been exercised unreasonably or in circumstances which amounted to an abuse of power, it could not be interfered with in appeal. He also urged that according to the Minutes of the meeting of creditors held on 30-3-1963, the appellant could claim majority in his favour only if Shri Amar Singh

Bhalla and Shri Sher Singh were held to be genuine creditors. He submitted that apart from Shri K. P. Aggarwal, five other creditors of the company, namely, Shri Kajori Lal, Shri Gopal Das Dhingra, Shri Sahib Dayal Kapur, Shri Inder Sain Jain and Shri Nand Lal Bajaj had also supported the objection that these two persons as well as the appellant were not genuine creditors of the company. The status of these persons being under challenge, Mr. Chaudhry argued that the learned District Judge was perfectly justified in holding that the majority of creditors had lost faith in him. Mr. Chaudhry further urged that whatever be the reasons which prevented the appellant from completing the winding up proceedings, the fact remained that for over 12 years the appellant had not shown any substantial progress nor had the creditors and contributories been paid anything.

Regarding the employment of Shri Sher Singh Yadav, Mr. Chaudhry argued that it was highly undesirable that a person who was closely associated with the previous management and had been a willing tool in their hands as long as they were in office, should have been retained in service by the appellant when the affairs of the company during that very period, were under investigation by him. Moreover, Shri Sher Singh's name had also been included in the Schedule of Creditors settled by the appellant. The employment of such a person who had personal interest in the company's assets was to say the least, highly undesirable and improper. Mr. Chaudhry also argued that it had not been denied by the appellant, as indeed it could not be denied, that whatever assets had been realised during all these years, the same were wholly spent on litigation, maintenance of office, entertainment, travelling and conveyance charges. According to Mr. Chaudhry, it looked as if the only object of continuing the winding up proceedings was to enable the appellant to earn for himself the office, travelling and conveyance allowance out of the moneys belonging to the company and to provide himself with an opportunity to pay large sums of money as professional fees to the lawyers engaged by him.

25. Mr. Chaudhry also argued that Mr. Sawhney was not right in his criticism regarding qualifications and reservations which the auditors had mentioned in their reports on the statements of accounts prepared by the appellant. He strongly repudiated Mr. Sawhney's suggestion that the auditor's comments on accounts were of a routine nature and invited my attention to several items of objections and comments and strenuous-

ly argued that the reports threw a lurid light on the conduct of liquidation proceedings by the appellant. Mr. Chaudhry submitted that the learned District Judge had taken a sympathetic view of the whole matter and had without pronouncing finally on the question of the appellant's unfitness as a liquidator, come to the conclusion that it was not desirable and in the interest of the creditors and the contributories of the company that the appellant should be allowed to continue as its liquidator. Mr. Chaudhry drew pointed attention to the fact that the learned District Judge had made it clear that the removal of the appellant did not at all imply that any allegation of misconduct, misappropriation, or unfitness had been established against him. In fact the learned District Judge was careful enough to say that that question was being left to be determined in other appropriate proceedings. Mr. Chaudhry strongly refuted Mr. Sawhney's contention that it was obligatory on the part of the learned District Judge to have examined evidence in this case, because according to Mr. Chaudhry, the necessity for examining evidence would have arisen only if the order of the appellant's removal had been based on allegations of misconduct, misappropriation or unfitness against him.

26. These being the broad contentions of the parties, I now pass on to the examination of the cases which have a bearing on the question before me.

27. The winding up of the company admittedly commenced before the commencement of the Companies Act 1956 (hereafter to be referred to as "the Act"). Section 647 of the Act as amended by the Companies (Amendment) Act 1960, provides that where the proceedings in any such winding up are pending at the commencement of the said Act, sections 463, 502, 515 and 524 shall, as far as may be, also apply in relation to such proceedings. The company having been ordered to be wound up subject to supervision of the Court, the provisions of section 524 of the Act are attracted. The said section as amended by the Amendment Act 1960 reads:

"(1) Where an order is made for winding up subject to supervision, the Court may, by that or any subsequent order, appoint an additional liquidator or liquidators.

"(2) The Court may remove any liquidator so appointed or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal or by death or resignation.

"(3) The Court may appoint the Official Liquidator as a liquidator under sub-section (1) or to fill any vacancy occasioned under sub-section (2).

"(4) The Court may also appoint or remove a liquidator on an application made by the Registrar in this behalf."

28. Unlike section 515 of the Act under which the Court can remove the liquidator in voluntary winding up on cause being shown, section 524 confers plenary power of appointment and removal of liquidator on the Court in the case of winding up subject to its supervision.

29. Although the extent of Court's power is not delimited by the section it seems to me to be implicit in the section that an order of removal of liquidator can only be passed or at any rate should be passed only for good cause shown and not in an arbitrary manner. I therefore find it difficult to accept the extreme position taken by Mr. Chaudhry that section 524 confers absolute discretion on the Court and as such the learned District Judge was not bound to give any reasons in support of the order made by him and that in any case the correctness of those reasons cannot be canvassed before this Court.

30. I hold that an order for the removal of the appellant can only be passed "on cause shown" and not without justifiable reasons.

31. In (1867) 4 Eq 692, the judgment relied upon by the learned District Judge, Sir R. Malins V. C. while dealing with section 141 of the Companies Act 1862, in a case of voluntary winding up under the supervision of the Court, posed the question what is the meaning of the words "on due cause shown" and gave the following answer:

"On one side it is contended that "due cause" must be something amounting to misconduct or personal unfitness; on the other side it is contended, and I think that the contention is borne out by the case of *Ex parte Pullbrook* that the Court may take all the circumstances into consideration, and if it finds that it is, upon the whole, desirable that a liquidator should be removed, it may remove him. I do not feel much doubt that the latter is the true construction, and that I have the power to remove these gentlemen. I think that in these cases of winding up, the Court is in the same position as regards the company and the liquidator as the Commissioner in Bankruptcy as regards the estate of a bankrupt and his assignees, and it would be most inconvenient if the Court had not the power to remove any officer employed in the winding up."

32. In *re, British Nation Life Assurance Association*, (1872) 14 Eq. 492 the learned Vice Chancellor reiterated his earlier view and observed:

"My opinion is still that I have the power, and that it is a due cause shown if it appears to the court upon the whole

desirable that the removal should take place; or, in other words, that the winding up is likely to go on more advantageously upon the removal of the liquidators appointed than it would by their retention. I am therefore of the opinion that I have the power."

33. The correctness of the view taken by Malins V. C. in the two cases mentioned above was however challenged before the Court of Appeal in England in *re, Sir John Moore Gold Mining Co.* (1879) 12 Ch. D. 325, where Sir Jessel M. R. observed:

Now, what is the meaning of the words "on due cause shown" in the Companies Act, 1862, S. 141? I am not prepared altogether to adopt the view of Vice-Chancellor Malins in the case of (1872) 14 Eq 492. The words must have some meaning, but it is difficult to define the extent to which they distinguish a case from one in which the ordinary words "if the Court shall think fit" are used. I should say that, as a general rule, they point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term."

34. In *Ex Parte, Sheard*; In *re Pooley* (1880) 16. Ch. D. 107 the Court of Appeal had occasion to consider the question of removal of a trustee in bankruptcy which office had been likened by Malins V. C. to the office of liquidator in voluntary winding up. Jessel M. R. dealing with the question observed:

"Questions of this kind are all matters of discretion, though it is a discretion which is to be exercised according to law. The Court of Appeal will not interfere with the exercise of the discretion by the Registrar, if it has been exercised according to law, merely because there may be more or less proved against the man who has been removed. I agree that the removal must not be at mere discretion of the Registrar, but that it must be for good cause shown."

35. The observations of Jessel M. R. in (1879) 12 Ch D 325 came up for consideration before the Court of Appeal once again in *re, Adam Eyton Ltd. Ex parte Charlesworth*, (1887) 36 Ch. D. 299 where a very strong Bench consisting of Cotton, L. J., Bowen, L. J. and Fry L. J. made a special mention of what Sir George Jessel, the late Master of the Rolls had said. The following observations of Bowen, L.J. which represent the considered view of the Court on this question are apposite:

"The case, therefore, is not important for that reason, but I do think it is an important case to the profession because a contention was raised by Mr. Cozens-

Hardy, and based upon the language of Sir George Jessel, the late Master of the Rolls, in (1879) 12 Ch D 325 to the effect that unfitness in the liquidator ought to be shown before he is removed. If anybody understands Sir George Jessel's language in that case to mean that, I think that this Court ought now to lay down that such an apprehension of his meaning is incorrect, and that it is not the sole ground under the statute for which a liquidator can be removed. In many cases, no doubt, and very likely, for anything I know in most cases, unfitness of the liquidator will be the general form which the cause will take upon which the Court in this class of cases acts, but that is not the definition of due cause shown. In order to define "due cause shown" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fairplay to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation. That should be thoroughly understood, I think, as of great importance; and in that sense it seems to me this case is of interest because it clears, once and for all, away the misconception upon which the argument of the Appellant's counsel was based."

36. Both these cases: *In re Adam Eyton* (1887) 36 Ch D 299 and (1879) 12 Ch D 325 were followed by *Mc Nair, J.* of the Calcutta High Court in *In re Pabna Dhanabandar Co. Ltd.* 1936 Com. Cas 422 when dealing with the case of removal of official liquidator under S. 176 of the Indian Companies Act 1913. The same view had earlier been taken by a Division Bench of Bombay High Court in *Kaikhushru Nusservanji Chandabhoy v. Tata Industrial Bank Ltd.* AIR 1924 Bom 339 where it was held:

"In the voluntary winding up of a company the Court can remove a liquidator on cause shown. Apart from personal unfitness also Court can remove a liquidator. The cause shown for the removal of the liquidator is to be measured by a reference to the real, substantial, honest purpose which necessitated the appointment of the liquidator." It is in the light of these principles that the question relating to the appellant's removal has to be approached.

37. Taking an over-all view of the matter and balancing the consideration of fairplay to the liquidator himself and the real, substantial and honest interest

of liquidation, which is the purpose for which the liquidator was appointed, can it be said that the learned District Judge while ordering the removal of the appellant had kept these considerations clearly in view?

38. After giving my anxious consideration to both these aspects and weighing carefully the points made for and against the appellant, I am of the view that the learned District Judge has not shown towards the appellant that amount of fairplay to which he was legitimately entitled. The appellant, in spite of severe handicaps has been carrying on an extremely arduous job. He has had to face tremendous opposition, animosity and stubborn resistance at the hands of those whom he considered to be responsible for mismanaging the affairs of the company. If in the pursuit of his object of bringing the offenders to book and at the same time realising the assets of the company, he was compelled to embark on a career of litigation, the responsibility for that cannot be laid on him alone and may equally be apportioned to the circumstances under which he was working. In the discharge of his duties he may have made some mistakes; in fact, he did make some mistakes; but it cannot be held that he was actuated by malice or self-interest alone and had sacrificed the real, substantial and honest interest of liquidation. On the other hand it is equally true to say that he has allowed the winding-up proceedings to drag on for all these years without making any substantial progress. Neither the creditors nor the contributories have so far been paid anything. Whatever money has been realised has been spent by him on litigation, office, entertainment and conveyance. This cannot by any means be considered to be a wholly satisfactory state of affairs. He has certainly made some mistakes. It is also apparent that the accounts maintained by him are not up to the standard required of him, but in spite of this it is too much to say that he is either unfit or that the interest of liquidation is likely to suffer if he is allowed to continue in office. At the same time he cannot be allowed to go on in his own way and to convert the business of winding up into a life long occupation for himself.

39. I therefore accept the appeal to the extent that the order of removal of the appellant passed by the learned District Judge is set aside, as in my opinion the discretion exercised by the learned District Judge does call for interference of this Court. But at the same time I am of the view that it is in the interest of liquidation that one other person should also be associated with the appellant as liquidator.

40. I therefore direct in exercise of my powers under sub-section (1) of section 524 of the Act that Mr. V. S. Juneja official liquidator of this Court to be appointed Additional Liquidator with the appellant and the two of them between themselves should endeavour to conclude the winding up proceedings without any avoidable delay.

41. Order accordingly.
GGM/D.V.C. Appeal allowed.

AIR 1969 DELHI 120 (V 56 C 18)

L D. DUA, C J. AND OM PARKASH, J.
M/s Kakoo Shah Uttam Chand and others, Plffs. Appellants v. Kamla Wati and others, Defts Respondents

Regular First Appeal No. 128-D of 1960 D/- 19-7-1967, against the decree of S. J. Ist Class, Delhi, D/- 8-3-1960.

(A) T. P. Act (1882), S. 58 (f) — Mortgage by deposit of title deeds.

If a mortgagor by deposit of title-deeds instructs his mortgagee to take delivery of the title-deeds from a prior mortgagee on payment to him of the amount due by the mortgagor, and if after making such payment, the documents of title are taken delivery of by the subsequent mortgagee, then, the legal requirements of a mortgage by deposit of title-deeds must be considered to be fully complied with. (1863) 55 ER 351 Foll. (Para 8)

(B) T. P. Act (1882), S. 58 (f) — Mortgage by deposit of title-deeds — Deposit can be both actual and constructive.

In a case where the title deeds are already with the mortgagee in respect of a prior loan advanced to the debtor, a second loan can also be treated as being secured by the same deposit and want of deposit for a second time does not bar the transaction being a mortgage by deposit of title-deeds. Deposit or delivery of title-deeds can be both actual and constructive. Mortgage by deposit of title-deeds rests on the principle of part performance and is founded on the rule that equity treats that as done which ought to be done. Being a rule of equity it has to be construed keeping in view equitable considerations AIR 1965 S. C. 430 Rel. on. (Para 8)

(C) Registration Act (1908) S. 17 (1) (b) — T. P. Act (1882), Ss. 58 (f) and 59 — Registration of Memo accompanying deposit of title-deeds.

A writing purporting to be a covering letter whereby one only of the two debtors forwards the title deeds of his property to remain in deposit with the creditor by way of equitable mortgage and

it does not embody the terms of the mortgage, viz., the rate of interest or term as to waiver of protest and presentment and is not the sole repository of all the terms of the mortgage by deposit of title-deeds, does not require registration and is, therefore, admissible in evidence. Merely because it contains a recital about a mortgage by deposit of title-deeds, does not necessarily render it subject to compulsory registration.

(Para 9)

If it be a written bargain in the form of a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement, then, it would be compulsorily registrable.

(Para 9)

A mortgage by deposit of title-deeds requires three ingredients : the existence of a debt in present or in future; the deposit of title-deeds; and an intention that the title deeds shall be security for the debt. The intention is indeed the essence of the transaction. The writing in the instant case must be considered as emphasising such intention. AIR 1965 SC 1591 & AIR 1916 PC 115 and AIR 1931 PC 36 and AIR 1950 SC 272, Rel. on. (Para 9)

(D) Civil P. C. (1908), O. 6 R. 2 — Pleadings — Construction — Law of pleadings should not be so rigidly construed as to be inappropriate and not calculated to serve the cause of justice.

In a case where the evidence clearly disclosed that the transaction of equitable mortgage extended to both 6th and 7th of August 1952, but the plaintiff averred it to have taken place on the 6th, the plaintiff was precluded from relying on the mortgage having been effected on the 7th and was non-suited. On appeal, it was held that on the peculiar facts of the case, the lower court's rigid construction of the law of pleadings was inappropriate and not calculated to serve the cause of justice for which the law of procedure was largely designed.

(Para 10)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 1591 (V 52) = | |
| Civil Appeal No. 83 of 1963, D/- | |
| 1-2-1965, United Bank of India | |
| Ltd v. Messrs. Lekharam Sonaram & Co. | 9 |
| (1965) AIR 1965 SC 430 (V 52) = | |
| (1964) 6 SCR 727, K. J. Nathan | |
| v. S. V. Maruthi Rao | 8 |
| (1950) AIR 1950 SC 272 (V 37) = | |
| 1950 SCR 548, Rachpal Mahraj | |
| v. Bhagwandas | 9 |
| (1931) AIR 1931 PC 36 (V 18) = | |
| 58 Ind App 68, (Obla) Sundarachariar v. Narayan Aiyar | 9 |
| (1916) AIR 1916 PC 115 (V 3) = | |
| 43 Ind App 122, Franjiwandas | |
| Mehta v. Chan Ma Phee | 9 |

(1863) 55 ER 351 = 3 New Rep
285, Daw v. Terrell 8

S. N. Chopra and H. K. Sabharwal, for
Petitioner; Iqbal Krishnan, for Respon-
dent.

DUA, C. J.: This is a 'plaintiffs' appeal directed against the judgment and decree of a Subordinate Judge Ist Class, Delhi, dismissing the plaintiffs' suit for the recovery of Rs. 15,900/- comprising of principal and interest claimed on the basis of an equitable mortgage of a house situated in Kucha Chelan, Delhi, effected by Deep Chand deceased, father of defendants Nos. 2 and 3, and husband of defendant No. 1 and by Inder Dev Upadhyaya, defendant No. 4. The suit was dismissed on the finding that the mortgages by deposit of title-deeds have not been proved, the documents Exhibits P. Y. and P. 13 being inadmissible in evidence for want of registration.

2. The only question canvassed before us on appeal in the circumstances lies within a very narrow compass and is confined to the question whether the mortgages in question were effected by means of documents requiring registra-
tion.

3. According to the allegations in the complaint, on 6-8-1952, Shri I. D. Upadhyaya and Shri Deep Chand, father of Vishal Chand Jain and Ramesh Chander (defendants Nos. 2 and 3) and husband of Smt. Kamla Wati (defendant No. 1) borrowed Rs. 10,000/- from M/s Kakoo Shah Uttam Chand, plaintiff No. 1, and executed a demand promissory note for that amount agreeing to pay back the loan with interest at the rate of 12 per cent per annum till the date of payment. As security for the loan due under the promissory note, Shri Deep Chand deposited with the plaintiff-firm by way of equitable mortgage the title-deeds of house No. 2727 in Kucha Chelan, Delhi. On 22-4-1953, Shri Deep Chand and Shri I. D. Upadhyaya took a further loan of Rs. 1,000/- on executing a promissory note promising to pay the amount with interest at 12 per cent per annum. As security for this loan also, a further charge by way of equitable mortgage was created by Shri Deep Chand on the property, the title-deeds of which had already been deposited with the plaintiff-firm for the loan of Rs. 10,000/-.

The suit was instituted on 5-8-1958 and the interest was claimed in the plaint only at the rate of Rs. 7/8/- per cent per annum on the plea that higher rate of interest could not be claimed under the law. As Shri Deep Chand had died in the meantime, his legal representatives were impleaded as defendants.

4. Defendants Nos. 1 to 3 in their joint written statement admitted that Shri Deep Chand had died on 15-9-1953

and that the answering defendants were his legal representatives. They denied the factum of the two loans and also of the creation of equitable mortgage. In further pleas, the only relevant plea to be noticed is the denial by the defendants that the letter dated 6-8-1952 purporting to be signed by Shri Deep Chand Jain created any charge on the property in suit or that the same was admissible for the said purpose. The property was alleged to be joint Hindu family property of the defendants, the mortgage of which was neither for consideration, nor for legal necessity, nor for the benefit of the family, with the result that it was in nowise binding on the defendants. It appears that Shri I. D. Upadhyaya did not appear in spite of service and ex parte proceedings were ordered against him on 5-2-1959.

5. On the pleadings of the parties, several issues were framed, but it is unnecessary to refer to any other issue except issue No. 3 which reads as follows:

"3. Whether Deep Chand deceased created a mortgage by deposit of title-deeds (a) for Rs. 10,000/- on 6th August, 1952?

(b) for Rs. 1,000/- on 22nd April, 1953 on the suit property?"

6. Shri Mangal Sain P. W. 5 is a property dealer residing in Karol Bagh, New Delhi. He claims to have known Shri Deep Chand and Shri I. D. Upadhyaya, defendant No. 4. Both of them had approached the witness for arranging some loan for them to the extent of Rs. 25,000/- or Rs. 30,000/- because they wanted to import rock salt from Italy. Mangal Sain thereupon contacted the plaintiffs in this connection and the plaintiffs agreed to advance the loan against mortgage by deposit of title-deeds. The two prospective debtors agreed to this proposal. Initially a sum of Rs. 10,000/- was advanced to Deep Chand and defendant No. 4, both of whom signed Exhibit P. 8, the promissory note dated 6-8-1952 in the presence of the witness after admitting the contents to be correct. A sum of Rs. 10,000/- was actually paid partly in cash and partly by means of a cheque. The amount given in cash was to be paid to the previous mortgagee of the house who had a claim to the extent of about Rs. 3,040/-. Deep Chand and I. D. Upadhyaya also signed the receipt Exhibit P. 9 dated 6-8-1952 after admitting its contents to be correct.

According to Exhibit P. 9, it may be pointed out, a sum of Rs. 6,000/- was paid by means of a cheque and a sum of Rs. 3,090/- was to be paid by M/s Kaku Shah Uttam Chand plaintiffs themselves to Pandit Inchha Ram with whom the property in question was stated to be al-

ready mortgaged. The balance of Rupees 910/- was also stated to have been paid in cash. The amount due to the previous mortgagee was actually paid by Deep Chand who was accompanied by Roshan Lal at the house of the said mortgagee in the presence of this witness. This payment is evidenced by the receipt Exhibit P. 7, which was attested by the witness Mangal Sain. The executants of the promissory note had agreed to pay interest at the rate of one per cent and at the time of advancing the loan, it was expressly agreed that the title-deeds of the property in question would be obtained by the plaintiffs from the previous mortgagee and the transaction would partake of the nature of a mortgage by deposit of title-deeds.

After payment to the previous mortgagee, the title-deeds were delivered by him to Roshan Lal in the presence of Deep Chand who had also accompanied the witness and Roshan when they went to the previous mortgagee. The amount reserved for payment to the previous mortgagee being Rs. 3,090/- and the amount actually to be paid to the previous mortgagee being Rs. 3,045/-, the balance of Rs. 45/- was paid by the plaintiffs to Deep Chand and defendant No. 4 and in lieu of this payment, Deep Chand and I. D. Upadhyaya executed Exhibit P. 10 dated 7-8-1952. The promissory note Exhibit P. 8, which is payable on demand, it may be pointed out, mentions the rate of interest to be 12 per cent per annum and it also contains a term waiving protest and presentment. About seven or eight months after this transaction, Deep Chand and I. D. Upadhyaya again approached Mangal Sain P. W. 5 with the object of getting a further loan of Rs. 1,000/- arranged. The witness took them to the plaintiffs and the required amount was lent by them to the two debtors, the amount of loan having been paid by means of a cheque. Exhibit P. 11 is the pronote dated 22-4-1953 payable on demand executed by the two debtors in which just like Exhibit P. 8, interest was provided at the rate of 12 per cent per annum and protest and presentment was waived.

Exhibit P. 12 dated 22-4-1953 is the receipt for this amount and in the letter addressed to the plaintiffs Exhibit P. 13, which was dated 22-4-1953, Deep Chand Jain expressly recited that he had already deposited with the plaintiffs the title-deeds of his property house No 2727 in Kucha Chelan for creating an equitable mortgage in respect of the loan of Rs. 10,000/- taken on the basis of a pronote dated 6-8-1952 executed by him and Shri I. D. Upadhyaya. It was further confirmed in this letter that regarding the additional loan on the basis of the pronote dated 22-4-1953 also, the title-

deeds relating to house No. 2727 in Kucha Chelan were to remain in deposit by way of equitable mortgage. Exhibit P. 14 is another letter sent by both the debtors and addressed to the plaintiffs in which the existence of the earlier loan on the basis of a pronote dated 6-8-1952 payable with interest was confirmed and it was added that the amount borrowed on 22-4-1953 was to be an addition to the pre-existing loan of Rs. 10,000/- borrowed on 6-8-1952.

All these documents have been stated by P. W. 5 Mangal Sain to have been signed by the parties concerned in his presence. In his cross-examination, nothing has been elicited which can be considered even remotely to cast any doubt on his testimony or on the genuineness of the documents mentioned above. Indeed before us in his arguments, the learned counsel for the respondents has made no attempt to criticise the testimony of the plaintiffs' witnesses on the transaction in question. It may, however, be pointed out that Mangal Sain has in his cross-examination deposed that without the deposit of title-deeds, the plaintiffs were not prepared to advance the loan. Inchha Ram P. W. 3 is the previous mortgagee with whom Deep Chand had mortgaged this very property. He has proved Exhibits P. 6 and P. 7 and has deposed about the payment to him of the amount by Roshan Lal, son of Uttam Chand on 7-8-1952 and of the return of the mortgage-deed to the person making the payment. In his cross-examination, he has stated that the sale-deed relating to the mortgaged property had been handed over by him to Roshan Lal.

Lal Chand, plaintiff No. 2, a partner of plaintiff No. 1, has appeared as P. W. 7. According to him, the sale-deed relating to the property in question and the previous mortgage-deed had been brought to him on 6-8-1952 and they were again brought to him on 7-8-1952 by Roshan Lal. In his cross-examination, it has been elicited by the defendants that on 6-8-1952, when the pronote was executed, Deep Chand had brought the mortgage-deed and the sale-deed of the property with him. After the execution of the pronote, they were taken back by him. After payment of the amount to the previous mortgagee, Roshan Lal brought documents to P. W. 7. Exhibits P. X and P. Y were put to witness in cross-examination and it was admitted by him that Exhibit P. X had been signed by him whereas Exhibit P. Y had been signed by Deep Chand. Both these documents were admitted to have been executed at the same time and on the same day as Exhibits P. 8 and P. 9 were executed, but Exhibit P. X was not handed over to defendant No. 4 on that date.

The witness has denied that the plaintiffs ever desired to do the business of selling rock salt along with defendant No. 4, though he has admitted that the defendants had taken Rs. 10,000/- for doing the business of rock salt. Roshan Lal has appeared as P. W. 8 and has deposed about Deep Chand having shown to the plaintiffs certified copies of the sale-deed of the property to be mortgaged by him, and also about the witness having paid the amount due to Inchha Ram and thereafter to have secured the mortgage-deed with the endorsement thereon of the receipt of the amount. The original sale-deed was also secured by him at that time. In support of the defendants' denial of the plaintiffs' claim, Wishan Chand, D. W. 1 has denied the signatures of his father Deep Chand on Exhibits P. 8 to P. 14, but his cross-examination shows that his denial is practically valueless.

7. The trial Court came to the conclusion that the title-deeds of the property in question were handed over by Inchha Ram to Roshan Lal on 7-8-1952 when he was paid the amount of the mortgage and not on 6-8-1952. On the basis of this conclusion, the Court did not uphold the plaintiffs' averment in the plaint that equitable mortgage by deposit of title-deeds had been created on 6-8-1952. In view of this averment, the plaintiffs were also held disentitled to prove that the equitable mortgage had been effected on 7-8-1952. The Court added that the incurring of debt and the creation of mortgage were intended to be contemporaneous events because, as deposed by Mangal Sain P. W. 5, the plaintiffs were not willing to advance loans except on the basis of an equitable mortgage. Exhibit P. Y. not being registered and no oral evidence of the mortgage intended to be created by this document being admissible, in the opinion of the Court below, the plaintiffs' claim on the basis of mortgage must fail for want of admissible evidence. In regard to the further loan of Rs. 1,000/- the Court took the view that the mortgage in regard to this loan was created by Exhibit P. 13 and not by deposit of title-deeds which were already with the creditors. Exhibit P. 13 being also unregistered, the plea of additional mortgage was also repelled. On this reasoning, the plaintiffs' suit failed in the Court below.

8. On appeal in this Court, the short question, as already observed, centres round the validity of the two equitable mortgages. The learned counsel for the respondents has in his reply to the appellants' arguments conceded at the outset that the documents should be considered to have been delivered by Deep

Chand to the plaintiffs on 6-8-1952, as recited in Exhibit P. Y. In other words, he has not attempted to support the conclusion of the trial Court that the documents should, on the facts and circumstances of this case, be deemed to have been delivered on 7-8-1952 after their return by the previous mortgagee Shri Inchha Ram P. W. 3. This concession renders it unnecessary for us to consider at length the arguments urged on behalf of the appellants that the title-deeds on the facts and circumstances of this case should be deemed to have been deposited on 6-8-1952 and the alternative submission that in any event, even though the actual delivery of the original sale-deed and the prior mortgage-deed was finally made on 7-8-1952 by Inchha Ram, the said delivery did not affect the validity of the mortgage by deposit of title-deeds in respect of the loan of Rs. 10,000/- actually advanced on 6-8-1952.

It may, however, be observed in passing that the testimony of Roshan Lal P. W. 8 read with the testimony of Lal Chand P. W. 7 and of Mangal Sain P. W. 5, in the light of the contents of Exhibit P. Y., clearly tends to show that on 6-8-1952, the documents of title were shown to the plaintiffs for their satisfaction and after payment of the prior mortgage debt by the plaintiffs to the prior mortgagee, the original title-deeds were actually taken over by the plaintiffs from the prior creditor and the whole transaction being one continuous whole, any legal objection to the validity of the mortgage on the score of the actual final delivery of title-deeds a day later than the advancement of loan seems to us to be misconceived and untenable. Inchha Ram's statement as P. W. 3 does not in any way go against this view. It may be recalled that a part of the amount intended to be advanced as loan to Deep Chand was retained by the plaintiffs themselves to be paid to the prior mortgagee on behalf of the debtors. A sum of Rs. 3,045/- was paid to Inchha Ram out of Rs. 3,090/- retained by the plaintiffs and a sum of Rs. 45/-, the balance of the amount, retained for payment to Inchha Ram was paid to I. D. Upadhyaya, a co-debtor on 7-8-1952. This quite clearly shows that the loan was advanced both on the 6th and 7th of August, 1952. But this apart, it may also be appropriately assumed in the present case that Deep Chand must have authorised the plaintiffs to take delivery of the title-deeds from the prior mortgagee on payment of the debt due to him, and if that be so, then quite clearly no serious legal infirmity can attach to the validity of his mortgage by deposit of title-deeds merely on the ground that a part of the bulk of the loan was initially

advanced on 6-8-1952 and the actual delivery of title-deeds was made to the creditor on 7-8-1952 when also a part of the loan was paid both to the debtor and to his nominee, who was the prior creditor. If a mortgagor by deposit of title-deeds instructs his mortgagee to take delivery of the title-deeds from a prior mortgagee on payment to him of the amount due by the mortgagor, and if after making such payment, the documents of title are taken delivery of by the subsequent mortgagee, then, in our opinion, the legal requirements of a mortgage by deposit of title-deeds must be considered to be fully complied with.

Support for this view seems to us to be forthcoming from the decision of the Master of Rolls (Sir John Romilly) in *Daw v. Terrell*, (1863) 55 E. R. 351. In so far as the additional loan of Rs. 1,000/- is concerned, the view of the Court below that this loan could not be considered to have been secured by a mortgage by deposit of title-deeds because the title-deeds were already with the plaintiffs, is wholly unsustainable. Deposit or delivery of title-deeds can be both actual and constructive and in this case, it must be held to be a case of constructive deposit of title-deeds with the plaintiffs for the purpose of covering the second loan. As observed by Subba Rao J. (as he then was) in *K. J. Nathan v. S. V. Maruthi Rao*, AIR 1965 SC 430, "physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A Court will have to ascertain in each case whether in substance there is a delivery of title-deeds by the debtor to the creditor. If the creditor was already in possession of the title-deeds, it would be hyper-technical to insist upon the formality of the creditor delivering the title-deeds to the debtor and the debtor re-delivering them to the creditor. What would be necessary in those circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction."

In this connection, it must not be forgotten that a mortgage by deposit of title-deeds rests on the principle of part performance and is founded on the rule that equity treats that as done which ought to be done. Being a rule of equity, in our opinion, it has to be construed keeping in view equitable considerations.

9. Coming now to the principal argument addressed on behalf of the respondents, we have to see if Exhibit P. Y. dated 6-8-1952 and Exhibit P. 13 dated 22-4-1953 require registration and being unregistered, the mortgages by deposit of title-deeds must be considered to be invalid or unprovable. This takes up to the relevant statutory provisions. Sec-

tion 58 (f) of the Transfer of Property Act provides that where a person, in the areas to which that section is applicable, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds. According to section 59 of the T. P. Act, where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses.

Adverting to the Indian Registration Act, the relevant clause for our purpose is section 17 (1) (b) which provides for compulsory registration for non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property. The question, therefore, arises whether Exhibit P. Y. and Exhibit P. 13 fall within the terms of this clause. Exhibit P. Y. dated 6-8-1952 reads as under:

"Dear Sir,

Regarding the sum of Rs. 10,000/- received from you by pronote dated today executed by Shri I. D. Upadhaya and myself I hereby send to you the title-deed of my property in Kucha Chelan House No. 2727, to remain in deposit with you by way of equitable mortgage." Exhibit P. 13 dated 22-4-1953 may now be read:

"Dear Sir,

I had already deposited the title-deeds of my property in Kucha Chelan H. No. 2727 to remain in deposit with you by way of Equitable Mortgage in respect of sum of Rs. 10,000/- received from you by pronote dated the 6th August, 1952 executed on that day in your favour by Shri I. D. Upadhaya and myself.

I confirm that regarding the sum of Rs. 1,000/- received from you by pronote dated today by Shri I. D. Upadhaya and myself, the said title-deeds of property in Kucha Chelan, H. No. 2727 shall remain in deposit with you by way of Equitable Mortgage for the amount due under this pronote dated today also"

As the plain reading of Exhibit P. Y. shows, it merely purports to be a covering letter whereby Deep Chand alone has forwarded the title-deeds of his property to remain in deposit with the plaintiffs by way of equitable mortgage. It does not seem to us to embody all the terms of the mortgage. It is significant that this document neither men-

tions the rate of interest to be paid by the debtor on the loan nor does it contain the term whereby protest and presentment was waived. It is, therefore, not easy to sustain the contention that this document purports to be the sole repository of all the terms of the mortgage by deposit of title-deeds which is capable of being effected orally. Merely because a document happens to contain a recital about a mortgage by deposit of title-deeds, does not necessarily render it subject to compulsory registration.

As at present advised, we can conceive of at least four following possibilities of a document connected with a mortgage by deposit of title-deeds:

1. The document may record a past transaction of a mortgage by deposit of title-deeds and may be executed with that intention;

2. The title-deeds may be passed without more or without anything said except that they were to be security;

3. The delivery may be accompanied by a bargain which either is not written, or if written, does not constitute the contract of mortgage; and

4. There may be a written bargain in the form of a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement.

It is, in our view, only the last category of documents which may require compulsory registration. In the present case, it is merely a covering letter emanating only from Deep Chand, one of the co-debtors, forwarding the title-deed with the expressed intention that they were to remain in deposit by way of equitable mortgage in respect of the loan of Rs. 10,000/- taken by the writer and Shri Upadhyaya on a pronote that very day. Such a document quite clearly does not require registration. A mortgage by deposit of title-deeds, it may be remembered, requires three ingredients; the existence of a debt, in present or in future; the deposit of title-deeds; and an intention that the title-deeds shall be security for the debt. The intention is indeed the essence of the transaction. Exhibit P. Y., in our view, is intended to emphasise such intention, the previous existence of which is amply proved on the record, and this letter merely forwards the title-deeds. It is not the sole repository of all the terms of the mortgage, and indeed was not intended by the parties to be an integral part of the transaction between them. It is not even signed by both the co-debtors.

We may here appropriately quote from a judgment of the Supreme Court in *United Bank of India Ltd. v. Messrs. Lekharam Sonaram and Co. etc.* Civil

Appeal No. 83 of 1963 decided on 1-2-1965=(AIR 1965 SC 1591).

"It is essential to bear in mind that the essence of a mortgage by deposit of title-deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under S. 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immoveable property where the value of such property is hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

After quoting from a decision on the original side of the Calcutta High Court and from L. R. 43 Ind App 122=(AIR 1916 PC 115) *Pranjivandas Mehta v. Chan Ma Phee*, 58 Ind App 68=(AIR 1931 PC 36), (*Obla*) *Sundarachariar v. Narayana Ayyar* and 1950 SCR 548=(AIR 1950 SC 727) *Rachpal Maharaj v. Bhagwandas Daruka*, the Court added:

"Applying the principle to the present case, we consider that the letter at Ex. 7 (a) was not meant to be an integral part of the transaction between the parties. The letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. It is important to notice that the letter does not mention details of title-deeds which are to be deposited with the plaintiff-bank. We are, therefore, of the opinion that the view of the High Court with regard to the construction of Ex. 7 (a) is erroneous and the document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property." In view of what has been said above, we do not consider it necessary to deal in detail with the other decisions cited at the bar. What has been said in regard to Exhibit P. Y. goes completely for Exhibit P. 12 as well as a matter of fact, Exhibit P. 13 may also be considered to contain a recital of the past transaction of equitable mortgage in respect of Rupees 10,000/- effected on 6-8-1952 and may be

held to be admissible in evidence for that purpose, but on the view that we have taken in regard to Exhibit P. Y., it is unnecessary to say anything more about Exhibit P. 13 in this connection.

10. Before concluding, we may in passing advert to the observation of the Court below that in the plaint, 6-8-1952 having been pleaded to be the date of the equitable mortgage, it was not open to the plaintiffs to rely on the equitable mortgage having been effected on 7-8-1952. On the view that we have taken, it is not necessary to deal with this point, but we cannot help observing that the Court below has taken far too technical a view of the pleadings in this respect on the facts and circumstances of the present case. The transaction of equitable mortgage quite clearly extended to both 6th and 7th of August, 1952 and to construe the law of pleadings with the rigidity with which the Court below has done on the peculiar facts of the present case, seems to us to be inappropriate and certainly not calculated to serve the cause of justice for which the law of procedure is largely designed. We may, however, say nothing more on this point.

11. For the foregoing reasons, we allow this appeal and setting aside the judgment and decree of the Court below pass a preliminary decree in favour of the plaintiffs for a sum of Rs. 15,900/- with interest thereon from the date of the suit up to the date of the present decree at 7 1/2 percent per annum with costs of both the trial Court and this Court. Future interest from the date of this decree till realisation should be paid at the rate of 4 percent per annum. The amount decreed may be paid on or before 1-1-1968 and failure to do so would render the mortgaged property liable to sale as required by Order 34, Code of Civil Procedure. The appellants would be entitled to their costs, both here and in the Court below. A preliminary decree as required by Order 34, Rule 7, Code of Civil Procedure, may be framed by the office in accordance with the above decision.

12. OM PARKASH, J.: I agree.
TVN/D.V.C. Appeal allowed.

AIR 1969 DELHI 126 (V 56 C 19)

L. D. DUA; C. J.

Shri Krishan Gopal, Appellant v. Haji Mohammed Muslim and others, Respondents.

Second Appeal No. 173-D of 1966, D/- 31-1-1968, from order of Addl. Dist. J., Delhi, D/- 11-10-1965

(A) Civil P. C. (1908) O. 41 R. 22 — Cross objections — Dismissal of—Decree

DL/GL/B530/68

should bear date of judgment of dismissal — Application for certified copy of decree not made within time for appeal — Decree sheet also not prepared — Period of limitation will not be extended — S.5, Limitation Act can be used to claim extension.

A decree dismissing the cross-objections should, in accordance with law, bear the same date on which the judgment dismissing them was given. When an application for a certified copy of the decree dismissing the cross objections was not made within the prescribed period of limitation for the appeals, and the Court had failed to prepare a decree sheet, merely because no decree sheet was actually prepared, would not by itself extend the period of limitation prescribed by the Limitation Act. Such failure can only be pressed into service for the purpose of claiming extension of time under section 5 of the Indian Limitation Act. (Para 6)

(B) Civil P. C. (1908) O. 41 R. 22 — Cross objections — Scope of — Respondent, when should raise cross-objection.

Order 41, R. 22 is apparently a special provision permitting a respondent who has not appealed from a decree, to object to the said decree in the opposite party's appeal as if he had himself preferred a separate appeal.

Where a decree is partly against one suitor and partly against another, one of such parties being satisfied with his partial success, may not prefer an appeal within limitation, but, on the other party appealing may like to reopen the adverse part of the decree. In the larger interest of the cause of justice, it is in such circumstances that the party satisfied with partial success is granted another opportunity of challenging the part of the decree against him upon his opponent preferring an appeal, of which notice is served on him. In order to avail of this right, he has to take cross objections within one month from the date of service on him of notice of the hearing of his opponent's appeal.

(Para 7)

(C) Civil P. C. (1908) O. 41 R. 22 — Cross objections — Decree against some defendants — One defendant's appeal dismissed — Appeal by others — Whether the defendant whose appeal was dismissed can assail the decree and reopen the controversy in the garb of cross objections? (Quære). (Para 7)

(D) Civil P. C. (1908) O. 41 R. 22 — Cross objections — Appeal and cross objections should be heard together — Judgment should be one; and decision incorporated in one decree — Appeal finally disposed of — Cross objection cannot be adjudicated upon later.

The Cross objections are to be heard when the appeal is heard and, as a gene-

ral rule, the Court is expected to dispose of both the appeals and the cross objections together by one judgment and the decision should be incorporated in one decree. By means of a deeming fiction, the cross objections are, for certain purposes, treated as a memorandum of appeal, but they are neither registered as an appeal nor are they clothed with an independent status as such. They do not constitute a separate independent cause or writ but largely draw their source of survival from the competence of the appeal in which they are taken and the exceptions to this dependence are provided in sub-rule (4) of Rule 22.

In the absence of any binding precedent or of any clear provision of law, it would not be advisable to remit the case to the lower appellate court for adjudicating on the cross objections on the merits after the final disposal of the appeal, even if otherwise such a course were legally permissible and called for.

(Para 7)

Cases Referred: Chronological Paras

- (1944) AIR 1944 Lah 433 (V 31)=46
 Pun LR 281, Jan Mohammed v.
 P. N. Razdon 3
 (1920) AIR 1920 Lah 204 (V 7) =
 56 Ind Cas 469, Sant Ram v. Kidar
 Nath 3

P. N. Khanna, for Petitioner; H. R. Khanna, for Respondents.

JUDGMENT: Hafiz Zahir-ud-din, Haji Mohamed Hasham and Mst. Khatun Mahshar instituted a suit against nine defendants, including Shri Krishan Gopal (defendant No. 6 and appellant in this Court) for the recovery of a sum of Rs. 433.50 and ejectment of defendants Nos. 1 to 6 from a plot of land. The grounds on which the suit was based were that Shri Nand Lal deceased, husband of defendant No. 1 and father of defendants Nos. 2 to 6 had taken the vacant plot of land on lease from the plaintiffs and defendants Nos. 7 to 9 and had also executed a rent note in their favour. The lease was taken from Mohamed Hasham, plaintiff No. 2, for a cycle-stand and rent was being paid to Mohamed Hasham in his capacity as the Manager on behalf of all the landlords.

Shri Nand Lal died in March, 1959, leaving behind defendants Nos. 1 to 6 as his legal heirs and representatives. After Nand Lal's death, Krishan Gopal was running the cycle-stand and paid rent to Mohamed Hasham under the terms of the rent deed at the rate of Rs. 25.50 per mensem, and indeed paid the rent till 31-12-1960. As a result of private partition of the said land between the owners in February, 1958, a part of the suit land fell to the share of plaintiff No. 1. In 1961, pursuant to further private partition amongst the

owners, the other portion of the plot fell to the share of Mohamed Hasham and Mst. Khatun Mashar. On these averments, damages were claimed. It is unnecessary to go into further details for the purposes of the present appeal. Suffice it to say that on the trial of various issues framed, the trial Court on 17-8-1963 passed a decree for ejectment of defendants Nos. 1 to 6 from the property in suit and also made a decree for Rs. 433.50 nP. against them.

2. H. Mohd. Muslim, defendant No. 8 in the trial Court took the matter on appeal in the Court of the Additional District Judge, in which it was prayed that the judgment and decree of the trial Court be set aside and, to quote the exact words, "either the decree for ejectment and recovery of rent may be passed in favour of the appellant and respondents Nos. 1 to 3 and No. 10 and 11 or the suit of the plaintiff-respondents may be dismissed with costs." Respondents Nos. 1 to 3 in the lower Appellate Court, it may be pointed out, were the three plaintiffs and respondents Nos. 10 and 11 were Hafiz Mohd. Mian and H. Mohd. Sami, defendants Nos. 7 and 9 respectively in the trial Court. It is obvious from this that the appeal was not directed against Krishan Gopal, defendant in the trial Court and respondent in the lower Appellate Court (Appellant before me). Krishan Gopal presented cross-objections in the lower Appellate Court on 21-12-1963 which were directed against the plaintiffs who were also co-respondents along with Krishan Gopal in the lower Appellate Court, it being added that he had been served with a notice of the appeal on 2-12-1963.

3. An objection was raised in the lower Appellate Court that these cross-objections were incompetent and in view of the decisions reported as Jan Mohammad v. P. N. Razdon, AIR 1944 Lah 433, which followed an earlier decision of the Lahore High Court in Sant Ram v. Kidar Nath, AIR 1920 Lah 204, and a decision of the Punjab High Court given in 1965, this objection was upheld as per order dated 11-10-1965. The disposal of the appeal was, however adjourned on the ground that the minors were to be properly represented. The appeal of H. Mohd. Muslim (Regular Civil Appeal 126 of 1965) was finally dismissed by the judgment and decree dated 6-12-1965. That decree clearly shows that the appeal had been heard on 1-12-1965, but the judgment was announced on 6-12-1965, it having apparently been reserved on 1-12-1965.

4. The appellant in the present appeal is aggrieved only by the order dismissing the cross-objection on 11-10-

1965. The present appeal was presented in the predecessor of this Court on 3-3-1966 and the office objected to the competency of the appeal on the ground that no certified copy of the decree appealed from had been attached with the memorandum of appeal. To this, the appellant's learned counsel replied that the decree in respect of the dismissal of the cross-objections had not been prepared by the lower Appellate Court and it was added that an application for preparing such a decree was pending in the lower Appellate Court and time was sought for producing the certified copy. From the original record, it appears that an application was presented in the Court of Shri M. L. Jain, Additional District Judge, by the appellant on 14-3-1966, praying that a decree should be framed dismissing his cross-objections, it being added that the omission to so frame a decree had apparently been due to an accidental slip. After hearing the arguments of the counsel, the lower Appellate Court on 26-3-1966 directed the decree-sheet to be prepared. It was pursuant to this order that a decree was prepared but bearing the date 26-3-1966, in which it is mentioned that the appeal had come up for hearing on 28-9-1965 in the presence of the counsel for the parties and the cross-objections filed by Shri Krishan Gopal were thereby dismissed. It is also added in the decree that the cross-objections had been dismissed by the order of the learned Additional District Judge dated 11-10-1965. The number of the appeal, as mentioned in the heading, is Regular Civil Appeal No. 126 of 1965.

5. One other circumstance also deserves to be mentioned at this stage. Shri Krishan Gopal had also presented an appeal in the Court of the Senior Subordinate Judge against the judgment and decree of the trial Court, dated 17-8-1963. This appeal was presented in that Court on 20-9-1963 and on 2-4-1964, the same was held to be beyond the pecuniary jurisdiction of that Court, with the result that the same was returned to Shri P. N. Khanna, Advocate, for being presented to the competent Court. Pursuant to this order, on the same day, the appeal was presented in the Court of the learned District Judge. It was noted by the counsel that respondent No 10 (H Mohd. Muslim) had also filed an appeal against the same judgment and decree to which Shri Krishan Gopal had already filed cross-objections which were pending in the Court of the Additional District Judge, in which the next date of hearing was 1-5-1964. Because of this note, this appeal was also transferred to the Court of Shri Udham Singh, Additional District Judge. By means of the order dated 11-10-1965, the learned Additional

District Judge hearing the appeals held the appeal of Shri Krishan Gopal to be barred by time and dismissed the same as such. The main judgment containing reasons dismissing Krishan Gopal's appeal (Regular Civil Appeal No. 127 of 1965) was passed in H. Mohd. Muslim's appeal (Regular Civil Appeal No. 126 of 1965,) which appeal was adjourned for properly impleading some minors, only a short order having been made in Regular Civil Appeal No. 127 of 1965. It may be pointed out that in this Court, the judgment and decree dismissing Krishan Gopal's appeal as barred by time is not being contested and the only grievance urged is that the cross-objections should not have been dismissed as incompetent.

6. Now, the decree dismissing the cross-objections should, in accordance with law, have borne the same date on which the judgment dismissing them was given i.e. 11-10-1965. It is not the appellant's case that an application for a certified copy of the decree dismissing the cross-objections had been made within the prescribed period of limitation for the appeals and the same was not granted all this while because of the failure on the part of the Court to prepare a decree sheet. Merely because no decree-sheet was actually prepared, would not by itself extend the period of limitation prescribed by the Limitation Act. Such failure can only be pressed into service for the purpose of claiming extension of time under S. 5 of the Indian Limitation Act. This step has obviously not been taken by the appellant for claiming the present appeal to be within limitation. But this apart, there are also other obstacles in the way of the appellant which are not easy to surmount.

7. Rule 22 of Order 41, Civil Procedure Code, is apparently a special provision permitting a respondent, who has not appealed from a decree, to object to the said decree in the opposite party's appeal as if he had himself preferred a separate appeal. This rule may appropriately now be read.

"R. 22 (1) Any respondent, though he may not have appealed from any part of the decree may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to

by learned Counsel for the parties. According to Mr. Kakodkar, the 1958 Decree repealed the 1910 Decree. Therefore, the conversion formula in the 1910 Decree is not to be considered for the purposes of taxation. The 1910 Decree being inapplicable, and the 1958 Decree having established parity between the Goan escudo and the metropolitan escudo, it is necessary to go back to the 1911 Decree, according to which, 1 metropolitan escudo was equated to 100 post-republican centavos or 1000 pre-republican reis during the regime of monarchy in Portugal. The argument proceeded that because of the 1911 Decree, the words '500 reis' in Article 132 of the 1906 Decree must be deemed to have been substituted by a half metropolitan escudo or 50 centavos. Accordingly the tax liability in the case contemplated for 100 hectares would be 500 centavos or 50 Goan escudos because of the parity under the 1958 Decree. This figure of 50 Goan escudos is to be multiplied by 10 in pursuance of the 1942 Decree and thus the liability would be 500 Goan escudos and not 8571.6 Goan escudos, as assessed by the Portuguese Government before liberation.

After liberation this liability would be 500/6 Goan escudos=83 Indian Rupees and odd paise and not 1428.6 Indian rupees as assessed by the respondents. It is because the impact of the 1911 Decree is not considered by the respondents therefore the tax liability is about seventeen times more than what it should be according to law. The method of computation of tax followed by the respondents, argued Mr. Kakodkar, is wrong. The error committed by the Portuguese Government in computing the tax has been repeated by the respondents after liberation and the said increase has not the support of law. He further argued that the petitioners too committed the same error when they discharged the tax liability before liberation but thereafter they can seek the protection of Article 265 of the Constitution and decline to pay the excess tax illegally demanded notwithstanding the delay in discovering the error for the first time in March 1967. The above arguments of Mr. Kakodkar are refuted by Mr. Tamba, learned Government Pleader for the respondents. According to him, in the first place, the 1958 Decree did not repeal the 1910 Decree. Secondly, the 1911 Decree did not apply to the territory and, therefore, in spite of parity established by the 1958 Decree, substitution of 50 centavos or half escudo in place of 500 reis in Article 132 of the 1906 Decree is not warranted. Thirdly, the parity between the Goan escudo and the metropolitan escudo came to an end when the Goan escudo ceased

to be a legal tender with effect from 15th May, 1962.

7. The rival contentions urged at the Bar may now be considered. Did the 1958 Decree repeal the 1910 Decree? If it did then no reliance can be placed thereon for the purposes of taxation. Mr. Kakodkar conceded that the 1958 Decree did not repeal the 1910 Decree in express terms, but he hastened to add that it did so by necessary implication. If this argument is valid the petitioners would then be liable to discharge the tax liability by paying 83 Indian rupees and odd paise in place of 1428.6 Indian rupees for 100 hectares, relying on the 1911 Decree. The failure to add a repealing clause in the 1958 Decree prima facie leads to a presumption that it was not the intention of the Portuguese Government to repeal the 1910 Decree. This presumption is rebuttable where comparison of these Decrees reveals an intention to repeal. In *Municipal Council, Palai v. T. J. Joseph*, AIR 1963 SC 1561 (1564), Mudholkar, J., speaking for the Supreme Court, observed:—

"But it is an equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together."

A case of an implied repeal may arise where the latter of the two general enactments is worded in negative terms. It may also arise where the latter general enactment is in affirmative terms but, in fact, it involves that negative, which renders the earlier general enactment inconsistent. Each case of an implied repeal is to be considered on its own facts; the decisions in other cases being illustrative and not determinative. That the 1910 and 1958 Decrees are general enactments is not in dispute. It is well settled that the Courts lean against implying a repeal. This is because the legislature is presumed not to intend that the two inconsistent enactments should co-exist.

Are the 1910 and 1958 Decrees contrary in matter? In other words, are they repugnant to each other? If they are, then the general rule '*leges posteriores priores contrarias abrogant*' will apply: (the latter statute will abrogate the earlier). The inconsistency or repugnancy must be actual and not accidental. It must be real and not superficial. The 1910 and the 1958 Decrees are not word-

ed in negative terms. The 1910 Decree fixed the official value of one Goan rupee at 350 reis. The 1958 Decree fixed the official value of one Goan rupee at 6 Goan escudos for the purposes of exchange. Both these Decrees deal with currency reform. This is their object. The 1958 Decree did establish parity between the Goan escudo and the metropolitan escudo, but it did not say that the official exchange value in the 1910 Decree shall not have effect. The 1958 Decree did not contain that negative which rendered the 1910 Decree inconsistent. The Goan rupee was no doubt withdrawn from circulation as a legal tender, but for the purposes of taxation, it retained its link with the 1910 and 1942 Decrees. The tax became payable in the Goan escudos after 1st January, 1959 but the method of taxation in terms of the 1906, 1910 and 1942 Decrees remained unaffected.

The repugnancy may have arisen, if, for example, the 1958 Decree had equated 1 Goan rupee to more than 350 reis but this is not so in the present case. Mr. Tamba argued that if the 1910 Decree had been inapplicable after 1st January, 1959, the petitioners would not have discharged their tax liability before liberation according to the method followed by the Portuguese Government. The answer to this argument, according to Mr. Kakodkar, is that the petitioners committed an error. This may or may not be so, but what I am required to consider is the law on the subject. Considering the language and the object of the 1910 and 1958 Decrees, I agree with Mr. Tamba that the 1958 Decree did not repeal the 1910 Decree by necessary implication, as contended by Mr. Kakodkar. The 1958 Decree nowhere referred to reis. The 1910 Decree continues to hold the field. The 1910 and 1958 Decrees are not irreconcilable. The doctrine of implied repeal is governed by well-established rules of construction.

The 1906, 1910 and 1942 Decrees have been adopted as our laws and they are to be construed according to our system of law, and not according to the Portuguese system of law, *Xec Ayub v. Goa Govt.*, AIR 1967 Goa 102 (110), although I understand from learned Counsel for the parties, that the rules of construction on repeal are not different under the Portuguese system of law, based on the Code Napoleon. That takes me to the next argument of Mr. Tamba. Is it open to the petitioners to seek the aid of the 1911 Decree in the manner suggested by Mr. Kakodkar? Article 5 of this Decree is relied upon by Mr. Kakodkar. It provides for sub-division of one metropolitan escudo into 100 centavos and 1 metropolitan centavo into 10 pre-republican reis. Mr. Kakodkar can rely on this Article for the purposes of substitu-

tion of a half escudo in place of 500 reis in the 1906 Decree provided the Decree applies to the territory.

As will appear from Article 1, the Decree applies to Portugal only and not to the territory. The metropolitan escudo and the metropolitan centavo continue to be legal tender in Portugal but at no stage from 1906 to 1961, they were legal tender in the territory. Reis ceased to be a legal tender in Portugal after the 1911 Decree but, for the purposes of conversion into metropolitan escudos or metropolitan centavos, reis was recognized as a monetary unit, in Portugal only. Reis was never a sub-division of metropolitan escudo or metropolitan centavo in the territory. There was no such currency as reis in the territory but for the purposes of official business and banking etc. calculation was in reis in terms of the 1906 and 1910 Decrees. The argument of Mr. Kakodkar that because the 1911 Decree is metropolitan law therefore substitution is permitted is not correct. Mr. Tamba argued that if the intention were that the 1911 Decree should have effect in the territory then it had to be expressly applied as in the case of the 1906, 1910, 1942 and 1958 Decrees. I agree.

It may be added that in the case of pre-liberation Decrees promulgated by the Portuguese Government a distinction was always drawn by that Government between such Decrees applicable to Portugal or to the overseas colonies. It is true that the 1958 Decree established parity between the Goan escudo and the metropolitan escudo but this will not enable the petitioners to rely on the 1911 Decree which did not apply to the territory. The 1911 Decree is the sheet anchor of the petitioners. With the fall of this anchor, fails the case of the petitioners. The petitioners cannot be permitted to substitute the metropolitan currency in Article 132 of the 1906 Decree.

Was there any parity between the Goan escudo and the metropolitan escudo after 15th May, 1962? For an answer to this question we may turn to *The Goa, Daman and Diu (Currency and Coinage) Regulation, 1962*, promulgated by the President. This Regulation provides for the demonetisation of the escudo and certain other notes and coins and for the extension of certain Indian laws to the territory. Section 2 (a) defines "appointed day" as the 15th day of May, 1962. Section 3 provides that the 1958 Decree, and any rule, regulation or order made thereunder, shall, as from the appointed day, cease to have effect except as regards things done or omitted to be done before the said day under that decree. Section 4 states that all escudo notes and coins issued under the 1958 Decree and

all other notes and coins issued by or on behalf of the Portuguese Government, shall, as from the appointed day, cease to be legal tender in the territory. Section 6 provides for extension of the Indian Coinage Act, 1906 and some other laws which came into force as from the appointed day. It will appear from the above provisions that the Goan escudo ceased to be a legal tender with effect from the 15th of May, 1962, and, therefore, argued Mr. Tamba, parity established by the 1958 Decree, between the Goan escudo and the metropolitan escudo, came to an end and hence it is not open to the petitioners to rely on the metropolitan currency. It seems this argument is not without force. The petitioners have questioned the assessment in the final mining tax lists for the years 1962 to 1966 and, parity having disappeared, no reliance can be placed on the metropolitan escudos for the purposes of taxation. The taxes were payable in the Indian currency and not in the Goan escudos with effect from 15th May, 1962.

Mr. Kakodkar stated that assuming the effect of the Regulation was that parity came to an end, in that case, he argued, reliance also cannot be placed by the respondents on the 1958 Decree for the purposes of the tax liability. Mr. Tamba submitted that what the Regulation provides is that the Goan escudo shall cease to be a legal tender, but for the purposes of the tax liability, the value of 1 Goan rupee as equivalent to 350 reis under the 1910 Decree or 6 Goan escudos under the 1958 Decree is not affected and it is on this basis that the tax liability was ascertained, relying on the 1906, 1910 and 1942 Decrees. He further submitted that reis was not a legal tender in the territory but for the purposes of equivalent value of a Goan rupee or Indian rupee, taxation notionally was to be in reis because of the operation of the 1906, 1910 and 1942 Decrees.

It is true that the 1958 Decree ceased to have effect from 15th May 1962 as a result of Section 3 of the Regulation, "except as regards things done or omitted to be done" before that day under that Decree, but the method of taxation, in my opinion, is not affected. It is contended by Mr. Kakodkar that the saving clause in this Section is not attracted. It only saves transactions past and closed. The saving clause is attracted, according to Mr. Tamba. It is really not necessary to decide this point. There is one thing more. The State had the exclusive right of fixing the equivalent value of six Goan escudos into one Indian rupee. This right is not questioned. The power to issue currency is derived from sovereign authority. The law is well settled that it is within the competence of the new sovereign to accord recognition to existing

currency or to substitute it by its own currency by law or otherwise. It may be added that the State was concerned on 30-12-1961 with the Goan escudos and not with the metropolitan escudos. As, stated earlier, the latter was a legal tender in Portugal and not in the territory.

What was recognized upto 15th May 1962 was the Goan escudo and not its parity with the metropolitan escudo. The 1910 Decree being an insuperable hurdle in the way of the petitioners, the 1911 Decree being inapplicable to the territory, and the 1906, 1910 and 1942 Decrees having been continued as the laws in force, the method of computation relied upon by the petitioners does not seem to have authority of law. The method of computation followed by the respondents has authority of law and, as far as I am able to see this matter, there is no contravention of Article 265 of the Constitution.

It is not the case of Mr. Kakodkar that the tax levied is unconstitutional. An unconstitutional tax has to be distinguished from the tax imposed without authority of law. There is no enhancement of the tax where substitution of one coinage is made by another coinage of equivalent value as in the instant case. *Mangalore Ganesh Beedi Works v. State of Mysore*, AIR 1963 SC 589, but, assuming for the sake of argument, that one Indian rupee should not have been equated to six Goan escudos on 30-12-1961 and that this equation had the effect of enhancement of the tax then such enhancement by an executive order had authority of law under Section 9 (1) of the 1962 Act. No tax or duty can be levied by an executive order. It is well settled law that no tax can be imposed by inference or by analogy. There is no equity about a tax. *Canadian Eagle Oil Co. v. R.*, (1946) AC 119 at p 140, as per Viscount Simon, L. C. In the matter of taxation, the assessee has no choice if the tax imposed has authority of law, as in the instant case. The taxing authorities remind me of the French lady who consulted her fowls as to whether they would rather be boiled or roasted.

The arguments advanced on the hardship in this case are to be rejected when taxation is according to law; for such arguments are only quicksands in the law and, if accepted, will swallow up every principle of law. Before discussion is closed on the principal question, I shall briefly refer to some decisions cited by Mr. Kakodkar. It has been said so often that a case is an authority for what it decides. As, I shall presently show, the facts of the instant case are distinguishable from the facts of the following decisions cited:— (1) *Tata Engineering and*

Locomotive Ltd. v. Assistant Commissioner of Taxes, AIR 1967 SC 1401; (2) New Manek Chowk Spg. and Wvg. Mills Co. Ltd. v. Municipal Corporation of the City of Ahmedabad, AIR 1967 SC 1801; (3) Commissioner of Income Tax Madras v. Bosetto Brothers Ltd., AIR 1940 Mad 366 (370) (SB); (4) Kastur Chand v. Gift Tax Officer, AIR 1961 Cal 649, (5) Gulabdas & Co v. Assistant Collector of Customs, AIR 1957 SC 733.

The decision at (1) states that for the purposes of writs there are certain exceptions to the doctrine with regard to the exhaustion of statutory remedies, and one such exception is where action is taken under an invalid law or arbitrarily without the sanction of law. The decision at (2) deals with a case where the rateable value determined had not the support of law and, therefore, it was useless for the assessee to take objections or file appeals if he was challenging the said value as being in violation of Article 14 of the Constitution. The decision at (3) reaffirms the principle that if a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under one which leaves him with a lighter burden. The petitioners cannot have the benefit of the "lighter burden" for reasons that are obvious. The decision at (4) reiterates the oft-cited rule of construction that taxation laws shall be strictly construed. The decrees relied upon by the respondents against the petitioners for the purposes of taxation have not been liberally construed. The decision at (5) emphasizes the principle that unless the provisions relating to imposition of duty are challenged as unconstitutional, or the orders in question are challenged as being in excess of the powers given to the Customs Authorities and, therefore, without jurisdiction, no question of any fundamental right under Art. 19 (1) (f) and (g), can at all arise. In this view of the matter the petitions under Article 32 were dismissed. I think I have said enough on the principal question, and I need say no more. This question is decided against the petitioners.

8. The principal question having been disposed of, the other questions need not detain me long. Mr. Tamba next contended that the petitioners are guilty of inordinate delay and, therefore, they should be denied relief under Article 226 of the Constitution. He also contended that the petitioners should have availed of the remedy by way of an appeal under the 1906 Decree before approaching this Court for a writ of certiorari, etc. He cited *State of Madhya Pradesh v. Babulal Bhaiyalal*, AIR 1964 SC 1006 and *Joao da Costa v. Union Territory of Goa*, AIR 1968 Goa 3 on the question of delay. In the former case Their Lordships of

the Supreme Court observed that the power to give relief under Article 226 is a discretionary power and among the several matters which the High Court rightly takes into consideration in the exercise of that discretion, is the delay made by the aggrieved party in seeking the special remedy and what excuse there is for it. In the latter case this Court stated that delay, however, is not an absolute bar where the State action is arbitrary and of a gross character as where the authority acts in a capricious manner.

Delay also is no bar where fundamental rights are infringed. The petitioners have not alleged infringement of any fundamental right. The State action also is not arbitrary and, therefore, argued Mr. Tamba, discretionary relief should be refused. The material facts may be stated. This Court was vested with writ jurisdiction for the first time on 16th May, 1964, under the Goa, Daman and Diu (Judicial Commissioner's Court) (Declaration as a High Court) Act, 1964. The petitions are filed in April 1967. Asked to explain this delay, Mr. Kakodkar replied that the error in the method of computation was discovered by the petitioners in March 1967 and not earlier. The petitioners were asked to pay the taxes each year, by the end of August, from 1962 to 1966, but they did not dispute the demands made upon them. It would be sinking into the milky credulity of infancy to believe that wisdom dawned upon them in March 1967 and not earlier. What led to the discovery of the error is not explained. The excuse for the delay is not convincing. The Court would aid the vigilant and not the indolent. The petitioners are expected to prosecute their case without undue delay. It is well settled that stale demands are not to be encouraged in the exercise of writ jurisdiction. It may be stated that the chief element of delay is acquiescence. I would have condoned the delay and acquiescence if I had been satisfied that the tax levied for these years is without authority of law. The Courts cannot stand by as silent spectators when Article 265 of the Constitution is contravened.

In *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara*, AIR 1961 SC 964, a general observation was made that acquiescence in an illegal tax for a long time is not a ground for denying the relief to the petitioners. In that case the impugned tax was imposed by the local authority in March 1935 and the first occasion when its validity was challenged was in only 1957, "though, if the petitioners are right in their submissions their acquiescence might in itself be a ground for denying them relief". The petitioners questioned the tax on the

ground that it was unconstitutional. This plea was negated by Their Lordships of the Supreme Court. The petitioners in the instant case paid taxes for the years 1959 to 1961 and thereafter taxes were demanded from them but beyond making representations at a very late stage they did not challenge the validity of the tax levied, until April 1967 when they filed the petitions. The inordinate delay is a factor against the petitioners. The law is well settled that in taxation matters ordinarily a party aggrieved should have his grievance redressed in accordance with the machinery provided by the taxing statutes. Where an alternative and equally effective remedy is open to an aggrieved party, ordinarily he should be required to pursue that remedy and not invoke special jurisdiction of the High Court to issue a prerogative writ.

In this case the petitioners in petitions Nos. 24 and 25 did not lodge an appeal with the Lt. Governor in terms of Article 136 of the 1906 Decree. The Lt. Governor is the successor of the Portuguese Governor-General or the Portuguese Governor, as the case may be, by virtue of Clause 2 of the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962. The petitioners in petition No. 14 lodged an appeal only for the year 1966, and not for the earlier years, but the same was rejected. Having decided that the tax levied for the years 1962 to 1966 has authority of law, it is really not necessary to dilate on the past, and make this failure on the part of the petitioners, as an additional ground for rejecting their petitions. The interest in the past is for the light it throws upon the present. I need hardly add anything more on the two contentions advanced by Mr. Tamba.

9. It may be emphasized that the jurisdiction of the High Court under Article 226 of the Constitution is extraordinary and has to be used sparingly. The jurisdiction is supervisory and not appellate. The petitioners have failed to establish contravention of Art. 265 of the Constitution. The tax levied and sought to be collected is according to the provisions of law. The petitions are therefore devoid of substance. The petition No. 14 is accordingly dismissed with costs. The costs are assessed at Rs. 200/-. This order will also apply to petitioners in petitions Nos. 24 and 25. Order accordingly.

GGM/D.V.C.

Petitions dismissed.

AIR 1969 GOA, DAMAN AND DIU 37
(V 56 C 5)

V. S. JETLEY, J. C.

Comunidade of Velguem of Bicholim through Yeshwant Vishnu Sahastrabudhe, Applicant v. Vassant Vithal Govekar, Respondent.

Civil Revn. Appln. No. 12 of 1968, D/- 26-7-1968.

(A) Civil P. C. (1908), S. 115 — Section is similarly worded as S. 8 (2) (b) (i) of Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963) — Suit for possession under S. 6 of Specific Relief Act (1963) filed before Subordinate Judge — Judge coming to conclusion that sanction of Administrative Tribunal under S. 9 of Code of Comunidades (1961) was necessary before such suit was entertained — Revision remedy held not barred — Expression "Case" includes civil proceedings other than suits, and is not restricted to entirety of proceeding in Civil Court — AIR 1966 Goa 1 (FB), Foll. — (Words and Phrases — "Case"). (Para 2)

(B) Specific Relief Act (1963), S. 6 (2) (a) — Suit for possession under — Code of Comunidades (1961), Ss. 9, 4, 400, 371, 349 — Sanction of Administrative Tribunal under S. 9 not obtained — Permission only of Administrator obtained — Suit neither conservative nor executive — Ss. 4 and 400 not attracted — S. 371 prescribing procedural formalities, not applicable — Formalities mentioned in S. 349 should be followed — Case whether case is covered by second exception of S. 9 — Question is necessary for deciding maintainability of suit — Case remanded in revision with direction to decide this question — (Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), S. 8 (2) (b) (i)) — (Civil P. C. (1908), S. 115). (Paras 3, 4)

Cases Referred: Chronological Paras (1966) AIR 1966 Goa 1 (V 53) (FB),

Ramanata v. Judge, Comarca Court 2

M. S. Usqaonkar, for Applicant; P. Mulgaonkar, for Respondent.

ORDER:— This revision under Section 115 of the Civil Procedure Code is directed against the order passed by the learned Subordinate Judge, Bicholim, dated 29th February, 1968, whereby he came to the conclusion that the permission of the Administrative Tribunal is necessary in terms of Section 9 of the Code of Comunidades, 1961 before the suit for possession under Section 6 of the Specific Relief Act, 1963 is entertained. The plaintiff felt aggrieved by this decision and hence moved this Court under Section 115 of the Civil Procedure Code.

2. Mr. Usgaonkar, learned Counsel for the plaintiff-applicant, contends that the learned Subordinate Judge did not correctly construe the provisions of Section 9 of the 1961 Code with the result that he fell in error in recording the conclusion that permission of the Administrative Tribunal was necessary before the suit⁺ could be entertained. Section 115 is similarly worded as Section 8 (2) (b) (i) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963. The two provisions were construed by this Court in *Ramanata v. Judge, Comarca Court*, AIR 1966 Goa 1 (FB). If, as is argued by Mr. Usgaonkar, that sanction is not necessary then in declining to entertain the suit the learned Subordinate Judge failed to exercise a jurisdiction vested in him and, consequently, the provisions of Clause (b) of Section 115 are attracted. Mr. Mulgaonkar, learned Counsel for the respondent-defendant, submits that the order passed by the learned Judge is an interlocutory order and therefore it cannot be considered as "any case which has been decided", within the substantive part of this section. This argument does not seem to be correct. The expression "case" includes civil proceedings other than suits, and is not restricted to the entirety of the proceeding in a Civil Court. The precise meaning and ambit of this section has been explained in the above decision of this Court, relying on certain decisions of the Privy Council and the Supreme Court. The revision remedy therefore is not barred.

3. That takes me to the next question whether the learned Judge acted correctly in stating that in absence of the permission of the Administrative Tribunal in terms of Section 9 of the 1961 Code the suit filed by the plaintiff could not be entertained. In support of this decision the learned Judge came to the conclusion that the said suit is not a "conservative" suit within the meaning of Section 9 of the 1961 Code. This Section (as translated) states that "the comunidade cannot institute any civil suits without permission of the Administrative Tribunal except if the suit be merely conservative or executive or if on account of the delay in its institution it is likely to result in the extinction of the right or of any security and, in such case, the permission of the Administrator was sufficient." It is common ground that the permission of the Administrator was obtained before filing the suit. Mr. Usgaonkar next argues that the said suit is of "conservative" category, and, therefore it is covered by one of the exceptions mentioned in Section 9. Mr. Mulgaonkar joins issue and, according to him, the said suit is not "conservative".

In support of his argument that the said suit was "conservative" Mr. Usgaonkar relies on the provisions of clause (c) of Section 4 and also the heading of Chapter IV of the Civil Procedure Code, which includes Section 400. Mr. Mulgaonkar refutes this argument by contending, and not without substance, that clause (c) is not attracted for the simple reason that the alleged trespass had already been committed. This clause provides that the object of the "conservative" suit is to prevent a harm which is apprehended. The learned Subordinate Judge also did not accept the contention of Mr. Usgaonkar that the said suit is covered by Section 4. Section 400, Mr. Mulgaonkar submits, is not attracted for the simple reason that it does not apply to suits (accões) but to proceedings (processos). This is so and Mr. Usgaonkar is not right when he relies on these provisions in support of his argument that the said suit is "conservative". It is common ground that it is not "executive".

4. Mr Usgaonkar invites my attention to Sections 371, 379 and 352 of the 1961 Code. He argues that the procedure contemplated by Section 371 is a lengthy procedure and that if it were to be followed it would not have been possible for him to file the said suit within the period prescribed under Section 6 (2) (a) of the Specific Relief Act, 1963. Under that provision no suit shall be brought — (a) after the expiry of six months from the date of dispossession. The date of dispossession in this case, according to the plaintiff, was 24th October, 1966 and the said suit was instituted by him on 3rd March, 1967. Before filing the suit, notice was sent to the respondent, dated 28th October, 1966, wherein he was informed that he had encroached upon the land belonging to the Comunidade and further he was asked to demolish it. Mr. Mulgaonkar submits that since the said suit was of possessory type, consequently, by virtue of clause unique of Section 371 the formalities required in that section are not to be observed. Mr. Usgaonkar concedes that the said suit is of possessory nature and therefore it is governed by clause unique of Section 371 and, in this view of the matter, it was not necessary for the plaintiff-applicant to follow the procedural formalities prescribed by this section.

Section 371 contemplates a number of procedural formalities which are to be followed before filing suits against trespassers of the comunidade land. Section 371 being inapplicable by virtue of the said clause unique Mr. Usgaonkar then relies on the second exception contemplated in Section 9 of the 1961 Code. According to him, it is because of the procedural delays involved in obtaining the permission of the Administrative Tri-

bunal he sought the permission of the Administrator. This exception enables the comunidade to institute suits without obtaining the permission of the Administrative Tribunal. The permission of the Administrator is regarded as sufficient for the purposes in view. Mr. Mulgaonkar points out correctly that the provisions of Section 371 being inapplicable, the plaintiff-applicant was required to follow the procedural formalities mentioned in Section 349 of the 1961 Code. There are a number of procedural formalities which are to be complied with under this section before getting the permission of the Administrative Tribunal. I agree with the learned Judge that the suit is not "conservative" in nature but the learned Judge is directed to consider whether it does not fall within the purview of the second exception contemplated by Section 9.

It is primarily a question of fact whether the right of the plaintiff-applicant in instituting the suit would have been extinguished if the formalities as required by Section 349 were to be complied with. If it is decided, in view of the period of limitation mentioned in Section 6 (2) (a) of the Specific Relief Act, that the right of the plaintiff-applicant would have been extinguished if the suit had not been brought within the period prescribed then the permission of the Administrative Tribunal would not be necessary and, in that case, the suit was maintainable. As stated already, the plaintiff-applicant had obtained the permission of the Administrator before instituting the said suit.

In this view of the matter, the order passed by the learned Civil Judge, Senior Division, dated 29th February, 1968, is upheld except with this direction — that Section 379 of the 1961 Code is not applicable to the facts of the present case. The direction is also to the learned Judge that he should consider whether the said suit falls within the second exception, which is contemplated by Section 9. The revision application is accordingly allowed and the matter is remanded to the learned Civil Judge, Senior Division, with directions to decide whether the said suit falls within the above exception. It would be open to the learned Subordinate Judge to frame additional issues of law and fact in case he does not wish to dispose of the suit finally on the preliminary issue of law regarding non-maintainability of suit because of want of permission from the Administrative Tribunal. The parties should bear their own costs.

SSG/D.V.C.

Order accordingly.

AIR 1969 GOA, DAMAN AND DIU 39
(V 56 C 6)

V. S. JETLEY, J. C.

The State, Applicant v. Hemappa Chandrasiddappa Angaddi, Respondent.

Criminal Revn. Appln. No. 6 of 1968, D/- 1-4-1968.

(A) Penal Code (1860), S. 304-A — Ingredients of.

Section 304-A requires the prosecution to prove (1) the death of the person in question; (2) that the accused caused such death; and (3) that such act of the accused was rash or negligent, although it did not amount to culpable homicide.

(Para 3)

(B) Penal Code (1860), S. 304-A — Rash and negligent act — Mixed question of fact and law — Statement of accused that accident was due to failure of brakes — Not a plea of guilty — Conviction and sentence on such plea not proper — Criminal P. C. (1898), S. 271).

What is rash and negligent act is a matter which is to be proved properly by the prosecution. What may be rash and negligent act according to layman may not be so for the purposes of S. 304A. Each case is to be proved on its facts. Where death is directly due to rash and negligent driving the trying Magistrate should record some material evidence in support of the proof of the guilt before accepting plea of guilty. The rash or negligent act has to be the direct or proximate cause of the death, and it is not a question of fact only but a mixed question of fact and law. It is therefore necessary that an accused person should know the substance of the charge before he can be in a position to plead guilty. The statement made by the motor driver with the reservation that the accident was due to the failure of brakes may not properly be regarded as a plea of guilty. Hence conviction and sentence based on such plea is not proper.

(Para 4)

S. Tamba Govt. Pleader, for the State; S. V. Joshi, for Respondent.

ORDER:— This is an application made on behalf of the State under Section 439 of the Code of Criminal Procedure praying for the reasons mentioned therein that the sentence imposed on the accused-respondent under Section 304A is 'too light' and therefore it should be enhanced. The respondent was convicted on his own plea under the section and sentenced to pay a fine of Rs. 400/-, and in default of payment of fine, to undergo 4 months of simple imprisonment. The charge against the respondent was that on 7th of September, 1966, at 16.45 hours at Verna he drove the tank-car No MYW 4169 "at an excessive speed, negligently and carelessly, as a result

of which on the descent of Verna, the tank ran into a bullock-cart which also was moving down the slope and the bullock-cart driver Santana Gama fell on the ground and the cart passed over him causing his death'. The respondent in answer to the charge read out to him made an application (Ext. 5). In that application he inter alia stated that "as the brakes failed down that the accident took place." In his statement he confirmed what he had stated in the application and admitted that he was to be blamed for the accident, as a result of which the driver of the above bullock-cart died. He also pleaded for leniency. The learned Magistrate accepted the plea of guilty and convicted him as mentioned above. The State felt aggrieved by the lenient sentence imposed on the respondent and therefore moved this Court in revision.

2. Shri Tamba, learned Government Pleader for the State states that on the plea of guilty made by the respondent the sentence is 'too light'. Shri Joshi learned Counsel for the respondent, invites my attention to the above application (Ex. 5) wherein it was stated by the respondent that as the brakes failed and therefore the accident took place. What is stated in this application was later confirmed by him in his statement to the Court. When the respondent stated that the accident was due to the failure of brakes and this he gave as the principal reason for the accident it cannot then be said that he substantially admitted that he had caused the death of Santana Gama by rash or negligent act.

3. Section 304A requires the prosecution to prove (1) the death of the person in question; (2) that the accused caused such death; and (3) that such act of the accused was rash or negligent, although it did not amount to culpable homicide. The charge also was not framed properly against the respondent. In this connection attention of the learned Magistrate is invited to the form of the charge under Section 304A at page 835 of the 'Law of Crimes' by Ratanlal and Dhirajlal. If the respondent were actually guilty under Section 304A then in absence of any mitigating circumstances the sentence of Rs. 400/- was undoubtedly 'too light', as rightly stated by the learned Government Pleader. In the charge framed by the learned Magistrate it is mentioned that the bullock-cart driver fell on the ground and the bullock-cart passed over him causing his death. The fact that the bullock-cart driver died is not in dispute, but what is necessary to prove is whether this death was due to rash and negligent act on the part of the respondent. What is "rash and negligent act" is explained at length in the above commentary on Section 304-A.

4. I am not satisfied that the respondent really understood the nature of the charge framed against him. It is necessary that an accused person should know the substance of the charge before he can be in a position to plead guilty. What is 'rash and negligent act' is a matter which is to be proved properly by the prosecution. This is a mixed question of fact and law. What may be rash and negligent act according to a lay-man may not be so for the purposes of this section. Each case is to be proved on its facts, decisions in other cases being illustrative. In cases of rash and negligent driving where death of a person is directly due to such driving it is desirable that the Magistrate trying the case should record some material evidence in support of the proof of the guilt before accepting plea of guilty. The rash or negligent act has to be the direct or proximate cause of the death. It is well settled that a person driving a motor car or a truck has got a duty to control that vehicle, but whether in a particular case death is directly due to rash and negligent act is, as already stated, not a question of fact only but a mixed question of fact and law.

In this case the statement made by the respondent with the reservation that the accident was due to the failure of brakes may not properly be regarded as a plea of guilty. The conviction and sentence imposed on the respondent are set aside. It is directed that he be re-tried under Section 304A according to law. The revision petition filed by the State for enhancement of the sentence fails. It is conceded by the learned Government Pleader that in the circumstances of the case re-trial would meet the ends of justice. The learned Magistrate, Vasco, should try the case. The respondent is directed to appear before him on 22nd April, 1968. The fine paid by the respondent is ordered to be refunded. The prosecution may lead evidence before the Court on that day.

HGP/D.V.C.

Order accordingly.

AIR 1969 GOA, DAMAN AND DIU 40
(V 56 C 7)

V. S. JETLEY, J. C.

State, Appellant v. Anand Lakshiman Chari, Respondent.

Criminal Appeal No. 10 of 1968, D/- 25-7-1968.

(A) Criminal P. C. (1898), S. 367 — Appreciation of evidence — (Evidence Act (1872), S. 3).

A Magistrate should first discuss the prosecution evidence and then consider

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the defence evidence because, it is for the prosecution to prove their case beyond reasonable doubt in the first instance, and the falsity of the defence version is not by itself sufficient to relieve the prosecution of the burden imposed on it. (Para 3)

(B) Criminal P. C. (1898), Ss. 417, 423 — Presumption of innocence — Benefit of doubt — Acquittal in appeal — High Court will not disturb finding of fact — (Penal Code (1860), Ss. 405, 406) — (Evidence Act (1872), S. 3) — (Motor Vehicles Act (1939), S. 31).

The complainant had given his motor car to the accused somewhere in November, 1963, for repairs. In September, 1966 he came to know that the accused had sold the car and misappropriated the sale proceeds. The complaint was lodged after about two months from September 1966. After necessary investigation the accused was prosecuted under Sec. 406, Penal Code. Though the accused was convicted by trial Magistrate he was acquitted in appeal on the ground that the breach of trust was not proved by the prosecution beyond doubt.

Held that, in normal circumstances, the complainant could not have left the car with the accused for nearly three years before knowledge of sale. There was a presumption of innocence in favour of the accused. This presumption was strengthened by the fact that he was acquitted by the Sessions Judge in appeal. The right of the accused to the benefit of any doubt continues right up to the last stage. The High Court would be slow in disturbing a finding of fact based on the appreciation of evidence by the Sessions Judge. The fact that the accused, did not have the ownership of the car transferred to his name in the records of the R. T. O., as required by Section 31 of the Motor Vehicles Act, could not go against him because the Act came into force in January 1965 long after the sale in favour of the accused in November 1963. Cri. Revn. Appln. No. 333 of 1965, D/- 13-11-1967 (Goa) & Cri. Appeal No. 325 of 1965, D/- 13-11-1967 (Goa), Ref. (Paras 3, 4)

Cases Referred: Chronological Paras
(1967) Cri. Revn. Appln. No. 333
of 1965, D/- 13-11-1967 (Goa),
State v. Olavo Perpetuo Noronho
Fernandes 4
(1967) Cri. Appeal No. 325 of 1965,
D/- 13-11-1967 (Goa), State v.
Ricardo de Lima e Melo 4
S. Tamba, Govt. Pleader, for the State;
M. S. Usgaonkar, for Respondent.

JUDGMENT:— This appeal under Section 417 (1) of the Code of Criminal Procedure, 1898, is directed against the order passed by the learned Sessions Judge, Panjim, dated 28th March, 1968, whereby

he gave benefit of doubt to the accused Anand Lakshiman Chari and directed his acquittal. The State is the appellant.

2. The prosecution case before the learned Magistrate was that complainant Dwarcnata Sirsat from Mapusa had given car No. IGA-28-23 of Austin make for repairs to the accused in November 1963. It was at the end of 1966 that the complainant Dwarcnata Sirsat visited the workshop of the accused and found that some of the parts of the car given for repairs were sold by the accused. He therefore lodged a complaint with the Police and after necessary investigation the accused was challaned under Section 406 of the Indian Penal Code.

The prosecution examined six witnesses in support of their case. On behalf of the accused were examined six defence witnesses. The defence of the accused before the learned Magistrate was that he had purchased this car from the complainant. This defence was disbelieved by the learned Magistrate and, accordingly, he convicted him under Section 406 I. P. C. and sentenced him to pay a fine of Rs. 400/- or, in default, to undergo 3 months' imprisonment. The accused felt aggrieved by this decision and hence filed an appeal in the Court of Session. The learned Sessions Judge, after considering the prosecution evidence and the defence evidence, came to the conclusion that the prosecution had not proved beyond doubt that the accused had committed criminal breach of trust. In this view of the matter he directed his acquittal.

3. Mr. Tamba, learned Government Pleader for the State, states that the purchase version of the accused was disbelieved by the learned Magistrate. This is so, but he fairly concedes that the learned Magistrate failed to discuss the evidence of the prosecution witnesses against the accused. The learned Magistrate should have first discussed the prosecution evidence and then he should have considered the defence evidence. It is for the prosecution to prove their case beyond reasonable doubt in the first instance. The falsity of the defence version is not by itself sufficient to relieve the prosecution of the burden imposed on it to prove their case beyond reasonable doubt. The learned Sessions Judge considered the prosecution evidence and the defence evidence and then came to the conclusion that the prosecution had not proved dishonest misappropriation in this case. The learned Sessions Judge seemed to feel that the defence version was not improbable.

It may be stated that before the car was given to the accused for repairs, as stated by the complainant, it was not in working order for a period of 2 years

This fact appears from the evidence of the complainant. According to the complainant, he gave the car to the accused somewhere in November 1963 for repairs and it was only in September 1966 that he came to know that the accused had sold the car and misappropriated the sale proceeds. In normal circumstances, as argued by Mr. Usgaonkar, learned Counsel for the accused, the complainant could not have left the car with the accused for nearly three years before knowledge of sale.

There is another fact against the complainant and that is that the complaint in this case was lodged after about two months from September 1966. Ordinarily, in criminal offences people affected do not wait for months before moving the Police. The only point that goes against the accused, according to the learned Sessions Judge, is that he did not have the ownership of the car transferred to his name in the records of the R. T. O., as required by Section 31 of the Motor Vehicles Act.

Mr. Usgaonkar submits that this Act came into force in January 1965, but the sale in favour of the accused was somewhere in November 1963. This is so and, therefore, it was not possible for the accused to have complied with the provisions of the above section apart from the fact that this failure on his part is really not relevant for the purposes of proving the offence of criminal breach of trust under Section 405, Indian Penal Code. The learned Sessions Judge, after considering the evidence adduced on behalf of the prosecution and the defence, felt a reasonable doubt and, accordingly, he directed his acquittal.

4. There is a presumption of innocence in favour of the accused. This presumption is strengthened by the fact that he was acquitted by the learned Sessions Judge in appeal. The right of the accused to the benefit of any doubt continues right up to the last stage. The High Court would be slow in disturbing a finding of fact based on the appreciation of evidence by the learned Sessions Judge.

In *State v. Olavo Perpetuo Noronha Fernandes*, Criminal Revn. Appln. No. 333 of 1965, D/- 13-11-1967 (Goa) and *State v. Ricardo de Lima e Melo*, Criminal Appeal No. 325 of 1965, D/- 13-11-1967 (Goa), the scope of an acquittal appeal has been considered by this Court at length. It cannot be said that the learned Judge came to an erroneous conclusion on the evidence before him. In this view of the matter the appeal filed on behalf of the State is devoid of substance and is accordingly rejected. It would be open to the complainant to seek

a civil remedy in Court if he is really aggrieved.

HGP/D.V.C.

Appeal rejected.

AIR 1969 GOA, DAMAN AND DIU 42 (V 56 C 8)

V. S. JETLEY, J. C.

Sazro Govind Gadi, Petitioner v. Malba Madeva Suria Rau Desai, Respondent.

Civil Revn. Appln. No. 15 of 1967, D/- 3-11-1967.

(A) Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), S. 8 (2) (b) — Suit for eviction of tenant filed by landlord under Portuguese Civil P. C. — Relief prayed for granted — Revision by tenant — Contention that by combined operation of Ss. 4, 8 (1) and 58 (2) read with S. 2 (11) (i) of Goa, Daman and Diu Agricultural Tenancy Act, Judge was barred from entertaining suit for eviction — Contention raised in suit but not pressed — Tenant held could not re-agitate this point in revision — Relief granted not interfered in revision — AIR 1966 Goa 1 (FB), Foll. — (Tenancy Laws — Goa, Daman and Diu Agricultural Tenancy Act (1964), Ss. 4, 8 (1), 58 (2), 2 (11) (i)). (Paras 3, 4)

(B) Transfer of Property Act (1882), Pre., Ss. 1 and 114A — Act operates prospectively — Contract of lease executed under relevant provisions of Portuguese law in 1961 — Act coming into force in Goa in November 1965 — Parties acquiring certain vested rights and incurring certain liabilities under contracts of lease executed before T. P. Act came into force — In absence of any provision giving retrospective effect, such contracts held would not be affected — Suit filed by landlord for eviction of tenant under above lease without complying with S. 114A — Suit held not liable to be dismissed — S. 114A applies only to leases executed under the Act — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Prospective and retrospective operation). (Para 3)

Cases Referred: Chronological Paras (1966) AIR 1966 Goa 1 (V 53) (FB).

Ramanata v. Judge Comarca Court 4
R. R. Colvalcar, for Petitioner.

ORDER:— This is a revision petition filed on behalf of the petitioner Sazro Govind Gadi under Section 8 (2) (b) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963.

2. The facts broadly stated are that the petitioner was tenant of the property "Cajirtuv" owned by the respondent landlord with effect from 1961 at the annual rent of Rs. 440/-. This lease was for

a period of 5 years. The petitioner committed default in payment of rent and also used the land for the purposes not authorised by the contract of lease executed. The respondent filed a suit for eviction of the petitioner. This suit was under the relevant provision of the Portuguese Civil Procedure Code. The learned Judge after considering the rival contentions in the pleadings recorded the following conclusions: (a) that there was a contract between the Plaintiff and the Defendant for commencing the tenancy of the property in dispute and that notes of the said contract were taken down by the Plaintiff and a copy whereof was annexed to the proceedings, (b) that according to the terms of the said contract the lease was for 5 years, (c) that the annual rent was of Rs. 450/- which was subsequently reduced to Rs. 440/- and which was payable in two instalments, (d) that the defendant had to pay the rent in two instalments, (e) that the defendant had to plant 50 coconut seedlings in the 1st year and 100 in the second, (f) that the defendant ought not to cultivate paddy in the property, (g) that the defendant had deposited Rs. 300/- with the plaintiff as guarantee and (h) that the defendant had failed to comply with (d), (e) and (f) above.

The learned Judge also came to the conclusion that the petitioner had no right to retain the property after the expiry of the period mentioned in the contract of lease and, in view of these conclusions, he held that the suit filed by the respondent was maintainable and he granted the relief prayed for, namely, eviction of the petitioner from the land leased to him. The petitioner felt aggrieved by this decision of the learned Judge and accordingly he filed a "reclamacao". This 'reclamacao' was also rejected by the learned Judge.

3. Shri Colvalcar, learned Counsel for the petitioner, raised two questions in this revision petition — (1) that by virtue of combined operation of Sections 4, 8 (1) and 58 (2) read with Section 2 (11) (i) of the Goa, Daman and Diu Agricultural Tenancy Act, 1964, the learned Judge was barred from entertaining the suit for eviction and (2) that the Transfer of Property Act 1882 having been brought in force in this territory with effect from 1st November, 1965, the respondent landlord was bound to comply with the provisions of Section 114A and since he failed to do so therefore the suit should have been dismissed. As regards the first point it will appear from the decision of the learned Judge that this contention was also raised before the learned Judge but Shri Colvalcar did not press it. In this view of the matter Shri Colvalcar cannot be permitted to reargue this point in this revision.

There remains the second point for consideration. As, stated earlier, the Transfer of Property Act came into force in November, 1965. The contract of lease admittedly was executed under the relevant provisions of the Portuguese law in 1961. The Transfer of Property Act operates prospectively. It cannot apply to the leases executed before this Act came into force. The parties acquired certain vested rights and incurred certain liabilities under the contracts of lease executed before this Act came into force and, in absence of any provision giving retrospective effect to this Act, such contracts would not be affected. It is argued by Shri Colvalcar that Section 114A is a provision of procedural nature and, therefore, it should apply to the leases executed before this Act came into force. This argument is without substance. The requirement of notice under this section would apply only to the leases executed under this Act, what is 'lease' is defined in Section 105 of this Act.

4. The scope of Section 8 (2) (b) of the said Regulation is limited. In the decision of this Court in *Ramanata v. Judge, Comarca Court*, reported in AIR 1966 Goa 1, the implications of this section have been considered at some length. There is no appeal from the decision of the learned Judge. Therefore a part of this provision is satisfied. But still there remains more important part which has to be satisfied before this Court can grant relief in this petition, and that part states that this Court can grant relief only if the Subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of its jurisdiction with material irregularity. It is not the case of the petitioner that the learned Judge failed to exercise the jurisdiction vested in him. It is also not the case of the petitioner that he exercised the jurisdiction not vested in him by law.

As for 'material irregularity', in view of the finding that the Transfer of Property Act is not applicable to the leases executed before it came into force the conclusion is that the learned Judge did not act in the exercise of his jurisdiction with material irregularity. It is not the case of the petitioner that he was not given an opportunity to present his case before the Court. In other words there is no plea regarding violation of the principles of natural justice. I have heard Shri Colvalcar at some length but I find it difficult to agree with him that this is a case for interference in the exercise of revisional jurisdiction under Section 8 (2) (b) (i). This is also not a question of law which requires further consideration. The legal position is clear. As stated al-

ready this Act cannot govern the leases executed before it came into force. In this view of the matter Section 8 (2) (b) (ii) is also not attracted. This is not a good case for admission and, accordingly, the petition is dismissed in limine.
SSG/D.V.C. Petition dismissed.

AIR 1969 GOA, DAMAN AND DIU 44
(V 56 C 9)
V. S. JETLEY, J. C.

Joao da Costa Pereira, Petitioner v. Union Territory of Goa, Daman & Diu and others, Respondents.

Civil Misc. Petn. No. 37 of 1967, D/-16-11-1967.

(A) Constitution of India, Art. 133 (a), (b) and (c) — Sub-clause (c) is wider in scope than sub-clauses (a) and (b) — Cases not satisfying requirements of sub-clauses (a) and (b), may fall under sub-clause (c) — Sub-clause (c) does not confer an unlimited jurisdiction on High Court — AIR 1954 SC 457, Rel. on.

(Para 2)

(B) Constitution of India, Art. 133 (c) — Substantial question of law — Whether particular person is member of the "Hospicio" and other related questions regarding elections to General Body and Governing Council are neither substantial questions of law nor of general public importance — Question of law, in order to be substantial, may be of private importance but it should have importance from point of view of both parties to the litigation. AIR 1962 SC 1314, Rel. on.

(Para 4)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 1314 (V 49)=

65 Bom LR 267, Chunnilal V.

Mehta and Sons Ltd. v. Century

Spg. & Mfg. Co. Ltd. 4

(1954) AIR 1954 SC 457 (V 41)=

1954 Cri LJ 1167, Narsingh v.

State of Uttar Pradesh 2

B. F. D'Souza, for Petitioner; S. Tamba, Govt. Pleader, for Respondents.

ORDER:— This is a petition for grant of a certificate under sub-clause (c) of Clause (1) of Article 133 of the Constitution. The material facts leading to this petition are explained in the order passed by this Court dated 24th June, 1967* whereby the writ petition filed by the petitioner Joao da Costa Pereira was dismissed on four grounds: (1) that the petitioner was not an aggrieved party because the tests of 'standing' and 'injury' were not satisfied; (2) that the petition was filed after considerable delay; (3) that assuming the petition is maintainable even then the State action in ap-

pointing the Committee to manage the affairs of the 'Hospicio' was not arbitrary; and (4) that a writ of mandamus or any direction or order issued against the respondents would be futile because the respondents cannot convene a meeting of the General Body and the Governing Council of the 'Hospicio' for lack of quorum.

2. Sub-clause (c) of clause (1) of Article 133 provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that the case is a fit one for appeal to the Supreme Court. This sub-clause is wider in scope than sub-clauses (a) and (b) of this Article. It is possible to conceive of cases which, in terms of the amount or value, do not satisfy the requirements of sub-clauses (a) and (b), and yet they may fall under sub-clause (c). The discretion of the High Court under this sub-clause is a judicial one and must be judicially exercised along the well established lines which govern these matters. *Nar Singh v. State of U. P.*, AIR 1954 SC 457. A party aggrieved has a right to apply for a certificate and it is for the High Court to consider whether it should be granted. This sub-clause does not confer an unlimited jurisdiction on the High Court.

3. Shri D'Souza, learned Counsel for the petitioner, argues that the questions involved in the writ petition are substantial questions of law and further they are of general public importance and, therefore, the certificate applied for should be granted. Shri S. Tamba, learned Government Pleader for the respondents, joins issue and he contends that the questions involved are primarily questions of fact. They are neither substantial questions of law nor of general importance and hence the certificate applied for should be refused.

4. What is a 'substantial question of law' for the purposes of sub-clauses (a) and (b) of clause (1) of Article 133 has been explained by their Lordships of the Supreme Court in the following words:

"The proper test for determining whether a question of law is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is

a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law." (Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co., Ltd., AIR 1962 SC 1314 (1318)).

Shri D'Souza submits that the construction of relevant by-laws and Legislative Diplomas is a question of law. This is so but for the purposes of sub-clause (c) this requirement is not enough. The additional requirement — and a decisive one — is that there should be a substantial question of law for consideration. It is stated by Shri D'Souza that this Court did not correctly construe relevant by-laws and Legislative Diplomas and, as a result of this error, the Court recorded wrong conclusions, namely, that the petitioner was not a member of the 'Hospicio' and, therefore, he had no right to vote and be elected. The Court also, according to him, recorded wrong conclusions that the right of voting of the petitioner and his being elected was not revived. It is a fact that the petitioner by himself cannot constitute a quorum for the purposes of elections to the General Body and Governing Council. It is also a fact that the petitioner does not represent 23 other persons who are stated to be members of the 'Hospicio'. They have not come forward to support the case of the petitioner. These facts are not denied by Shri D'Souza. I have considered the case of the petitioner, at its best, but even so it is not clear how substantial questions of law are involved in this case. Whether the petitioner is a member or not is primarily a question of fact. It is because of lack of quorum that elections in this case were not held since 1948. This fact is a matter of record and is not in dispute. The petitioner took no steps for moving the appropriate authorities before liberation to hold elections to the General Body and Governing Council.

He also took no steps for some years after liberation to move the appropriate authorities to hold elections. The question to be determined under sub-clause (c) is not the propriety of the order against which a certificate is sought, but the importance of the questions raised therein. I agree with learned Government Pleader that the question of membership of the petitioner and also related questions regarding elections to the General Body and Governing Council are neither substantial questions of law nor of general public importance. Does the decision in this case affect the interests of a large number of people? The answer is in the negative. A question which does not affect a large number of persons cannot be said to be a question of general public importance. The rights of the respondents do not seem to be affected in

this case. At best the right of the petitioner may be affected if he is to be regarded as a member and, therefore, entitled to vote and be elected. Who would elect him in absence of the quorum prescribed by the by-laws? It is not his case that the by-laws are not applicable to the 'Hospicio'. A question of law, in order to be substantial, may be of private importance, but it should have importance from the point of view of both parties to the litigation. I am unable to agree with Shri D'Souza that substantial questions of law and also questions of general importance are involved in this case.

5. It is not the case of the petitioner that he enjoys certain fundamental rights which have been infringed. It is also not his case that relevant Legislative Diplomas and by-laws are invalid. This is also not a case where well-settled principles of law have been incorrectly applied. The tests of 'standing' and 'injury' were not satisfied in this case. They are substantial tests for the purposes of writ petitions. The action of the State Government in appointing the Committee to manage the affairs of the 'Hospicio' prima facie has support of the law. It is not the case of the petitioner that respondent No. 1 cannot exercise the powers of the 'Provedoria', a civil department whose affairs after liberation are regulated and controlled by respondent No. 1. As it is, Shri D'Souza is unable to satisfy the Court that there are any difficult or substantial questions of law or principle involved which require further consideration by the Supreme Court. The Supreme Court is not an ordinary Court of Civil Appeal. The Constitution intends that the High Court should normally and ordinarily be a final Court of Appeal. In the view taken of this matter, the petition for the certificate applied for under sub-clause (c) is dismissed. Order accordingly.

SSG/D.V.C.

Petition dismissed.

AIR 1969 GOA, DAMAN AND DIU 45
(V 56 C 10)

V. S. JETLEY, J. C.

Ramakant Rajarama Painguinkar, Applicant v. Manuel Fernandes, Respondent.

Criminal Revn. Appln. No. 21 of 1968, D/- 11-9-1968.

Criminal P. C. (1898), S. 522 (1) — Force or criminal force contemplated — Applicant not in physical possession of house — Disposition of, by placing lock over lock — No force used to his person — Section not attracted — (Penal Code (1860), Ss. 349, 350).

JL/JL/E720/68

Section 522 contemplates an offence attended by criminal force, or show of force, or by criminal intimidation. What is "force" is defined in Section 349 and "Criminal force" is defined in S. 350 of the Penal Code. The only force that is contemplated by Secs. 349 and 350 is the force as applied to a human being.

The house in dispute was purchased by the applicant. The respondent placed a lock over the lock placed by the applicant and after removing the latch from the rear portion of the house entered therein. On conviction of the respondent under S. 448 Penal Code, the applicant moved the Court for restoration of the possession of the said house under S. 522 (1). It was not the case of the applicant that he was in physical possession of the house and that he had been dispossessed by criminal force.

Held that the application filed under S. 522 (1) was not maintainable and the order for restoration could not be passed.

Section 522 only confers on the criminal Court a summary power to restore the state of things which existed at the time of dispossession by the convicted person. This jurisdiction is of a quasi-civil nature and is exercised on grounds of public policy and general convenience. AIR 1914 Cal 829, Rel. on. (Para 1)

Cases Referred: Chronological Paras (1914) AIR 1914 Cal 629 (V 1)=15

Cri LJ 175, Bisweswar Singh v.

Bhola Nath Pathak

1

B. S. Ranim, for Applicant.

ORDER:— This is an application under Section 522 (1) of the Code of Criminal Procedure, 1898. The material facts leading to this application are that by an order dated 28th June, 1967, the respondent-accused was convicted under Section 448 of the Indian Penal Code, by the learned Magistrate, Margao, and was sentenced to pay a fine of Rs. 200/-, or in default, to undergo simple imprisonment for one month. The respondent-accused preferred a revision in the Court of the learned Sessions Judge, Panaji. The learned Sessions Judge dismissed this revision petition holding that the offence under Section 448 of the Indian Penal Code had been proved. The respondent-accused then filed second revision petition in this Court, which was rejected by order dated 10th June, 1968. It was after that order that the applicant moved this Court for restoration of possession of the house in question under Section 522 (1) of the Code of Criminal Procedure. As will appear from the concurrent findings of the two Courts below and also the conclusion of this Court, the house in question was purchased by the applicant. The respondent-accused placed a lock over the lock placed by the applicant and after removing the latch from the rear portion

of this house he entered therein, apparently with the intention of causing annoyance to the applicant. Mr. Ranim, learned Counsel for the applicant is asked to satisfy this Court whether the application filed under Section 522 (1) is maintainable. This section states that whenever a person is convicted of an offence attended by criminal force or show of force, or by criminal intimidation, and it appears to the Court that by such force, or show of force, or criminal intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit when convicting the person, order at any time within one month from the date of conviction, the person dispossessed to be restored to the possession of the same. This provision contemplates an offence attended by criminal force, or show of force, or by criminal intimidation. What is "force" is defined in Section 349 of the Indian Penal Code. "Criminal force" is defined in Section 350 of the Indian Penal Code. It is an admitted fact that the applicant was not in the house when the respondent-accused removed the latch and entered therein. The applicant, according to Mr. Ranim, was not living in the house when the respondent-accused entered therein. The only force that is contemplated by Sections 349 and 350 is the force as applied to a human-being. It was not the case of the applicant at any stage that he was in physical possession of the house and thereafter he had been dispossessed by criminal force. There is an authority for the proposition that where a complainant is dispossessed of his garden by breaking open a padlock of its gate but no force or violence is used to any person an order of restoration cannot be passed: *Bisweswar Singh v. Bhola Nath*, AIR 1914 Cal 629. The section would have been attracted if the applicant, present in the house, had been dispossessed by use of criminal force, or show of force. The section confers on the criminal Court a summary power to restore the state of things which existed at the time of dispossession by the convicted person. This jurisdiction is of a quasi-civil nature and is exercised on grounds of public policy and general convenience. The essential requirements of the section are not satisfied in this case, apart from the fact that the application under Section 522 (1) is a belated one. As it is, the application is devoid of substance and is accordingly rejected in limine.

HGP/D.V.C.

Application rejected.

AIR 1969 GOA, DAMAN AND DIU 47
(V 56 C 11)

V. S. JETLEY, J. C.

Hari Manu Gaudo, Applicant v. Harishchandra Shankar Gaudo, Respondent.

Ref. No. 17 of 1968, D/- 16-7-1968.

Criminal P. C. (1898), Ss. 435, 439 — Offences under Ss. 504 and 323, Penal Code tried as summary case — On some altercations between Magistrate and Counsel for accused, latter withdrawing his vakalatnama after cross-examining some of prosecution witnesses — Upon Counsel's withdrawal, accused participating in trial and himself examining defence witnesses without moving Court that he would like to engage another advocate — On conviction, accused making grievance that prejudice was caused to him because his counsel could not cross-examine one of prosecution witnesses — On revision, conclusions of magistrate in support of conviction found to have been based on evidence and order of conviction found neither illegal nor improper — Nor was there any defect of jurisdiction — Case held not fit for interference in exercise of jurisdiction under Ss. 435 and 439 — (Penal Code (1860), Ss. 323, 504).

(Para 3)

Cases Referred: Chronological Paras
(1966) AIR 1966 Goa 32 (V 53)=1966

Cri LJ 1412, Caetano Colaco v.

Joao Rodrigues

3

G. B. Usgaonkar, for Applicant; S. Tamba, Govt. Pleader, for the State.

ORDER:— This is a reference made by the learned Sessions Judge under Section 438 (1) of the Code of Criminal Procedure. The report by him is that this case be remanded to any Magistrate other than the trial Magistrate and the applicant be given an opportunity to cross-examine the witnesses for the prosecution.

2. The material facts are that the respondent filed a complaint alleging that the applicant had insulted and caused him hurt on 3rd July, 1967, at about 10.00 a.m. The learned Magistrate tried the case summarily and after recording evidence adduced on behalf of the applicant and the respondent, convicted the applicant for the offences under Section 504 Indian Penal Code and directed him to pay a fine of Rs. 50/-. He also convicted him under Section 323 Indian Penal Code and required him to pay fine of Rs. 50/-. The total fine imposed was Rs. 100/-. The learned Magistrate passed an order that in case of default of payment of this fine the applicant had to undergo S I. for one month. The applicant felt aggrieved by this decision of the learned Magistrate and approached the learned Sessions Judge in revision.

The learned Sessions Judge accepted the contention on behalf of the applicant that his advocate was not permitted to cross-examine the witnesses and therefore he has been prejudiced in his defence. As will appear from the reference of the learned Sessions Judge there was some altercation between Mr G. B. Usgaonkar, learned Counsel for the applicant appearing in the Magistrate's Court, and because of that altercation Mr. Usgaonkar withdrew his vakalatnama. According to the learned Sessions Judge, it was necessary for the learned Magistrate to have given time to the applicant to engage another lawyer and as he did not do so therefore the procedure followed by him was not proper. He then came to the conclusion that the applicant be given an opportunity to cross-examine the prosecution witnesses who were heard but could not be cross-examined by Mr. Usgaonkar, appearing for the applicant. It is in these circumstances that reference is made by the learned Sessions Judge with the recommendation mentioned above.

3. Mr. Usgaonkar, learned Counsel for the applicant, contends that there was some altercation between him and the learned Magistrate and as he withdrew therefore the learned Magistrate should have permitted the accused to engage another lawyer and since he did not do so therefore prejudice is caused to the applicant. It may be stated that the case was triable summarily. The learned Magistrate has recorded long notes of evidence which he was not bound to do so under Section 263 of the Code of Criminal Procedure. Mr. Tamba, learned Government Pleader for the State, submits that no prejudice was caused to the applicant and that the withdrawal from appearance was not a suitable ground for adjourning the proceedings. I have gone through the record and I find that the complainant Horichondra Xencora Gaudo and his two witnesses Gones Gaudo and Data Govinda Gaudo were examined on 12th December, 1967. The complainant and Data Govinda Gaudo were cross-examined but as regards witness Gones Gaudo there is a note of the learned Magistrate that the cross-examination was not carried out. It may be stated that on 12th December, 1967, Mr. Usgaonkar did not make any application for withdrawal from the case. It was for the first time on 15th January, 1968, that he made an application which reads as under:—

"I was retained by the accused above-named to represent him in the above case. For reasons best known to the Court I feel that I shall be unable to continue any further. As such my vakalatnama may be please treated as withdrawn."

As will appear from this application, the vakalatnama was not withdrawn on 12th December, 1967, but on 15th January, 1968. This is not all. The case was further adjourned for recording defence evidence. On behalf of the applicant were examined defence witnesses Dananjaia Babusso Gaudo and Panduronga Nuno Gaudo. The examination-in-chief was carried out by the applicant himself in both cases. The applicant did not move the learned Magistrate that he would like to engage another advocate for carrying on examination-in-chief. The applicant could have engaged another advocate to examine the defence witnesses. The applicant actually participated in the trial and after he was convicted he made a grievance that prejudice had been caused to him because Shri Usgaonkar could not cross-examine witness Gones Vishnum Gaudo. Shri Tamba points out that in this case the learned Magistrate was not unfair to the applicant, and that, having regard to the evidence recorded, no prejudice was caused to the applicant. If the applicant does not wish to carry out cross-examination as in the case of prosecution witness Gones Vishnum Gaudo the Court cannot be blamed. The learned Magistrate considered the application dated 15th January, 1968, filed on behalf of the applicant and he passed the following order thereon, in Portuguese which, as translated, reads:—

"The case is a summary one. The witnesses were examined by the accused, and the prayer made for a new enquiry amounts to delaying tactics and as such I reject the prayer for a new enquiry."

The scope of revision petition has been explained by this Court at length in Caetano Colaco v. Joao Rodrigues, AIR 1966 Goa 32. I have been taken through the evidence and I find that the conclusions of the learned Magistrate in support of conviction are based on evidence. This is not at all a fit case for interference in exercise of the jurisdiction vested in this Court under Sections 435 and 439 of the Code of Criminal Procedure. The order passed by the learned Magistrate is neither illegal nor improper. There is no defect of jurisdiction in this case. In this view of the matter the reference made to this Court is not accepted and the conviction and sentence imposed by the learned Magistrate is maintained. The revision petition is accordingly rejected.

HGP/D.V.C.

Revision rejected.

AIR 1969 GOA, DAMAN AND DIU 48
(V 56 C 12)

V. S. JETLEY, J. C.

Lourenco Rocha, Applicant v. Euclidas Joao Rodrigues and another, Respondents.

Ref. No. 7 of 1968, D/- 16-2-1968

(A) Criminal P. C. (1898), S. 98 (1) — Property which is subject matter of complaint and is stated to be stolen, found lying in house of accused — S. 98 (1) is not applicable in terms apart from the fact there is no allegation either in the complaint or in examination of complainant that the house of accused is used for deposit or sale of stolen property — 1957 Cr. LJ 669 (Cal), Foll. (Para 3)

(B) Criminal P. C. (1898), Ss. 516-A, 96 — Complaint case against accused for paddy theft — Paddy found from house of accused not produced before Magistrate — Question of ownership involved — Order of Magistrate directing seizure of paddy from house of accused held to be not legal — S. 516-A not attracted. (Para 3)

Cases Referred: Chronological Paras (1957) 1957 Cri LJ 669=ILR (1958)

1 Cal 501, Amina Bewa v. Dukhimonni Dasi

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P. G. Navelkar, for Applicant; Bosco Vasconcelos, for Respondents.

ORDER:— This is a reference made by the learned Sessions Judge under Section 439 of the Code of Criminal Procedure.

2. The facts leading to this reference broadly stated are that a complaint was filed by complainant Euclidas Joao Rodrigues against accused Lourenco Rocha and accused Rita Liberata Mascarenhas under Sections 379 and 447 of the Indian Penal Code. The case of the complainant was that the accused had removed paddy from his field and thereby committed theft and also criminal trespass. The learned Magistrate after examining the complainant passed an order dated 13th October, 1967, directing that a bailable warrant should be issued against accused Lourenco Rocha under Sections 447 and 379 of the Indian Penal Code and also directing the police that on the basis of the warrant issued by him the paddy lying in the house of the accused Lourenco Rocha should be seized and handed over to the Sarpanch of Ambaulim. Accused Lourenco Rocha felt aggrieved by this order and filed a criminal miscellaneous application wherein it was prayed that the decision regarding seizure of the paddy be set aside as it has not the support of law.

The learned Sessions Judge treated this application as a revision application

a mere matter of procedure, but is a matter of substantive right so far as the parties to the suit are concerned.

5. This decision found its support from the decision of the Federal Court in *Venugopal v. Krishaswami*, AIR 1943 FC 24. The question in that case was whether the separation of Burma from India in the year 1937, had the effect of depriving the Trichinopoly Court of its jurisdiction to continue a suit in respect of the properties which were situated in Burma. The suit was instituted in the year 1932, when Burma was part of India and some of the items of properties included in the suit were those situated in Trichinopoly, while the remaining items were properties situated in Burma. There was no dispute on the question that the suit was properly commenced and that the Court was competent to adjudicate upon the claims relating to both these sets of properties. The Federal Court ruled that a right to continue a duly instituted suit is in the nature of a vested right and it cannot be taken away except by a clear indication to that effect in the subsequent enactment or statutory notification limiting the jurisdiction of the Court which had already entertained the suit in proper exercise of the jurisdiction it had at the time of the institution of the suit. It was also pointed out that:

"the true position is not whether there is any express provision permitting the continuance of pending proceedings but whether there is any clear indication against the continuance of pending proceedings to their normal termination."

6. Another case referred to is of the Supreme Court in *Ramanna v. Nallapparaju*, AIR 1956 SC 87. There the question was one of jurisdiction to execute a decree by a Court. The subject-matter of the decree had come to be transferred subsequently to the jurisdiction of another Court; and in that respect it was observed by their Lordships that it is settled law that the Court which actually passed the decree does not lose its jurisdiction to exercise it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court.

7. In the case of *Raghunath Hanumant v. Sadashiv*, 52 Bom LR 871 = (AIR 1951 Bom 270), a similar principle has been enunciated. There the Court had to consider the effect of the amendment made by the Bombay Civil Courts (Amendment) Act, 1940 and it was observed by Gajendra-gadkar J. after examining the provisions of the Amendment Act as follows:

'The legal position with regard to the litigants' right to file an appeal is fairly well settled. The amendments made by the present Act cannot be said to be merely

procedural. If they had been merely procedural, they would obviously have been retrospective. But in so far as one of these amendments changes the forum of appeal in some cases it cannot be said that this change is a mere matter of procedure. It clearly touches a right which was in existence at the time when the Act was passed, and this right to file an appeal in a higher forum has been always regarded as an important right vesting in the litigants at the time when the suits or proceedings are instituted. There is no doubt that when the present suit was instituted the parties to the suit had a right to come to this Court in appeal against the decree that may ultimately be passed in the suit. If this right which had vested in the parties at the time when the suit was instituted is intended to be taken away by the present amendment Act, such intention must appear clearly and unambiguously in the provisions of the Act.

It would thus be clear that in dealing with the preliminary objections raised before us in the present appeal we must bear in mind that the parties to the present suit had a right to come to this Court in appeal against the decree that would be passed in this suit. There is no doubt that Legislature can take away that right if they deem it proper to do so. But the right must be taken away expressly or by necessary implication. It must appear manifest on reading the provisions of the amending Act that there was no doubt whatever that Legislature intended by the amending Act to take away the parties' right in the matter of appeal."

This decision was followed in a subsequent decision in *Prabhakar Bhaskar v. Usha Prabhakar*, 55 Bom LR 59 = (AIR 1953 Bom 189) and the observations quoted hereinabove were also followed in that subsequent decision.

8. The same line of reasoning has been adopted in the case of *Doongarmal v. Roop-singh*, AIR 1957 Raj 336. In that case S 21 of the Rajasthan Civil Courts Ordinance, 1950, as amended by Rajasthan Act (6 of 1956), was considered; and it was held that S. 21 of the Rajasthan Civil Courts Ordinance, 1950, as amended by Rajasthan Act (6 of 1956), which came into force on 11-4-1956 can have no application to suits decided before the amendment was brought into force though appeals therefrom were actually filed after the amendment. It was further held that no doubt a right of appeal is not mere procedural matter and it pertains to the domain of substantive rights. Such a right cannot be allowed to be taken away retrospectively unless an express provision to that effect has been made by the Legislature or the same result is deducible on the principle of necessary intendment. It has been further observed that where a judgment from

which an appeal lies is pronounced a right of appeal at once arises to the aggrieved party to appeal from the decision given, to a Court which would be authorised to receive it at that time. It has been further observed that the aggrieved party would be within his rights on that very day to prefer an appeal from the decision by which he was feeling aggrieved, and in consonance with the law which was in force then, he would be well within his right to institute his first appeal in the High Court. This right cannot, in any way, be affected simply because he filed his appeal not immediately after the judgment sought to be appealed against was delivered, but he presented the appeal later within the period of limitation permitted to him under the law. It follows that this right cannot be allowed to be affected by any amendment of the law which may have been brought into force in between the pronouncement of the judgment and the presentation of the appeal. For, to allow this to be done would be to give a retrospective effect to the amendment contrary to the well-settled principle that laws touching the substantive rights of parties, as contradistinguished from their procedural rights, should be applied prospectively only, a retrospective operation being only permissible where legislature has made an express provision to that effect or such a result is irresistibly deducible on the theory of necessary intendment."

9. Mr. Shah for the appellant on the other hand relied upon two decisions in support of his contention.

10. In (1906) ILR 28 All 93, construction of S. 17 (1) of the Civil Courts Act (No XII of 1877) was considered. Section 17(1) of that Act provided as follows:—

"Where any Civil Court under this Act has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to that case, which, if that Court had not ceased to have jurisdiction, might have been had therein may be had in the Court to which the business of the former Court has been transferred"

Having regard to this provision, it was obvious that by reason of the Notification of the Government referred to in that case the District Judge has ceased to have jurisdiction. We have no such provision in the Notification issued under S. 22A of the Bombay Civil Courts Act; nor do we find any such provision which can help the present appellant. This case cannot, therefore, help the appellant as it proceeded on the construction of a different type of provision contained in S 17(1) of the Civil Courts Act, 1877.

11. The other case relied upon by the learned Advocate for the appellant is of *M. Subbaya v. M. Rachayya*, AIR 1915 Mad 362. That case, no doubt, supports the argument advanced by the learned

Advocate for the appellant but, with respect, it is not possible to agree with the reasoning and the conclusion arrived at therein.

12. The principle that can be deduced from the authorities referred to above, at any rate, lays down clearly the position that the right of appeal is not merely a procedural matter but it is a substantive right and that such a right can only be taken away by express provision to that effect. Such a right cannot be allowed to be taken away retrospectively unless expressly provided for by the Legislature. A right of appeal arises to a party with the institution of the suit and, at any rate, at the date when the decision has been given by the Court, so as to consider the authority of the superior Court having right to hear the appeal in respect of any such case. As already pointed out hereinabove, the Notification does not affect any pending cases or cases decided by the Court prior to the Notification coming into force or in any way affecting the jurisdiction of the appellate Court in respect of the decisions in those suits. The institution of the suit was proper and that continued till the decision of the suit and the right of appeal arose on 9-10-1959. The Notification issued under the Bombay Civil Courts Act did not exist and, therefore, in any view of the matter, the right to appeal under S. 96 C. P. C. was to the District Judge at Godhra, which Court had the jurisdiction over the Court at Kalol. The District Court at Godhra was authorised to hear the appeal over the decision of the Civil Judge Jr. Dn. Kalol. That jurisdiction of the District Court has not been affected by any express provision and the District Court was not in any way wrong in entertaining the appeal and deciding the same.

13. In the present case, the defendant himself had gone in appeal. He had raised a contention in the lower Court on the footing that by reason of the Notification issued on 3-4-1959 by the Governor of Bombay under Section 7 of the Bombay Land Revenue Code the Civil Court had no jurisdiction to entertain the suit; but that obviously could not affect the jurisdiction of the Civil Court unless any Notification under the Bombay Civil Courts Act was issued. That ground was taken in appeal and it was negatived by the learned District Judge. It was further observed by the learned District Judge that it was admitted by both the sides that no such Notification was issued by the Governor of Bombay under S. 22A of the Bombay Civil Courts Act transferring the said village within the jurisdiction of the Kalol Court to that of Baroda Court. Naturally, therefore, the learned District Judge had no occasion to go into that question. If the defendant himself had chosen the forum of going in appeal before the District Court

at Godhra and if he wanted to raise any contention about the District Court at Godhra having no jurisdiction to entertain the appeal, it was his duty to produce that Notification and have the decision obtained in that respect. It was only at the time of hearing of this appeal that this contention has come to be raised. Thus he can be taken to have waived any such point and, at any rate, such a contention cannot be allowed to be raised at this stage in appeal. But, in the view that I have taken it is not necessary to go into that aspect of the case.

14. Thus, the District Court at Godhra had authority to hear the appeal and there was nothing wrong in the District Court at Godhra hearing the appeal from the decision of the Court at Kalol.

15. The next point raised by Mr. Shah in this appeal was that the writing, Ex. 24, has been wrongly admitted in evidence by the trial Court. According to him the writing appears on adhesive stamps. While the upper two stamps have been cancelled by reason of the defendant putting his signature thereon, the two stamps therebelow have not been cancelled. The contention was that S. 12 of the Stamp Act has been contravened, which provided as follows:—

"12(1) (a) Whoever affixes any adhesive stamp to any instrument chargeable with the duty which has been executed by any person shall, when affixing such stamp cancel the same so that it cannot be used again;

* * * * *

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

Then he invited a reference to the case of Kasan Shah v. Atta Ullah, AIR 1933 Lah 148 (2), which lays down that such a document would be inadmissible in evidence. That was a case of a promissory note on which four stamps were affixed, three of them were cancelled and one was not cancelled; and it was held that the document was inadmissible in evidence. In the instant case, the writing Ex. 24, has been held by both the Courts not to be a promissory note as such and it cannot, therefore, stand in line with consideration of such a question which would arise in respect of a promissory note. The only effect arising out of want of cancellation of any stamp in any such writing arises under S 12(2) of the Stamp Act and it is, therefore, to be deemed as unstamped. Treating the same as unstamped document, the trial Court has by passing an order on 17-10-1959 directed the plaintiff to pay the stamp required to be affixed on an instalment-bond. He also directed him to pay a certain penalty re-

quired to be paid for the same. In all he was required to pay Rs. 185.57, before it was admitted in evidence. Apart from that position, under S. 35 of the Bombay Stamp Act, 1958, where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 53, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Thus, once the document is admitted in evidence, it would not be open to the defendant to challenge the admission of any such document in that suit on any such ground that the instrument has not been duly stamped. Mr. Shah, the learned Advocate for the respondent referred to a decision of Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655, saying that such a question is not permissible to be raised now by the defendant at this stage. It was held in that case as follows:

"Where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, S. 36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of Superior Jurisdiction".

The mere fact that the defendant remained absent at the time of hearing of the suit is no justification to urge to this Court that he had no opportunity to oppose the admission of any such writing. He could well have attended the Court and taken precautions to see that the document was not admitted.

16. The claim has been decreed by the trial Court and there is nothing that can be urged in that respect.

17. In the result, therefore, this appeal fails and is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 GUJARAT 100 (V 56 C 20)

J. M. SHETH, J.

Kacharji Hariji, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 465 of 1967, D/-27-6-1967 against judgment of Chief City Magistrate, Ahmedabad in Cri. Case No. 988 of 1966.

(A) Evidence Act (1872), S. 3 — Circumstantial evidence — Conviction on — (Criminal P. C. (1898), S. 367).

Conviction can be based on circumstantial evidence, only if that evidence is incompatible with the innocence of the accused. (Para 5)

(B) Evidence Act (1872), Ss. 8, 27 — Evidence of conduct — Admissibility — Accused giving information to Police head constable in presence of Panchas that he would show the stolen goods — He further taking them to cow-dung hill and from there taking out stolen articles — This done on very next day after commission of offence — This evidence being evidence of conduct of the accused was admissible under S. 8 — It was also admissible under S. 27. (Para 5)

(C) Evidence Act (1872), S. 114, Illustration (a) — Proof of possession of stolen goods and not of possession of place where those goods were hidden and found is necessary. (Para 6)

(D) Evidence Act (1872), Ss. 114, Illustration (a) and 8 — Presumption under S. 114(a) when arises — Mere pointing out place where articles are hidden — Not sufficient — (Penal Code (1860), Ss. 379, 411).

The question of raising a presumption under S. 114 Illustration (a) arises for consideration only after it is proved that the accused was in possession of stolen articles, after the commission of theft. If the accused merely points out a place where the articles are hidden and produces those articles therefrom, there are several possibilities; one possibility is that he had knowledge of the exact spot where the articles were hidden, as he himself was an author of concealment. The second possibility is that he may have gathered that information from a person who was the author of concealment. Another possibility that can be envisaged is that he may have actually seen a person concealing those articles. His seeing a thief concealing those articles may not be objected to, by that thief, as a thief might happen to be his friend or relation. It cannot be necessarily deduced from these circumstances only that he must necessarily be a thief. His knowledge without he being a thief, from other sources cannot be necessarily ruled out.

In absence of any other evidence, on

mere pointing of a place where the articles were concealed, and on account of the production of those articles therefrom, it cannot be necessarily deduced that that person must be either a thief or a receiver of stolen property. If it had been pointed out very soon after the commission of the theft, no doubt it is a circumstance, which will raise a very strong suspicion against the man. But a strong suspicion cannot take a place of proof. In the absence of any other evidence and in the absence of any incriminating statement made, at the time of giving information, as for example, that he was the author of concealment, this circumstance, found against that person can be explained on any other rational hypothesis. The circumstantial evidence therefore, will not be such as to be incompatible with the innocence of the accused. That person, therefore, cannot be presumed to be a thief or a receiver of stolen property. AIR 1958 Mad 384 & AIR 1958 Mad 451 & AIR 1959 Pat 54, Disting. and Expl.; AIR 1930 Bom 244 & AIR 1945 Bom 292 & Cri. App. No. 291 of 1943, D/- 11-11-1943 (Bom), Foll. (Paras 13, 14)

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M. F. Thakar, for Appellant; G. T. Nanavati, Asstt. Govt. Pleader, for the State.

JUDGMENT :— This is an appeal, filed by the appellant from Jail, against the order of conviction and sentence, passed against him in criminal Case No. 988 of 1966, by the learned Chief City Magistrate, Ahmedabad, Shri P. M. Mehta. The appellant is convicted of an offence, punishable under Section 379 of the Indian Penal Code and is sentenced to suffer three months' rigorous imprisonment and to pay a fine of Rs. 100/- and in default of payment of fine, to undergo one month's further rigorous imprisonment.

2. The prosecution story is briefly stated as under:—

There is a firm, named Everest Chemical Industries, situated at Maninagar, Rambaug, manufacturing medicines On 21st October, 1966, at about 11.00 a. m. four boxes of medicines were sent through Chhanaji Nathaji, an employee of the said firm. Three boxes were to be sent to Surat and one was to be sent to Botad. One which was to be sent to Botad was to be sent through Bharat Transport Co., situated near Sarangpur Gate, at Ahmedabad. The three boxes which were to be sent to Surat were to be sent to Ambika Medical Stores at Surat and the necessary slips for the same were attached to the boxes. The said firm was a partnership firm and one of the partners was the complainant, Ratilal Amthalal. The aforesaid four boxes were carried by Chhanaji in a hand-cart to Sarangpur Gate. He parked his cart outside Bharat Transport Co. near Sarangpur Gate. One box of medicines, which was to be sent to Botad was carried by him to Bharat Transport Co., leaving the three other boxes in the said handcart, unattended to. On his return after delivering one box to Bharat Transport Co., he found his cart as well as the three boxes of medicines, left in that cart, missing. He searched for the same, but it was in vain. He, therefore, reported about the incident to his master, Ratilal, who in his turn, filed a complaint at Kalupur Police Station. One of the three boxes contained 50 bottles of Syrup Vasaka, valued at about Rs 175/-. The second one contained 44 bottles of Cough-ex, valued at about Rs 198/- and the third contained 36 bottles of Isewhite Syrup, valued at about Rs 153/-. On 22nd of the same month, i.e. on the next day, one police constable, Dattu of D. C. B. got information that the present appellant and the other two named, Fata Bhikha and Dharma Shiva have committed a theft of these three boxes and they have hidden them somewhere near Dudheshwar. Dattu conveyed that information to the Head-Constable

Sukhaji, and Sukhaji incidentally caught hold of the present appellant and on being questioned, he showed his willingness to point out the muddamal. The information was given in the presence of panchas. It was noted down in the initial panchnama. The police and the panchas went to the place near a Chawl of Galaji near Dudheshwar at the instance of the appellant, and in a cow-dung hill, these bottles and parts of the boxes were found hidden and they were brought out by the accused-appellant in the presence of panchas. They were in a gunnybag in the said cow-dung hill. Panchnama Ex. 7 was drawn up. The appellant was arrested. After necessary investigation, charge sheet was sent against him.

3. The learned Magistrate, relying upon the evidence of pointing out the muddamal stolen bottles by the accused, which were found hidden in a cow-dung hill at Dudheshwar, near Galaji Chawl on a day next to the day of the offence, found that this appellant must be a thief. On the basis of it, he convicted the appellant of the offence in question. The appellant's version was that he had not committed any offence. He had not led any defence evidence.

4. The learned Advocate, Shri M. F. Thakar, appearing on behalf of the appellant, contended that the evidence led by the prosecution was not sufficient to hold the appellant guilty of the offence in question. The fact that the theft in question had taken place and the fact that the muddamal bottles found, formed a part of the stolen property, are not challenged by him. There is overwhelming evidence, led by the prosecution to prove those facts. That evidence is reliable evidence and it deserves credence. It is proved beyond reasonable doubt that the theft of three boxes, containing bottles of medicines had taken place, as deposed to, by the complainant Ratilal. It is also proved beyond reasonable doubt that a part of that stolen property was found from a cow-dung hill, situated near Galaji Chawl. It was in open piece of land. Those bottles were found in a gunny bag, and also the remnants of boxes in which these bottles were kept at the time they were taken by Chhanaji in a cart, were also found from that cow-dung hill. The stolen property has been identified by the complainant. His evidence on that point is not challenged. It is thus proved beyond reasonable doubt that the stolen property was found on the next day after the commission of the offence from the aforesaid cow dung hill. It is further proved from the evidence of the police head-constable, Sukhaji, Ex. 8 and panch witness, Babulal, Ex. 6, that the appellant had given information to the police head-constable, Sukhaji in the presence of the panchas that he would

show the goods and he took the police and panchas at this cow-dung hill, situated near Galaji Chawl near Dudheshwar. It also appears from the evidence of this panch witness Babubhai that it was appellant who took out these bottles etc. from that cow dung hill. It is true that this had been done on the very next day after the commission of the offence in question. It is only on this evidence that the appellant has been convicted of the offence in question.

4A. It is significant to note that no statement is made by the appellant that he was the author of concealment. It is not stated by the police head-constable, Sukhaji or the panch witness Babubhai or the police constable Dattu that the appellant gave the information that he had hidden these articles which formed a part of the stolen property at the place pointed out by him and wherefrom he produced these Articles.

5. The interesting question that arises for determination in this appeal is whether from this evidence only, it can be said that this appellant was in conscious possession of the stolen Articles and if so, the presumption can be raised against him in view of the illustration (a), given in Section 114 of the Indian Evidence Act, that he was a thief. It could without any hesitation, in my opinion, be said that the conviction of the appellant is based on circumstantial evidence. There is no direct evidence to prove the guilt of the appellant. It is a well-settled position of law that conviction can be based on circumstantial evidence, only if that evidence is incompatible with the innocence of the accused. In my opinion, it could also be said that this evidence is the evidence of the conduct of the appellant which may be admissible evidence under Section 8 of the Indian Evidence Act. It could be said that this evidence was admissible under Section 27 of the Indian Evidence Act.

6. The learned Assistant Government Pleader, Shri G. T. Nanavati, appearing on behalf of the respondent-State, seriously contended that this was not a mere case of producing stolen articles. It was not a mere case of pointing out the place where the stolen articles were found. It was a case wherein certain information was given and on the basis of that information, discovery was made and that discovery was coupled with a circumstance of production of concealed articles by this very appellant who had given that information. He, therefore, contended that in such a case, where the articles were concealed in a cow dung hill, which cannot be easily seen by other persons, it should be presumed that this appellant was in exclusive possession of it. It was on the basis of his exclusive

knowledge. Once it is found that he was in conscious possession of those articles, presumption can arise in under Section 114 of the Evidence Act in view of the illustration (a), given in that section, that he was a thief, the reason was that his possession of stolen articles was very recent. I have not got the slightest hesitation in accepting his argument that if the appellant is found in possession of the stolen property, his possession being very recent, the provisions of Section 114 of the Evidence Act, can be pressed into service. That section runs as under:

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The illustration (a) given in that Section states that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. It is, therefore, evident that if the appellant is found in possession of this stolen property soon after the commission of the theft, the Court can presume that he is a thief. For attracting the provisions of this section, it must be first proved satisfactorily that the appellant was found in possession of stolen goods after the theft. It is also true that what is to be proved is the possession of the stolen articles and not the possession of the place wherefrom these stolen articles were found. The argument of the learned Asstt Government Pleader, Mr. Nanavati, that the fact that this cow dung hill was situated in a place which was not in possession of the appellant, has not got a very material bearing on the question of possession of articles by the appellant, is no doubt well founded. Even if the place wherefrom such articles are found, is accessible to others and is not in exclusive possession of the appellant, the appellant may, in given circumstances, be in exclusive possession of those articles. It could also be said that if the appellant had given an information that he had hidden these articles and as a result of the information given by him, these articles were discovered therefrom, he could have been said to be in possession of those articles and the presumption contemplated under Section 114 of the Indian Evidence Act, could have been raised. If in that case, the appellant was not in a position to account for his possession, it could have been presumed that he was a thief or a receiver of stolen property. The argument canvassed before me by the learned Assistant Govern-

ment Pleader was that in view of the fact that the appellant gave this information, namely; of showing the goods, as deposed to, by the panch witnesses and he took the panchas and the police to this cow-dung hill and there he himself produced these concealed articles, which were admittedly the stolen articles, a presumption could arise in view of the provisions of Section 114 of the Indian Evidence Act that the appellant was in conscious possession of these articles and as his possession was recent and he had not accounted for his possession, he can be presumed to be a thief. In short, his argument was that this was not a mere case where the appellant had the knowledge of the place where the stolen articles were kept. It was something more than that and hence, he can be said to be in conscious possession of these articles. It could be in the circumstances of the case said that this fact was within the exclusive knowledge of the appellant and unless he explains as to how he came to know about this place of concealment, it should be presumed that he must be a thief. In my opinion, these arguments are not well founded arguments. I must frankly state that his arguments do get support to a certain extent from the decisions relied upon by him, which I will presently refer to. Before I advert to those authorities, I would first refer to Section 8 of the Indian Evidence Act, which is material for our purposes. It reads as under:-

"Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact The conduct of any party or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

Explanation 1. — The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2. — When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant."

This section lays down that the evidence of the conduct in the circumstances referred to therein, is relevant, and that being so, such evidence will be admissible evidence.

7. In a case in re Kirukku Mayandi, AIR 1958 Mad 384, Ramaswami J. (as he then was) has made the following observations, on which the learned Assistant Government Pleader, Shri Nanavati has laid stress:

"In cases of pointing out, especially of stolen properties, the real question is not so much whether the accused was in physical possession of the properties hidden somewhere or buried in some field as whether he was the person that so hid the properties, for a person who buries treasure in a spot unknown to others is really in possession of it and it does not matter whether it is in a field not in his occupation or in his own house."

I am in respectful agreement with these observations made. It is further observed therein as under—

"A person is said to be in possession of a thing when the facts of a case are such as to create a reasonable expectation that he will not be interfered with the use of it. Thus, a person who hides a thing is in possession of it because he gains thereby a reasonable guarantee of the use of it. Then if the accused does not satisfactorily account for its possession, mere denial of theft or possession is not explanation and the presumption under Section 114, Evidence Act, can be drawn against him."

I am also in respectful agreement with these observations made. Thereafter, the following observations are made:

"The question whether the person who has pointed out has not himself hidden it is purely a question of fact. If the Court comes to the conclusion on the facts that the accused has hidden the property in question, one important step in resorting to the aid of illustration (a) to Section 114 of the Act is satisfied, viz., possession."

I am also in respectful agreement with these observations made. It is further observed that :

"It is not the law that the accused must positively prove his explanation. It is enough if his explanation is found to be reasonably true. No weight will be attached to the explanation however, if it is unreasonable or manifestly inadequate or improbable on the face of it"

In the body of the judgment, at page 386, in paras 12 to 14, certain observations have been made, on which reliance is placed by the learned Assistant Government Pleader, in support of his arguments. They can be referred to, with advantage at this stage:—

"In cases of pointing out, especially of stolen properties, the real question is not so much whether the accused was in physical possession of the properties hidden somewhere or buried in some field

as whether he was the person that so hid the properties, for a person who buries treasure in a spot unknown to others is really in possession of it and it does not matter whether it is in a field not in his occupation or in his own house. The person who hides a thing has possession of it for he has both the *Animus* and the *Corpus*

Possession is acquired whenever the two elements of *corpus* and *animus* come into co-existence. Salmond defines the possession of a material object as the continuing exercises of a claim to the exclusive use of it. A person is therefore said to be in possession of a thing when the facts of a case are such as to create a reasonable expectation that he will not be interfered with the use of it. Thus, a person who hides a thing is in possession of it because he gains thereby a reasonable guarantee of the use of it. Then if the accused does not satisfactorily account for its possession, mere denial is not explanation

The clinching question, therefore, as mentioned by Mr. Y. S. Rao in his valuable monograph — *Circumstantial and Presumptive Evidence* — Page 119 & foll., in cases of mere pointing out is, whether the person who has pointed out has not himself hidden it and this is purely a question of fact. If the Court comes to the conclusion on the facts that the accused has hidden the property in question, one important step in resorting to the aid of illustration (a) to Section 114 of the Act is satisfied, viz., possession. The line of inquiry as to whether the accused person who pointed out the thing was the person who had hidden it is very clear.

The difficulty with regard to the place where the property is found, being a public place or a place not in the control of the accused is got over if the property is found to be so carefully and cautiously hidden away from human gaze that a member of the public could not possibly know of its presence there and it therefore leads to the inference that the person who knows its whereabouts is the person who secreted it there."

These observations indicate that on account of certain circumstances found, it can be undoubtedly said that the person who knew the whereabouts, must be the person who secreted it there. In short, the circumstances must be such as to point to one conclusion that he must be the person who had hidden those Articles at the place and that question is a question of fact

It has been further observed therein as under:—

"It is upto the investigating officers to question the accused as to the details of the exact location of the secreted arti-

cle and to lead evidence as to the secrecy of the place, the correspondence between the details given out by the accused and the actual finding of the article, and the case with which the accused got straight to the point at which the article was concealed, in order to show that the accused must have dealt with the object to justify the knowledge displayed. The detailed knowledge of the location of the secreted object will serve to displace other hypothesis that may be possible though not probable.

The hypothesis that some one told the accused of the place of secretion is displaced by the very knowledge displayed, for it is unnatural that such details of secretion would be conveyed to another out of mere idle curiosity. Finally this hypothesis is totally vacated 'if the accused does not reveal the name of the person who has imparted to him this precious information, for it is impossible to believe that the accused is prepared to lose his life or liberty for the sake of his friendly obligation to keep the secret, nor is it reasonable to expect any sense of moral obligation in one who has not moved the authorities in the matter till he was himself suspected and questioned'."

With great respect to the learned Judge, I beg to defer from these latter observations made by him, which are underlined by me (here kept in single inverted commas), in my opinion, there is no obligation for an accused to reveal the name of the person who has imparted to him this precious information and in case he does not choose to reveal that information, and keeps mum, any inference can be drawn against him in a trial for a criminal offence. It will be against the fundamental principles of criminal jurisprudence. If the circumstances are such that from those circumstances, one could come to only one conclusion that he was the author of concealment, no doubt, on such circumstantial evidence, it could be reasonably said that he was found in possession of these articles. The reason being that the circumstances were such from which it could be said necessarily that he must have hidden those articles.

It has been further observed therein as under:—

"The only other hypothesis is that he managed to see the actual unknown criminal hiding the thing. The very knowledge exhibited by the accused is again an infirmity of this hypothesis, for criminals do not secret things unless they make sure that they are not being observed. If the possibility is still to be considered that the real criminal hid the object without knowing that another man was watching him, the very detailed knowledge of the actual place of secre-

tion displayed by the accused person is again an infirmity of this hypothesis, unless it is to be believed that the accused examined the place and the thing hidden after the criminal left the place.

If so, the pertinent question would be why the accused did not bring the matter to the notice of the authorities like an honest man, and if it is a valuable property and he is not honest why he did not appropriate it himself immediately and forestall the real criminal but was waiting till he was himself suspected and questioned. The irresistible conclusion can only be either that the accused was the real offender or at least an accessory after the fact. Not having revealed the principal offender if he was 'an accessory after the fact, he must be the principal offender himself, at least one of the principals'.

With great respect to the learned Judge, I am of opinion that the reasoning made in the observations underlined by me (here in inverted commas) does not appear to be very sound. No such duty is imposed upon the accused to reveal the principal offender. If he was an accessory after the fact and he does not reveal the principal offender, it cannot be necessarily said that he must be a principal offender himself or at least one of the principals. In my opinion, certain observations have been made in that decision which are very general. It may be correct to say that the circumstances proved in that case may be sufficient to come to a conclusion that a person charged with an offence of theft, must be an author of concealment. In that case, there were other circumstances to justify the conclusion. In this para 14 of the judgment, at page 387 the following pertinent remarks have been made, which can be referred to, with advantage at this stage.

"A further circumstance that fortifies this line of inquiry is the multiple discovery. If the accused points out not one incriminating object but a number of them and in different places and under different conditions, the suggestion that the accused might have managed to follow the criminal unnoticed at every stage and obtained a detailed knowledge of every article secreted is, to say the least, fantastic. Above all, it is difficult to understand how the accused was able to know what object would be found in any particular spot and how the object was connected with the crime with reference to which he was able to offer to point out when questioned by the police officer. It is, therefore, not correct to brush aside every case of mere pointing out as a case of mere innocuous knowledge."

It will be significant to note that in that case, several Jewellery articles were stolen. They were found from different persons at different places and the places

were pointed out by the accused. He had also pointed out the place — the exact spot where the ornaments were buried and the articles were dug out from beneath the ground. In view of those circumstances, it was found that he was in possession of those articles and that possession was recent and he did not account for possession. He was therefore convicted of the offence in question.

8. In the same Volume, there is another decision, given by Ramaswami J. AIR 1958 Mad 451. It has been observed as under :—

"It is quite true that exclusive possession cannot be brought home to an accused if properties are discovered in open places equally accessible to members of the public as a result of the information given by him. But at the same time, if the property is found to be so hidden away that no ordinary member of that public could know of its existence there, the fact that it is on that particular person's information and pointing out unaccompanied by any explanation of innocent knowledge, the incriminating article was discovered and recovered would lead to the presumption that he is the person who had secreted it there. It unmistakably shows that the accused was proceeding to the felony."

The facts in that case were as under.—

"The particular discovery made was as a consequence of the information given by the accused and his pointing out the spot wherein he had buried M. O. 1 with fermented wash."

That would probably suggest that he had given an information that he would point out the spot wherein he had buried M. O. 1 with fermented wash.

It is further observed therein as under:—

"But for this accused pointing out the spot the Sub-Inspector would never have been able to effect the recovery of M O 1. In fact the accused had all the wide open space of the village to secrete the pot with the fermented wash apart from the other imaginable places where such secretion could be made. The Sub-Inspector might even spend weeks without being able to spot out this secret hiding place. In Ramakrishna Mithanlal Sharma v. State of Bombay, 1955 SCR 903 = AIR 1955 SC 104, it was held that where evidence was given by a police officer that in consequence of a certain statement made by the accused and at the instance of the accused a tin box was dug out of a mud house and the nature of the statement made or information given by the accused was not sought to be proved (as here). S. 27 of the Evidence Act was not attracted and prima facie there was nothing to prevent the evidence being admitted against the accused concerned.

It is quite true that exclusive possession cannot be brought home to an accused if properties are discovered in open places equally accessible to members of the public as a result of the information given by him if the property is found to be so hidden away that no ordinary member of the public could know of its existence there, the fact that it is on that particular person's information and pointing out unaccompanied by any explanation of innocent knowledge the incriminating Article was discovered and recovered would lead to the presumption that he is the person who had secreted it there.

It unmistakably shows that the accused was proceeding to the felony; *Sher Mohd. v. Emperor*, AIR 1945 Lah 27 at p 32, *Mt Jamunia Partap v. Emperor*, AIR 1936 Nag 200=37 Cri LJ 1047; pointing out is evidence of conduct under Section 8, Indian Evidence Act, where an accused gives information leading to discovery, and the exact spot where the ornaments were buried is shown and the articles dug out by him from beneath, the question is not so much whether the accused was in physical possession of the ornaments buried in the field, though as a matter of fact a person who buries treasure in a spot unknown to others is really in possession of it, whether it is in a field accessible to every one or in his own house

The important point is that the circumstances and conduct of the accused point clearly to his knowledge of the exact spot where the ornaments were and in the absence of any explanation the reasonable inference is that he put them there himself. Such conduct taken in conjunction with other evidence is enough to warrant a presumption of complicity in the offence."

If we now bear in mind all these observations made by Ramaswami J. it appears that the ratio was that if circumstances and conduct of the accused, pointing clearly to his knowledge of the exact spot where the ornaments were and in the absence of any explanation the reasonable inference would be that he put them there himself and if there is such conduct, and if it is taken in conjunction with other evidence, it would be enough to warrant a presumption of his complicity in the offence. If there was only such conduct evidence, in my opinion, no such presumption of the appellant's complicity in the crime could be raised. Such a piece of circumstantial evidence can be explained on any rational hypothesis. Let us take an illustration for explaining the same. A friend or a relation of the accused has committed a theft and that relation or a friend conceals those articles in a place, like a place in the present case, to the know-

ledge of the accused. The accused can, therefore, in the aforesaid circumstances, point out the exact spot if he has minutely observed it and can take out the articles therefrom. Could it, therefore, on such pointing out a place and producing the articles therefrom, be said that the appellant must be a thief. Could it be said that he must be an author of concealment. Such conduct, therefore, can be explained on this reasonable hypothesis. As one has to base conviction on circumstantial evidence, the circumstantial evidence must be incompatible with the innocence of the accused and should point to only one conclusion, namely, about the guilt of the accused. That being not the position in the instant case, in my opinion, the appellant cannot be convicted of the offence in question on this piece of evidence only.

9. The learned Assistant Government Pleader, Shri Nanavati also invited my attention to a case of *Motilal v. State*, AIR 1959 Pat 54. The relevant observations made in paras 21 and 23 of the judgment at page 60 are as under :—

"Now the question arises whether the utensils taken out from the Sota by Moti Lal could be held to be in possession of Moti Lal from the simple fact of his going alone to the Sota and taking out the utensils from the place of concealment in the Sota. In my opinion, it is right to hold that Moti Lal was found in possession of the stolen utensils. The Sota was a public place no doubt not in the exclusive possession of Moti Lal. But here we are not concerned with the possession of the Sota; we are here concerned with possession of utensils

The utensils were kept in a hidden place and, according to the evidence of P. W. 5 as quoted above, by me, other persons who were asked to take out the utensils from the Sota failed, it was Moti Lal who went and brought the utensils out. It was, therefore, within his exclusive knowledge as to where the utensils were kept concealed in the Sota. From this fact of knowledge, an inference can be drawn under Section 114 of the Evidence Act, in absence of any other thing on the record to show as to how Moti Lal had knowledge of these things, that he had knowledge because he kept them there and, therefore, he had control over those articles and had the conscious possession of them. I may quote a sentence from Halsbury's Laws of England, 3rd Edition, Vol 10, at page 811, where while considering the possession of stolen properties it has been said.

'It is unnecessary to prove a manual possession of the goods by the prisoner; it is sufficient that they were under his conscious control, or, that he is in joint possession with the thief.'

As soon as it is held that the utensils were in possession of the petitioner, Illustration (a) of Section 114 of Evidence Act is attracted, and the stolen articles being found in possession of the petitioner soon after the theft, it must be presumed in the circumstances of this case that Moti Lal received the goods knowing them to be stolen because he did not account for his possession. A controversy has arisen in some of the cases and the point was argued by Mr. Nageshwar Prasad also before us as to whether mere knowledge of the fact as to where the stolen goods were kept can necessarily lead to the inference that they were in possession of the person having that knowledge.

On this question, in my opinion, every case will depend upon its own facts. There may be cases where a court may not be justified in presuming possession of the person who had mere knowledge of the articles placed but there may be cases where the articles are concealed in a place about which the particular person had the knowledge and it may be assumed in such cases that the articles were in his possession. I may in this connection refer to the case of Chavappa Pujari v. Emperor, AIR 1945 Bom 292. In this case a reference is made to an unreported Bench decision of the Bombay High Court in Rama Balappa v. Emperor, Criminal Appeal No 291 of 1943, D/- 11-11-1943 (Bom), where it was held that, though the place in which the property was found buried did not belong to the accused, the very fact that he knew that the property was buried there would justify the presumption that he was in possession of it since he would be able to exercise control over it and remove it any time he liked.

Divatia J., distinguished this unreported decision and took a different view on the facts and in the circumstances of the AIR 1945 Bom case. But Lokur J. who was a party to the unreported Bombay case and was also a party to the AIR 1945 Bom case stuck to his view. I would, with respect, follow the decision of the earlier unreported case. I may in this connection also refer to reported case of the Madras High Court by Ramaswami J. sitting singly, reported in *In re Murugan*, AIR 1958 Mad 451."

10. I now propose to refer to a case *Emperor v. Shivputraya Baslingaya*, 32 Bom LR 574 = (AIR 1930 Bom 244). A Division Bench of the Bombay High Court has made the following instructive observations therein:

"The mere fact that an accused person points out the place in which the stolen property is concealed does not give rise to any presumption under Section 114 of the Indian Evidence Act, or justify his conviction of the offence of receiving

stolen property, still less of the offence of theft or dacoity."

The learned Assistant Government Pleader tried to distinguish that case on the ground that it was a case of mere pointing out a place where the stolen articles were, and there was no evidence that the person charged with the offence, himself produced those concealed articles therefrom.

At pages 577 and 578 (of Bom LR) = (at p. 246 of AIR), the following observations have been made:—

"The evidence with regard to the production of the stolen articles by accused Nos 1, 3 and 4 does not show that the articles were produced from their possession. All that it amounts to is that those accused along with accused No. 2 pointed out places where the stolen articles were concealed. The only value that could be attached to the discovery of these articles would depend upon any relevant statements the accused may have made which led to the discovery. It is not shown from the evidence what statement each of the accused made which led to the discovery of the articles. Under these circumstances we cannot say that the jury was wrong in not attaching importance to the discovery of the articles made in consequence of the accused Nos 1 to 4 having pointed out the places where the articles lay hidden. Where the articles are not shown to have been in the possession of the accused, no presumption would arise that they had come by it by means of an offence."

In the judgment of Broomfield J., at page 580 (of Bom LR) = (at p. 248 of AIR), similar observations have been made. At page 581 of Bom LR = (at p. 248 of AIR), the following observations have been made.

"Exhibit 21, the Police Patil, says that the Sub-Inspector came and questioned the accused. They gave some information and offered to point out the place where the property had been hidden. The Sub-Inspector Exhibit 25, says similarly: "Accused Nos 1 to 4 came. I questioned them. They gave me information and offered to point out the places where the stolen property had been concealed." He then goes on to say that each accused independently pointed out the same place. The panch witness Gangappa Exhibit 15 says: "The first four accused led us to the places where they said they had secreted the ornaments. They took us to a place near the Patil's tank. There was nearby a prickly pear hedge. They could not be seen from outside. All the accused pointed out the same place as the one where they had secreted the stolen jewellery."

It thus appears that in that case also, there was not merely pointing out a place wherefrom concealed stolen articles were found. There also, the offenders had

taken the police and the panchas to that place which was a prickly pear hedge and therefrom, produced the stolen articles. It was held by a Division Bench of the Bombay High Court that the evidence was not sufficient to hold the offenders guilty of the offence in question.

11. In a case of AIR 1945 Bom 292, Divatia J., who was one of the members of a Division Bench, at pp. 296, 297 and 298, dealt with this topic. It has been observed as under:—

"As against the non-confessing appellants, the only evidence is the production of property and, in the case of some of them, the three confessions in which they are said to have taken part in the dacoity. The latter evidence cannot be regarded as substantive evidence against them. At the most it may be taken into consideration, if there is other independent and reliable evidence to connect them with the crime. In all cases, the stolen properties produced by the accused have been identified by the complainant and members of his family. The main question, therefore, is whether each appellant was in possession of stolen property, and if so, what presumption can be drawn against each from the fact of such possession under illustration (a) to Section 114, Evidence Act. That illustration describes a person in possession of stolen goods soon after the theft as a thief or a receiver of stolen property unless he accounts for his possession. The illustration is not exhaustive but only indicative of the general principle embodied in the section that in making presumptions the court should have regard to the common course of natural events and human conduct in their application to the facts of a particular case. However, the illustration has become the basis of a large number of decisions which are not altogether uniform in their application of the presumption underlying it. It is, therefore, necessary to consider when and in what manner the presumption would arise.

The condition precedent for the application of the illustration is that the accused must be in possession of stolen goods. Where they are on the person of the accused, as in the case with accused 11, or in the houses or fields exclusively occupied by them, as is the case with several accused in the present case, there can be no doubt that they must be deemed to be in their possession. But in quite a number of cases—and some of the accused before us come under that class—stolen property is produced without making any incriminating statement from a place which is not exclusively occupied by them or which is of the ownership of another person. In such cases a good deal depends upon whether the production

was accompanied by information given by the accused in custody as would be admissible in evidence under Section 27, Evidence Act. Under that section so much of the information as relates distinctly to any fact thereby discovered and deposited in Court would be admissible. Such information can be relied upon by the prosecution as incriminating evidence against the accused along with the production or discovery of stolen property. But the production of property by itself would not necessarily prove his possession. It would at the most show that he had knowledge where the property was kept or concealed. Thus, where it is proved that the accused made a statement to the effect that 'I have concealed the property at a particular place and I will produce it', and if it is discovered in consequence of that statement, it would be evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession he would not have kept them in that place. Where, however, the accused, without stating that he had concealed stolen property, merely produces it from a place to which other people could have access, it would not be sufficient to establish his possession even though the property may be concealed because it is consistent with any other person having done so and the accused might have merely knowledge of it. The leading case on this point is the Full Bench decision in (1890) ILR 14 Bom 260, *Queen-Empress v. Rana* where the accused after stating that he had buried the property in the fields presumably belonging to other persons took the police to the spot and disinterred an earthen pot in which it was kept: the statement was held admissible under Section 27, Evidence Act, in spite of the fact that the incriminating statement amounting to a confession was made before the police. The statement being evidence amounted to a proof of possession of the stolen articles by the accused."

12. The learned Government Pleader in that Bombay decision had also relied upon an unreported decision of the Bombay High Court in Criminal Appeal No 291 of 1943, D/- 11-11-1943 (Bom) to which a reference has been made by Ramaswami J., in the decision referred to, by me earlier. After making a reference to that decision, the relevant observations made are as under:—

"In that decision, the distinction was made between mere pointing out of property and its production from a concealed place in another man's field. It was held that in the latter case even though the place, in which the property was found buried, did not belong to the accused, the very fact that he knew that

the property was buried there would justify the presumption that he was in possession of it since he would be able to exercise control over it and remove it any time he liked. In that case there was no incriminating statement made by the accused before the police, and still it was held that the production of property by him from a concealed place in another man's field amounted not merely to his knowledge but also his possession. If the decision is limited to the particular facts of the case, it may be correct, but if the observations are meant to be of general application, I think they go too far. In absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from another man's property would not be sufficient to establish the accused's possession. It may at the most show his knowledge that the property was concealed there. In my view, mere knowledge that stolen property is lying hidden somewhere is not an incriminating circumstance for the offence of theft or receiving stolen property, and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish accused's possession apart from his knowledge, and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under illustration (a) to Section 114. I do not agree with the view taken by the Nagpur High Court in ILR (1936) Nag 78 = (AIR 1936 Nag 200) that the accused's knowledge of the concealment of articles raises a reasonable inference that he put them there himself. That view was based on the conduct of the accused in pointing out the articles as admissible in evidence under Section 8, Evidence Act. But our High Court has held in the Full Bench decision in (1890) ILR 14 Bom 260 (FB) that even a statement of the accused while pointing out buried property that he had concealed the property, though admissible under Section 27 is not admissible under Section 8. Moreover, even though conduct is relevant, such conduct unaccompanied by any incriminating statement proves merely knowledge but not possession."

These observations made by Divatia J., in my opinion, correctly lay down the position of law. I am in respectful agreement with it.

13. The question of raising a presumption under Section 114, illustration (a), arises for consideration only after it is proved that the accused was in possession of stolen articles, after the commission of theft. Till his possession is not proved, no question of raising this presumption will arise for consideration. If the accused merely points out a place

where the articles are hidden and produces those articles therefrom, there are several possibilities; one possibility is that he had that knowledge of the exact spot where the articles were hidden, as he himself was an author of concealment. The second possibility is that he may have gathered that information from a person who was the author of concealment. Another possibility that can be envisaged is that he may have actually seen a person concealing those articles. As stated by me earlier, his seeing a thief concealing those articles may not be objected to, by that thief, as a thief might happen to be his friend or relation. In view of this matter, it cannot be necessarily deduced from these circumstances only that he must necessarily be a thief. His knowledge without he being a thief, from other sources referred to above, cannot be necessarily ruled out. In my opinion, therefore, from these circumstances of pointing out the place and producing the stolen articles from the place where the articles were hidden, it cannot be necessarily deduced that he must be a thief. It cannot be necessarily deduced that he must be an author of concealment. Other possibilities, referred to, by me earlier, cannot be necessarily ruled out. In my opinion, therefore, the observations made by the Patna High Court and the Madras High Court in the decisions referred to above, if they are taken to be laying down a proposition that this should be a necessary deduction without there being any other evidence, they would be too general observations in my opinion as has been observed by Divatia J. in his judgment at page 297, referred to by me in the earlier part of the judgment.

14. The learned Assistant Government Pleader, Shri Nanavati urged that Lokur J. who was a party to the judgment of a Division Bench, has taken a different view. The relevant observations made in the judgment of Lokur J. at page 301. (AIR 1945 Bom) are as under:—

"Similar reasoning would apply to the nature of the possession of the stolen property from which the presumption contemplated by illustration (a) to Section 114, Evidence Act, can be raised. That possession may be actual or constructive as where the accused has kept it under his control by concealing it in another's house or burying it underground in another's field. Such was the case of possession in the case of Cri. App. No. 291 of 1943, D/- 11-11-1943 (Bom) which was regarded as sufficient to attract the presumption. In (1890) ILR 6 Bom 731 = 32 Bom LR 574 = (AIR 1930 Bom 244) and 40 Bom LR 927 = (AIR 1938 Bom 463) mere pointing out of stolen property from another's field was held not sufficient and N. J. Wadia J. distinguished them in

Cri App. No. 291 of 1943, D/- 11-11-1943 (Bom) where the accused had produced stolen property by digging it out in another's field but was unable to give any explanation as to how he had come to know about it. Stolen property, though not pointed out or produced by the accused, may be found on a search in a house or land occupied by the accused either exclusively or jointly with another, or he may produce it from such house or land or he may point it out in another's land or house where it could be easily seen or discovered by anyone or where it was hidden underground, or he may make some incriminating statement at the time of such production or pointing out. In each of these cases, a presumption of guilt may or may not be drawn according to the circumstances of that case. As observed in 15 Cr. LJ 410 = (AIR 1914 Oudh 176) the principle laid down by S. 114 is one of very wide application, which covers not merely the particular instances given in the illustrations to the Section, but all sorts of analogous cases in which the actual facts are distinguishable from the facts presumed by any one of the illustrations, but are equally amenable to the general principle enunciated by the Section itself.

Applying these principles to the case against each of the appellant, I agree with the conclusions just stated by my learned brother in his judgment and I do not wish to repeat the reasons for those conclusions. I, therefore, concur in the order proposed by him."

A careful consideration of these observations made by Lokur J. also indicates that he was also not of opinion that presumption of guilt could be necessarily deduced in a case like the present case. Taking into consideration the view of the Bombay High Court, in the decision referred to above, which I am bound to follow and with which I am also in respectful agreement, I am of opinion that the arguments advanced by the learned Assistant Government Pleader, Shri Nanavati, cannot be accepted. It cannot be said that an abstract proposition of law, enunciated by him, is justified from the view expressed by the Bombay High Court in the aforesaid decision. As stated earlier, no doubt, certain observations made in the two aforesaid decisions of the Madras High Court and in the decision of Patna High Court, do lend support to his arguments. But as stated by me earlier, in absence of any other evidence, on mere pointing of a place where the articles were concealed, and on account of the production of those articles therefrom, it cannot be necessarily deduced that that person must be either a thief or a receiver of stolen property. If it had been pointed out very soon after the commission of the theft, it is a cir-

cumstance, which will raise a very strong suspicion against the man. But a strong suspicion cannot take a place of proof. In the absence of any other evidence, and in the absence of any incriminating statement made, at the time of giving information, as for example; that he was the author of concealment, this circumstance, found against that person, can be explained on any other rational hypothesis. The position would, therefore, be that the circumstantial evidence led, was not such as to be incompatible with the innocence of the accused. That person, therefore, cannot be presumed to be a thief or a receiver of stolen property. Bearing these principles in mind, if we now take into consideration the facts proved in this case, it is evident that evidence is not sufficient to hold the present appellant guilty of the offence in question. The possession of the stolen articles by the appellant is not satisfactorily established. He did not make any incriminating statement at the time, he gave information. He merely showed his willingness to show the goods. He took the police and panchas at a heap of cow-dung and dust and therefrom produced a gunny-bag containing the stolen muddamal bottles of medicines and remnants of boxes. As revealed from the panchnama, proved by the panch witness, this cow-dung hill is used by Rabaris for storing cow dung and dust. That place is accessible to anybody. It is also not a case where something was hidden under the ground so that one could even say reasonably that the appellant had the exclusive knowledge. I am, therefore, of opinion that the prosecution has not satisfactorily established the guilt of the accused-appellant. The order of conviction and sentence, passed against the appellant, therefore, cannot be sustained.

The appeal is allowed. The order of conviction and sentence passed against the appellant is set aside. Fine, if recovered from him, is ordered to be refunded to him. He is ordered to be set at liberty forthwith.

HGP/D.V.C.

Appeal allowed.

AIR 1969 GUJARAT 110 (V 56 C 21)

J. B. MEHTA, J.

M/s. Kasturbhai Ramchand Panchal & Brothers and others, Applicants v. Firm of Mohanlal Nathubhai and others, Opponents.

Civil Revn. Applns. Nos. 710 and 602 of 1963, D/- 16-8-1967, from decision of VIII City Civil Court, J., Ahmedabad, D/- 9-4-1963.

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control

DL/KL/C61/68

Act (57 of 1947), S. 13(1)(g) — Word 'required' — Meaning of — It could not be equated with mere demand or claim— But absolute or compelling necessity need not be shown.

The expression "require" could not be equated with a mere demand or claim. The expression "require" has, in the context, the element of a genuine present need. For the application of S. 13(1)(g), the present need which the landlord must show must both be genuine or honest and reasonable in the circumstances. The whole emphasis of the requirement is on the element of the need which has to be established, which is always something more than a mere desire or a claim or a demand but which is surely less than a compelling or absolute necessity. There is no question of any absolute or compelling necessity. The question is only of a requirement and some element of need must be shown which must both be honest and reasonable in the circumstances of the case: AIR 1952 Cal 852, Explained. (Para 3)

(B) Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 13(1)(g) and 13(2) — Requirement of landlord — Even when part of premises is required honestly and reasonably, test of section is satisfied.

The tenancy is indivisible and unless it is terminated as a whole, it would not be open to the landlord to get a part of the premises. Even though, therefore, it may be open to the Court to decree the suit partially, in so far as the question of requirement of the landlord is considered, even when a part of the premises is required honestly and reasonably, the test of the section can be said to have been satisfied. The factors which the Court considers in judging the bona fides or reasonableness of the requirement may have also to be considered again in the context of greater hardship. The same factors may be asked to perform their services twice over in two different contexts. If the requirement of the landlord is not reasonable for the whole of the premises and a partial decree could be passed without causing any hardship to either side, the question would be resolved on the second ground contemplated in S. 13(2): AIR 1921 Bom 54 & AIR 1960 Madh Pra 345 (FB) & Civil Revn. Appln. No. 797 of 1963 D/- 11-3-1967 (Guj), Disting. (Para 3)

(C) Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 13(2) — Question of greater hardship — Considerations that weigh in striking just balance between landlord and tenant — Procedure in passing a partial decree.

One of the most important factors in considering the question of greater hard-

ship is, what other reasonable accommodation is available for the landlord or the tenant. The Court would have to put in the scale other circumstances which would tilt the balance of hardship on either side, including the financial position, both of the landlord and the tenant, the financial means available to them for securing alternative accommodation either by purchase or by hiring one, the nature and the extent of the business or their requirement of residential accommodation as the case may be, and the hardship that would be caused not only to the landlord and the tenant personally but even to their family members, dependents or persons residing with them as one unit, so that the hardship of those persons would really amount to the hardship of the landlord or the tenant.

Once the resultant hardship on this statutory balance is determined, the second part of S. 13(2) comes into play. Even though the words "no hardship" are used in S. 13(2) in the context of a partial decree, they must mean no resultant hardship, because the partial decree would deprive the tenant of some part of his premises and would require the landlord also to be satisfied with only a part. What the Legislature intends is a just balance being struck between the landlord and the tenant, so that when this factor is put in the scale, the Court would be satisfied that the scale will not be tilted on either side.

It is only then that the Court could pass a partial decree. But, if even this partial decree still tilts the balance and swings it on the side of the landlord, then, the Court would have no jurisdiction to refuse to pass the decree for the entire suit premises. Thus three contingencies might arise. If the balance swings on the side of the landlord, so that there is greater hardship left to the landlord as a result of this statutory balance-sheet of hardship, the landlord must get the entire decree. If, however, the resultant balance of hardship in this balance-sheet is nil in the sense that there is a just balance and the scale swings on neither side, then, the case is one of a partial decree. It is only when the greater hardship is on the side of the tenant and the balance or the scale tilts in his favour that the decree would be refused: Civil Revn. Appln. No. 237 of 1962, D/- 7-12-1962 (Guj) & 1947-1 All ER 164 & 1947-1 All ER 810, Rel. on.

(Para 4)

(D) Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 13(1)(g) and 13(2) — Burden of proof as to greater hardship — It is on tenant once landlord satisfies requirements of S. 13(1)(g) — Evidence Act (1872) Ss. 101 to 104. (Para 4)

(E) Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 29(2) and 13(2) — Nature of powers in revision of High Court with reference to cases under S. 13(2) — Civil P. C. (1908), S. 115.

The revisional jurisdiction with which High Court is invested under S. 29(2) is not merely in the nature of jurisdictional control. It extends to corrections of all errors in the overall decision which would make the decision contrary to law. The Legislature further empowers High Court in its revisional jurisdiction to pass such order with respect thereto as it thinks fit. The Legislature having invested High Court with powers of the widest amplitude to pass such orders as the Court thinks fit in order to do complete justice, it is obvious that this wide power should not be narrowly construed. In so far as S. 13(2) is concerned, it deals with the human problem of considering the relative hardships of the landlord and the tenant and to arrive at a just solution. In such cases, the highest Court of the State is given revisional powers, which are wider in scope than S. 115 of the Civil Procedure Code, so that it could do substantial justice by correcting even the errors where the decision as a whole is contrary to law. In such cases, if a limitation is sought to be implied that the power of High Court would only extend to the quashing of the impugned order and no further, it would clearly defeat the purpose of this wide revisional jurisdiction. In fact, the Legislature directs High Court to pass a just order, considering all the circumstances of the case. When all evidence is on the record, it would be denying justice to the party, who is feeling a genuine need of the suit premises to remand the matter to the lower appellate Court only to invite its decision on this issue of hardship: AIR 1956 Bom 560, Disting.

The jurisdiction of High Court is to correct all errors of law going to the root of the decision, which would, in such cases, include even perverse findings of facts, perverse in the sense that no reasonable person acting judicially and properly instructed in the relevant law would arrive at such a finding on the evidence on the record of the case. It would, therefore, be necessarily implied that a Court correcting such a perverse finding of fact must in the proper cases itself go into the question and arrive at such a finding itself, if all the evidence is on the record, in order that no further hardship would be caused to the party in whose favour the scale of hardship has already tilted. To refuse to exercise such a power would really result in failure of justice itself by prolonging the hardship of the party concerned. (1966) 7 Guj LR 1039, Foll. (Para 5)

(F) Houses and Rents—Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 29(2) — Evidence Act (1872), S. 115 — Objection to admission of additional evidence not raised before lower appellate court by defendants — Held, after having taken a chance of decision in their favour, it would not be open to defendants to raise any such point in revision. (Para 5)

Cases Referred: Chronological Paras

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| (1967) Civil Revn. Appln. No. 797 of 1963, D/- 11-3-1967 (Guj) | 3 |
| (1966) 1966-7 Guj LR 1039, Panchal Shankerlal v. Ranchhodlal Govindlal | 4, 5 |
| (1962) Civil Revn. Appln. No. 237 of 1962, D/- 7-12-1962 (Guj) | 4 |
| (1960) AIR 1960 Madh Pra 345 (V 47)=1960 MPLJ 925 (FB), Damodar Sharma v. Nandram Deviram | 3 |
| (1956) AIR 1956 Bom 560 (V 43)=58 Bom LR 144, Nagayya Gurupadayya v. Chayappa Santanappa | 5 |
| (1952) AIR 1952 Cal 352 (V 39)=56 Cal WN 480, Naresh v. Kanai Lal | 3 |
| (1947) 1947-1 All ER 164=176 LT 300, Chander v. Strevelt | 4 |
| (1947) 1947-1 All ER 810, Kelley v. Goodwin | 3, 4 |
| (1921) AIR 1921 Bom 54 (V 8)=23 Bom LR 856, Vithaldas Bhagwandas v. Nagubhai M. Joshi | 3 |

In C. R. A. 710/63.

B. R. Shah, for Applicants; B. B. Thakore, for Opponents (Nos. 1 to 3).

In C. R. A. No. 602/63

S. B. Vakil, for Applicants, B. R. Shah, for Opponent (No. 1).

ORDER :— These two cross revision applications are filed respectively by the original plaintiff and by the original defendants 1 and 3 against the decree passed by the City Civil Court, giving partial possession of the suit premises to the plaintiff, and to that extent modifying the trial Court's decree which was for possession of the entire suit premises. The short facts which have given rise to these revision applications are as under: The plaintiff is a partnership firm registered under the Indian Partnership Act. The plaintiff is the manufacturer and dealer in steel furniture and steel goods. The plaintiff has a factory in the interior of Ghanchi's Wadi near Pankor Naka where the steel goods and furniture are manufactured. As the plaintiff was in need of premises on the main road of Pankor Naka to open a show room and a sales office for its steel goods and furniture, the plaintiff firm purchased the suit house in an auction sale held on 26th October 1956. The final sale certificate was issued on 25th April 1957 and thus the plaintiff purchased the suit premises

from the Custodian of Evacuee Properties for a consideration of Rs. 35,250/-. The plaintiff's partner Chimanlal is now residing on the first floor and the second floor of the suit premises. On the ground floor of the suit house, the present suit premises, namely, the shop is situated, of which the defendant No 1 Firm of Mohanlal Nathubhai and the two defendants, Nos 2 and 3, who form the said coparcenary, are the tenants. The defendants are doing the business of Kharadi, preparing wooden articles like cradles, wooden boxes, bed-stands, etc. As the plaintiff needed the suit shop for the show room and the sales office, the tenancy of the defendants was terminated by a notice Exhibit 81 dated 1st July 1957, and the defendants were asked to hand over vacant possession of the suit shop. As the defendants did not comply with the said request, the plaintiff filed the present suit to recover possession of the entire suit shop on the ground of bona fide and reasonable personal requirement for the aforesaid purpose. The defendants contended that the plaintiff did not require the suit premises bona fide and reasonably for their own occupation and that greater hardship would be caused to them if a decree for possession was passed. The trial Court, namely, the Small Cause Court at Ahmedabad, held that the plaintiff required the suit premises reasonably and bona fide for its personal use and occupation and that greater hardship would be caused to the plaintiff if no decree for possession of the entire premises was passed. The trial Court accordingly decreed the plaintiff's suit on 5th May 1961. Defendants 1 and 3, namely, the joint family firm of Mohanlal Nathubhai and Ranchhodlal Mohanlal, filed an appeal in the Court of the District Judge at Ahmedabad. The appeal stood transferred to the City Civil Court at Ahmedabad. When it came up for hearing, the learned Judge passed the order, Exhibit 17, permitting additional evidence, as the same was required on the question as to whether, no hardship would be caused to either party if a decree in respect of only a part of the suit premises was passed. Both the parties led additional evidence and, after considering the entire evidence, the learned City Civil Court Judge held that the plaintiff required the suit premises reasonably and bona fide for personal occupation. On the question of hardship, the learned Judge held that no hardship would be caused to either party if possession of only a part of the suit premises admeasuring 9' x 20' was given to the plaintiff and the staircase in the corridor 6' x 20' was removed and placed in the three feet additional space allotted to the plaintiff on the west of the portion decreed to the plaintiff. In view of the

said finding, the appellate Court modified the trial Court's decree. It is this decree which is challenged in both these cross revision applications.

2. Mr. Vakil for the tenants, defendants 1 and 3, raised the following points at the hearing:

(1) that the finding of the lower Court as to the personal requirement of the landlord is contrary to law as it is based on a plain misconstruction of Section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Act);

(2) that the finding as to no hardship is based on additional evidence which ought not to have been admitted, and the said finding is contrary to law and is without jurisdiction,

(3) that the decision on the basis of these findings being contrary to law, this Court has no other power except to quash that decision and remand the matter to the lower appellate Court; and

(4) that, in any event, no decree for possession of the suit shop ought to be passed in favour of the landlord.

Mr. Shah, on the other hand, in his revision application urged that the additional evidence ought not to have been allowed and that the finding as to no hardship being perverse was contrary to law and, therefore, this Court must pass a decree for possession of the entire suit shop.

3. In order to appreciate the first contention of Mr. Vakil, we must consider the provision contained in section 13(1)(g) of the Act which runs as under :

"13 (1) Notwithstanding anything contained in this Act but subject to the provisions of section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied —

..... (g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust."

This ground contained in Section 13(1)(g), therefore, enables the landlord to recover possession if the premises in question are reasonably and bona fide required by the landlord for occupation by himself. Mr. Vakil urged that the lower appellate Court has in terms interpreted the expression "require" in Section 13(1)(g) as "demanded or claimed". The learned Judge in terms states as under :

"In view of these special safeguards provided in Section 13 of the Bombay Act the word 'require' must be equated with 'demanded or claimed' and as an

antithesis of 'pressingly needed' The element of 'must have' to which a reference has been made in the matter of *Naresh v Kanai Lal*, AIR 1952 Cal 852 cannot be introduced in the interpretation of word 'require' in the Bombay Act. I am therefore of the opinion that the expression 'require' as used in the Bombay Act must be equated with the expression 'claimed or demanded'"

Mr Vakil is right in his contention that the expression "require" could not be equated with a mere demand or claim. The expression "require" has, in the context, the element of a genuine present need For the application of section 13(1) (g), the present need which the landlord must show must both be genuine or honest and reasonable in the circumstances The whole emphasis of the requirement is on the element of the need which has to be established, which is always something more than a mere desire or a claim or a demand but which is surely less than a compelling or absolute necessity In AIR 1952 Cal 852, the expression "require" in a similar context under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, had been interpreted by Chunder J in the following words:

"The word 'require' is something more than the word 'desire' Although the element of need is present in both the cases, the real distinction between 'desire' and 'require' lies in the insistence of that need There is an element of 'must have' in the case of 'require' which is not present in the case of mere 'desire' What has got to be seen is that there must be a sort of 'must have' element in the need of the landlord and also that his want or need of the house must be honestly felt by him. Where both the elements are satisfied, the Court would be justified in granting a decree for ejection"

The distinction which has been brought out in the Calcutta case between 'desire' and 'require' is quite correct Even though the learned Judge has used the expression "must have", it is only in the context of the element of need, as distinguished from a mere desire Even though the learned appellate Judge was, therefore, wrong in stating the law on the point by saying that the word "require" could be equated with a mere desire or claim, the learned Judge was completely right in so far as he negated the argument of the tenants that there must be a compelling necessity shown That is why the learned Judge has stated that he would equate the term "require" with demand or claim as an antithesis of "pressingly needed" The whole contention before the learned Judge was based on the ground that, unless a pressing need is shown, the test of requirement would not

be satisfied. As I have already held, there is no question of any absolute or compelling necessity. The question is only of a requirement and some element of need must be shown which must both be honest and reasonable in the circumstances of the case. The learned Judge has, therefore, on the whole, applied the correct test in so far as he has held that no absolute necessity ought to be shown. The facts of the case, as found by both the Courts, show that the plaintiff has a factory for the manufacture of steel goods and furniture inside the premises known as Chamchi's Wadi and just at a short distance on the main road leading from Ponkor Naka the suit shop is situated. The honesty of the plaintiff's purpose could never be doubted, because, the goods manufactured in the factory have to be sold. In fact, in the years 1951 to 1955, the plaintiff had a shop in the premises known as Lalbhai's Manda and that shop had been vacated. The plaintiff's case in the evidence of partner Chumanlal is that, that shop had to be vacated as it was a small shop where no show room could be made and so the shop was not suitable for the requirement. Even the defendants have to admit in their evidence that the plaintiff's old shop was not in the area which was suitable for their market and that is why the same had to be vacated Immediately after the said shop is vacated, the plaintiff firm has invested an amount of Rs. 35,000/- to get this much-needed alternative accommodation by purchasing the suit premises where the partner can stay on the first and the second floors and the firm can have a show room and a shop in the ground floor shop. Thus, the plaintiff's requirement of the suit premises was an honest requirement and, at the same time, it was a reasonable requirement. The finding, therefore, of both the lower Courts on this question of fact must be upheld. Mr. Vakil had, no doubt, argued in this connection that when the requirement is of a part, there could be no reasonable requirement of the whole. Mr. Vakil in this connection relied upon the decision of Pratt J. in *Vithaldas Bhagwandas v. Nagubai M. Joshi*, 23 Bom LR 856=(AIR 1921 Bom 54), where the learned Judge had decided the question of bona fide and reasonable requirement in the context of Section 9 of the Bombay Rent (War Restrictions) Act, 1918. In that case, it was held that a bona fide requirement of a small fraction of premises leased did not amount to a reasonable requirement of the whole of the premises within the meaning of section 9 of the said Act. The said decision is a decision on its special facts. The tenant sought to be evicted in that case was a lady doctor who was in occupation of the ground floor as resi-

dence and the first floor as a hospital, and she had also one motor garage in an out-house appertaining to the said building. The landlord who lived on the New Chauney Road and had two motor cars and two carriages without horses, in terms stated that he did not require any part of the premises in the possession of the tenant, except the motor garage for the accommodation of one of his cars. At the relevant time, the landlord's cars were accommodated, and in a hired garage close to his residence and the other in a vacant shop in his sister's house. On these facts, the learned Judge held that, to evict the lady doctor from the suit premises merely for giving a garage to the landlord could not be considered as a reasonable requirement of the landlord of the suit premises. That decision could have no application to the facts of the present case. Mr Vakil next relied upon the decision of a Full Bench of the Madhya Pradesh High Court in *Damodar Sharma v Nandram Deviram*, AIR 1960 Madh Pra 345, where the Full Bench held that a tenant was liable to be ejected from the shop in his occupation on the ground that his landlord required it for continuing or starting his own business, unless it could be shown that any other non-residential accommodation in occupation of the landlord was suitable for the purpose of continuing or starting the landlord's own business. Their Lordships, no doubt, added that ejection of a tenant could not be had for future expansion of the business of the landlord. But, on the other hand, if the landlord's business had, in fact grown and there was a felt need, to be determined objectively, for additional accommodation for the purpose of continuing the expanded business, the tenant was liable to be ejected. I could not appreciate how this decision could help Mr Vakil. In the present case admittedly, the plaintiff is not in possession of any other shop of its own or in any rented premises. The plaintiff needs the suit shop for the purpose of continuing the present business. At present, the plaintiff sells the goods by canvassing orders or on the factory premises themselves. The shop which he had, has been vacated and now the plaintiff's need for the suit shop is both reasonable and genuine and is a present need, and so the finding of both the Courts on this question that the plaintiff requires the suit premises bona fide and reasonably for personal occupation cannot be questioned. In *Kolley v Goodwin*, (1947) 1 All ER 810 the Court of Appeal consisting of Cohen and Evershed, L. J. and Lynskey J. also held that although the landlord required a part of the premises for accommodation, the lower Court was justified in finding on the evidence that the

suit premises were reasonably required by the landlord for occupation as a residence for himself. In fact, the tenancy is indivisible and unless it is terminated as a whole, it would not be open to the landlord to get a part of the premises. Even though, therefore, it may be open to the Court to decree the suit partially, in so far as the question of requirement of the landlord is considered, even when a part of the premises is required honestly and reasonably, the test of the section can be said to have been satisfied. The factors which the Court considers in judging the bona fides or reasonableness of the requirement may have also to be considered again in the context of greater hardship. The same factors may be asked to perform their services twice over in two different contexts. If the requirement of the landlord is not reasonable for the whole of the premises and a partial decree could be passed without causing any hardship to either side, the question would be resolved on the second ground contemplated in section 13(2). Mr Vakil in this connection relied upon the decision of my learned brother Bhagwati J in *Civil Revn Appln No 797 of 1963, D/- 11-3-1967 (Guj)*. At p 7 of his judgment, my learned brother also holds that the word "require" imports a certain element of necessity and a mere desire on the part of the landlord is not enough. The landlord must require the premises, that is, the need of the premises must be bona fide and reasonable. My learned brother therefore considered the question in the context of rented premises where the tenure of the landlord of the rented premises was insecure. In such a case, my learned brother held that his claim for possession of his own premises could, in a proper case, be regarded as amounting to bona fide and reasonable requirement, but, in the case where his possession of rented premises was protected under the Rent Act a mere desire on his part to occupy his own premises in preference to the rented premises could not amount to bona fide and reasonable requirement so as to entitle him to evict his tenant. This decision is, therefore, in the context of what was considered as unreasonable in the context. It does not help Mr Vakil in his contention that where the landlord requires a substantial part, and proves his genuine present need the test required in S 13(1) (g) is not satisfied. In fact, as I will presently show, the landlord's present need is genuine and reasonable for the entire suit premises. In these circumstances the finding on the first question as to bona fide and reasonable requirement of the suit premises in favour of the landlord must be accepted.

4. Turning now to the next important question about greater hardship or no hardship, the contention of Mr. Vakil is

based on Section 13 (2) of the Act which reads as under:

"No decree for eviction shall be passed on the ground specified in Clause (g) of sub-section (1) if the Court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it."

The second part is as follows:

"Whereas the Court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises, the Court shall pass the decree in respect of such part only."

It should be noted that this Section 13(2) relates to the ground of eviction specified in Section 13(1)(g). Once the landlord satisfies the requirement of section 13(1)(g) by proving his genuine present need of the suit premises reasonably and bona fide, it is obvious that there would always be some hardship to him if the premises needed by him are not given to him. That is why it is now well settled that once the landlord satisfies the requirements of Section 13(1)(g), the burden as to greater hardship is on the tenant. My learned brother Divan J., in his decision in Civil Revn. Appln. No. 237 of 1962 D/- 7-12-1962 (Guj), has elaborately considered this question. He also considered the position in the light of the corresponding provisions of the English Act, namely, Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Schedule I, clause (h), which is identical with the first part of our section 13(2), and he held that, so far as the issue of greater hardship is concerned, it is obvious, looking to the language of Section 13(2) of the Act, that the onus of proving that issue of greater hardship always lies on the tenant. So far as the question of establishing the availability of the alternative accommodation is concerned, he held that it must be borne in mind that the question of alternative accommodation is but one of the circumstances, the totality of which has to be considered while deciding the issue of greater hardship. If the burden under section 13(2) lies on the tenant, it necessarily follows that the burden of establishing different circumstances, on the strength of which the Court is to be satisfied or can be said to be satisfied about the issue of greater hardship, must also lie on the tenant, and therefore, it is not correct to say that under Section 13(2), part of the burden, namely, that of establishing alternative accommodation, lies on the landlord and that the other burden of proof regarding the issue of greater hardship lies on the tenant. My

learned brother summarised the entire position as regards proof of greater hardship by holding that the entire burden of proving greater hardship lies on the tenant and it is for the tenant to establish various circumstances, including the circumstance of availability of alternative accommodation, in order to succeed on the issue of greater hardship. If no evidence is led by either side, then, the tenant would fail and the decree for possession would be passed in favour of the landlord. The Legislature has contemplated in Section 13(2) a delicate process of weighing the relative hardships, and it in terms directs the Court to consider the most important question as to whether other reasonable accommodation is available for the landlord or the tenant amongst other factors. As Scott L. J. figuratively put it in *Chandler v. Strevett*, (1947) 1 All ER 164, in a decision of the Court of Appeal under the corresponding English section, each case must always depend on its own facts, but there are two aspects which call for consideration. The first is that it is to the balance of hardship that the Judge is directed to turn his mind, and that means that he has to add up the items of hardship proved in evidence on each side of the statutory profit and loss account or balance sheet (for either metaphor will serve) and then see on which party the greater hardship falls. The second is that the Judge is called on to operate the process by putting a hardship value on the various items on each side. In the case before the Court of Appeal, the landlord had a flat in which they could live whereas the tenant with his large family of children had nowhere to go and so, the Court of Appeal held that only one possible answer on the issue of greater hardship could be given, and that was one in favour of the tenant and on that finding, even the Court of Appeal reversed the finding of the County Court Judge. Bucknill L. J. at page 166 also observed that one would have to consider the nature and place of business, the size of the family, the actual residence or lack of one at the time of asking for the order. Questions of health and cost of living and innumerable other possible factors might have to be taken into account. The Judge has to consider the problem of other accommodation, but he has to consider all the circumstances of the case and then, if he is satisfied that the order for possession would cause greater hardship to the tenant than the landlord, he must not make it. The burden of proving greater hardship would be on the tenant. Somervell L. J. also observed at page 168 that in having regard to all the circumstances of the case, the Court was expressly enjoined, in deciding on the issue of greater hardship,

to have regard to the question whether other accommodation was available for the tenant or the landlord. These words and the general principles of the Act make it clear that alternative accommodation, though not a condition, was the most important of the circumstances to which regard must be had. In the same Volume, in the aforesaid decision in (1947) 1 All ER 810, the Court of Appeal held that, on the question of hardship, the County Court Judge was entitled to have regard to the financial means of the tenant by reason of which he was in a position to obtain accommodation, not merely by renting a house but by buying one and also the fact that the tenant had taken no real steps to provide himself with alternative accommodation. These decisions show that, one of the most important factors is, what other reasonable accommodation is available for the landlord or the tenant. The court would have to put in the scale other circumstances which would tilt the balance of hardship on either side, including the financial position, both of the landlord and the tenant, the financial means available to them for securing alternative accommodation either by purchase or by hiring one, the nature and the extent of the business or their requirement of residential accommodation as the case may be, the hardship that would be caused not only to the landlord and the tenant personally but even to their family members, dependants or persons residing with them as one unit, so that the hardship of those persons would really amount to the hardship of the landlord or the tenant. The whole process of weighing the hardship is a delicate process where various factors have to be thrown into the scales and the Court has to examine how each factor tilts the balance on either side and thereafter it has to find out the final balance of hardship. Once this question is determined, keeping in mind that the burden of proving greater hardship is on the tenant, the Court would have to find out the resultant hardship on this statutory balance-sheet. Thereafter, the second part of section 13(2) comes into play which is enacted in our Act. Even though the words "no hardship" are used in the context of a partial decree, they must mean no resultant hardship, because the partial decree would deprive the tenant of some part of his premises and would require the landlord also to be satisfied with only a part. What the Legislature intends is a just balance being struck between the landlord and the tenant, so that when this factor is put in the scale, the Court would be satisfied that the scale will not be tilted on either side. It is only when such a just solution could be found, which causes no resultant hardship either to the tenant or to

the landlord, that the Court could pass a partial decree. But, if even this partial decree still tilts the balance and swings it on the side of the landlord, then, the Court would have no jurisdiction to refuse to pass the decree for the entire suit premises. Thus three contingencies might arise. If the balance swings on the side of the landlord, so that there is greater hardship left to the landlord as a result of this statutory balance-sheet of hardship, the landlord must get the entire decree. If, however, the resultant balance of hardship in this balance-sheet is nil in the sense that there is a just balance and the scale swings on neither side, then, the case is one of a partial decree. It is only when the greater hardship is on the side of the tenant and the balance or the scale tilts in his favour that the decree would be refused. My learned brother Divan J. had considered this question in *Panchal Shankerlal v. Ranchhodlal*, (1966) 7 Guj LR 1039, and he held that the decree for partial eviction could be passed under the second paragraph of Section 13 of the Act. Since this paragraph engrafts an exception to the general rule of law, it must be strictly construed and before a Court can pass a decree for partial eviction, the conditions laid down in that paragraph must be satisfied. Before any decree for partial eviction can be passed, the Court must satisfy itself that by passing such a decree, no hardship is going to be caused either to the landlord or to the tenant. Unless that satisfaction is reached by the Court, the decree for partial possession cannot be passed. At page 1042, correcting the approach of the learned trial Judge, who had held that there would not be any question of hardship as he was not ordering the defendant to vacate the entire suit premises but only a portion of the shop admeasuring 10'-8" x 9'-5" in breadth, my learned brother held that this was entirely an erroneous approach as it was obligatory upon the learned Judge to consider, in view of the issue that he had framed, whether greater hardship was going to be caused by passing the decree for eviction than by refusing to pass it and unless he came to a specific conclusion on that issue, he could not have passed any decree for eviction. My learned brother thereafter observed on the same page that it was obligatory on the Court before confirming the decree for partial eviction to satisfy itself that no hardship was going to be caused either to the landlord or to the tenant by confirming the decree for partial eviction. My learned brother also observed that the tenant, at the stage of giving evidence, could not have anticipated that the learned trial Judge was going to pass a decree for partial eviction and, therefore, it was

impossible for him to prove that he could not carry on his business in the portion which the learned Judge had allowed to remain with him. In these circumstances, my learned brother had remanded the matter as there was no material in the case before him which would go to show that the tenant had led evidence on the issue of no hardship when a partial decree was being contemplated. This decision clearly applies to the facts of the present case. The learned Judge of the city Civil Court, in the present case, in terms held that in para 6 of his judgment that, in view of his finding on the issue regarding feasibility of a partial decree the question of greater hardship became insignificant and so, in his view, it was not necessary to express any final opinion on that aspect of the matter. This is the erroneous approach which was sought to be corrected by my learned brother Divan J. In such cases the lower Court must first arrive at the finding on the issue as to whom, the landlord or the tenant greater hardship would be caused. It is only when the Court arrives at a finding on that specific issue against the tenant or against the landlord that there would be some resultant hardship on either side, which would require the Court either to pass the decree or to refuse it. It is only thereafter that the Court must consider the further question whether the partial decree would strike a just balance without causing any resultant hardship to either side. The second question can be taken up by the Court only after reaching a conclusion on the first question. In the present case, the appellate Court has ignored the first question and attempted to answer the second question and so, it has resulted in dissatisfaction both to the landlord and the tenant and both of them are arguing before me that the additional evidence ought to have been discarded completely. The additional evidence was allowed by the learned appellate Judge to give an opportunity to both the sides, as their attention was not focussed on this relevant aspect, which every Court must bear in mind if a partial decree could afford a just solution, which would strike a just balance, leaving no resultant hardship on the statutory balance-sheet. As the Court attempted to answer this second question first, it has left entirely out of consideration the most important question of availability of alternative accommodation to the tenants and has passed this decree. In fact, Mr Shah, the learned advocate for the landlord, is right in his contention that the evidence of the plaintiff which was led before the appellate Court has been misread by the learned appellate Judge. The partner of the plaintiff, in his deposition before the trial Court, had in terms stated that

they were not able to carry on their business properly because of want of a shop and a show room. If they did not get possession of the suit shop their business could not prosper. He further stated that he wanted the suit shop for showing and selling steel furniture. He had also added that they wanted to keep their sample furniture therein. In the additional evidence at Exhibit 20, he has stated that for display of articles he would require a show room and his minimum requirement would be of premises at least about 25 feet in depth and 15 feet in width from the front side, and if he was allowed that much space, his requirement would be satisfied for the present, though with some difficulty. The learned appellate Judge in paragraph 5 has observed that the plaintiff has categorically stated that so far as he is concerned, his requirement would be satisfied if a part of the premises of the dimensions mentioned by him was made available to him. Therefore, there was no doubt that no difficulty would be caused to the plaintiff. This is clearly a misreading of the plaintiff's evidence. The plaintiff's requirement for a show room might be met if the space of the entire frontage twenty-five feet in depth, was given to him for the display of his articles. The plaintiff, however, had the present need even of the rear portion for keeping his sample furnitures, as the entire suit shop was required not only for the show room purpose but also for being used as a shop, where furniture could be kept for sale after it was prepared in the factory. The learned appellate Judge had also fallen into another important error, in that he completely neglected the consideration of the hardship that would be caused to the plaintiff, by the corridor carved out by the learned appellate Judge for use by the defendants both for a passage and for displaying their articles, as the plaintiff's partner was residing upstairs. The plan, Exhibit 23, produced by the defendants, shows that the suit shop has a frontage of fifteen feet abutting on the main Pan-kor Naka road and it has a depth from east to west of about 43 feet. Now, in the said frontage of fifteen feet, there is a collapsible gate to close the stair-case and the W. C. portion for the use of the plaintiff's partner, who resides upstairs on the first and the second floors. This portion has never been let to the defendants. The partial decree which the learned Judge has ordered is by asking the plaintiff to change the position of this stair-case by taking it in the rear portion in the three feet space given to the plaintiff beyond the twenty feet depth. The plaintiff is given the portion 9' x 20', the frontage being 9 feet and the depth being 20 feet, and the staircase has to be

removed and placed in the three feet additional space allotted to the plaintiff, so as to leave to the defendants a clear space in the rear portion of about 20 feet x 15 feet. The learned Judge has passed this partial decree with a view that the defendants get the front corridor so carved out of 6' x 20' where at present the plaintiff has the staircase and the W.C. The learned appellate Judge has stated in the final part of his order that the tenants shall be able to enjoy full use of the corridor of 6' x 20' for their access to the rear portion. However, in para 5 of his judgment, the learned Judge has in terms observed that, in view of the corridor of 6' x 20', the tenant will be able to exhibit wooden articles in the front portion of the corridor and utilise the rest of it for his manufacturing activities and carrying on his selling operations. This would be creating a fresh lease of this corridor 6' x 20' which was never let to the defendants. Besides, if the defendants were to display their articles in this corridor where both the plaintiff and the defendants have a right of passage, it would result in great hardship to the family members of the plaintiff who have to use that corridor for going upstairs through the stair-case which is ordered to be removed at the back. Even Mr Vakil argued that this type of partial decree would cause great hardship to the tenant, as he would have every now and then to remove his articles in this corridor and at the time when the shop would have to be closed. In fact, the lower appellate Judge has not considered all these relevant aspects while coming to the conclusion that no hardship would be caused, and he has attempted to answer the second question without going into the first question itself. The whole approach of the learned appellate Judge is, therefore, completely erroneous and the decision on this question being perverse must be interfered with on the second finding as it is contrary to law.

5. Mr Vakil, therefore, argued that, once this Court holds that a finding of fact is contrary to law and that it has vitiated the decision, this Court must only quash the impugned decision and must remand the matter to the lower appellate Court, which is the Court of facts. Mr Vakil urged that this is a question of jurisdiction itself and the High Court would have no jurisdiction to pass any other order, except the one of remanding the matter to the lower appellate Court by arriving at a fresh finding on the questions of greater hardship and no hardship as required under Section 13(2) of the Act. I cannot accept this argument of Mr. Vakil. Mr. Vakil in this connection relied upon a decision of the Bombay High Court in *Nagayya Guru-*

padayya v Chayappa Santanappa, 58 Bom LR 144=(AIR 1956 Bom 560) by the Division Bench consisting of Dixit and Vyas JJ. In that case, the question had arisen in the context of Section 76 of the Tenancy Act which conferred powers on the Revenue Tribunal to entertain a revision application on the following grounds only (a) that the order of the Collector was contrary to law, (b) that the Collector failed to determine some material issue of law, or (c) that there was a substantial defect in following the procedure provided by that Act which has resulted in miscarriage of justice. At page 147 (of Bom LR)=(at p 562 of AIR), the Division Bench only observed that, as there was an error apparent on the face of the Tribunal's order and as the said error had resulted in the denial of an opportunity to the tenant to show that the landlord did not want the possession of those lands for bona fide personal cultivation, it was clear that their Lordships must interfere, but the question was whether they should remand the matter to the Tribunal or to the Assistant Collector. In that context, the Division Bench held at page 148 (of Bom LR)=(at pp 562-563 of AIR) that, in the light of the various decisions, the direction must be that the matter must be sent back to the Tribunal with a direction that if there was any point of law left in deciding the matter, the Revenue Tribunal should decide that point of law, and so far as the question of fact, namely, whether the landlord wanted to recover possession for his bona fide personal cultivation, was concerned, the Tribunal would send back the case to the Assistant Collector for recording a finding on that issue and for disposal according to law. That decision could not help Mr. Vakil for the simple reason that, in that case, the tenant was not given any opportunity to lead evidence by showing that the landlord did not want the possession of the fields for bona fide personal cultivation and so the Court had to consider the narrow question as to which authority they should make the remand, whether to the fact-finding body or to the body dealing with the questions of law alone. That decision would not help Mr Vakil in his contention that this Court would have no jurisdiction to pass a just order even when all the evidence has been led and there would be no purpose in remanding the matter, except in prolonging the hardship which is being felt by the landlord. Section 29(2) of the Act, which gives revisional jurisdiction to this Court, provides as under:

"No further appeal shall lie against any decision in appeal under sub-section (1), but the High Court may, for the purpose of satisfying itself that any such decision in appeal was according to law,

call for the case in which such decision was taken and pass such order with respect thereto as it thinks fit."

The revisional jurisdiction with which this Court is invested under this section 29(2) is not, therefore, merely in the nature of jurisdictional control. It extends to corrections of all errors in the overall decision which would make the decision contrary to law. The Legislature further empowers this Court in its revisional jurisdiction to pass such order with respect thereto as it thinks fit. The Legislature having invested this Court with powers of the widest amplitude to pass such orders as the Court thinks fit in order to do complete justice, it is obvious that this wide power should not be narrowly construed. In so far as Section 13(2) is concerned, it deals with the human problem of considering the relative hardships of the landlord and the tenant and to arrive at a just solution. In such cases, the highest Court of the State is given revisional powers, which are wider in scope than section 115 of the Civil Procedure Code, so that it could do substantial justice by correcting even the errors where the decision as a whole is contrary to law. In such cases, if a limitation is sought to be implied that the power of this Court would only extend to the quashing of the impugned order and no further, it would clearly defeat the purpose of this wide revisional jurisdiction. In fact, the Legislature directs this Court to pass a just order, considering all the circumstances of the case, when all evidence is on the record it would be denying justice to the party who is feeling a genuine need of the suit premises to remand the matter to the lower appellate Court only to invite its decision on this issue of hardships. Mr. Vakil sought to argue this point on the analogy of the jurisdiction of this Court in writ petitions under Article 226 where it is well settled that the Court issuing a writ of certiorari only quashes the impugned order and does not pass any further order. Mr. Vakil also tried to argue that section 103 of the Civil Procedure Code in terms provides that in second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error, or defect as is referred to in sub-section (1) of Section 100. Even in the absence of a similar provision like section 103 of the Civil Procedure Code, a similar power is conferred on this Court when the Legislature invests it with the power to pass such order as it deems fit as would be just in the circumstances of the case. The

jurisdiction of this Court is to correct all errors of law going to the root of the decision, which would, in such cases, include even perverse findings of facts perverse in the sense that no reasonable person acting judicially and properly instructed in the relevant law would arrive at such a finding on the evidence on the record of the case. It would, therefore, be necessarily implied that a Court correcting such a perverse finding of fact must in the proper cases itself go into the question and arrive at such a finding itself, if all the evidence is on the record, in order that no further hardship would be caused to the party in whose favour the scale of hardship has already tilted. To refuse to exercise such a power would really result in failure of justice itself by prolonging the hardship of the party concerned. Mr. Vakil had also in this context argued that the additional evidence ought not to have been admitted. No such objection had been raised before the lower appellate Court and, in fact, after taking a chance of getting a decision in their favour, it would not be open to the defendants to raise any such point in this revision. In fact, the lower appellate Court had itself required this additional evidence on the ground that the parties' attention had not been focused on this relevant issue which had not been framed by the trial Court. As the lower appellate Court thought of passing a partial decree, it gave an opportunity to both the sides to lead additional evidence on this question. That was exactly the approach which my learned brother approved in the aforesaid decision in (1966) 7 Guj LR 1039. I cannot, therefore, agree with Mr. Vakil that the matter ought to be remanded to the lower appellate Court to give the defendants an opportunity to fill up the lacunae in their evidence. (After considering the evidence in paras 6 and 7 the judgment proceeded).

8. If we have now to prepare the statutory balance-sheet, we would have to consider the following items and weigh their effect as to how they tilt the scale in favour of the landlord or the tenants. The first circumstance is that the landlord has proved the genuine present need of the entire suit premises for his show room and shop purposes. The landlord's factory is situated in close vicinity and one of the partners actually stays on the first and the second floors of the suit shop itself. The other merchants trading in steel furniture have their shops in the locality and five or six of them have been mentioned by the plaintiff in his evidence. It may be that they may not have a show room because a show room requires a fairly large frontage. Thus, the plaintiff has, on the one hand, established a genuine present need

and a reasonable and bona fide requirement of the entire suit premises, and he would suffer hardship without these premises as he has no other premises where he could have his own shop. On the other hand, the defendants have a shop at Ghanchi's Wadi, another shop at Pandani Khancha and two godowns and other house properties. Thus, the landlord has no other alternative accommodation, while the tenants have an alternative accommodation for their shop purposes as well as accommodation for their manufacturing purposes where their workers can sit and where even the timber can be stored, in the shape of godowns. In fact, each brother has, on their own showing, one shop and a godown. Thus, this circumstance would definitely tilt the balance of hardship in favour of the landlord as against the tenants. The next circumstance which Mr. Vakil wants me to throw into the scale was that the landlord had a shop in Lal-bhai's Wanda which he had vacated in 1955. This circumstance would really show the landlord's genuine need for a shop. The landlord had vacated the same as the shop was found to be too small for his requirements and he could not have adequate frontage for opening a show room, and in fact the defendants themselves admit that it was not in a locality suitable for the landlord's business. In fact, the landlords' efforts to secure alternative accommodation are proved by the fact that as soon as a shop was available, they purchased this suit property where they could both stay and carry on their business of a shop by investing such a large sum as Rs. 35,000. Thus, on the one hand we have a landlord who has done all within his power to get his much needed accommodation for his business; on the other hand, we have tenants who led no evidence whatsoever as to their efforts to secure any alternative accommodation, whether of their own or in rented premises, even when they had such large funds available to them by sale of only one property for the large sum of Rs. 45,000 in the year 1960. In fact, if the defendants need any alternative accommodation, they would have made genuine efforts, for which they have led no evidence. The learned appellate Judge was right in observing that even when he gave specific opportunity to the defendants to lead additional evidence, they did not avail of this opportunity by showing what is the extent of their business, what is the extent of their requirement and as to what they had done to secure other additional accommodation, if they really needed any. No evidence whatever has been led by the defendants to show what stocks they had and what area they needed for their various purposes.

Therefore, this circumstance could not in any manner tilt the balance in favour of the tenants, but, really would tilt the balance on the other side, as the defendants have made no efforts whatever to secure any alternative accommodation whatsoever even when they had sufficient means to do so. The last circumstance which Mr. Vakil relied upon was that the defendants had alleged that the plaintiff had taken one shop of Harjivandas in the name of one of the partners of the firm and that the said shop in Ghanchi's Wadi, where the factory is situated, could be used by the plaintiff for his business. The learned trial Judge had visited this shop which was inside the Wadi. The plaintiff's partner Chimanlal has deposed that one of their partners who was the brother of the plaintiff had his son carrying on business of a book stall in that shop in the Dela. This shop could, therefore, not be available to the plaintiff-firm, which is a partnership firm. The learned trial Judge was, therefore, right in excluding this shop as being available to the plaintiff-firm. Thus, all the three circumstances which have been urged by Mr. Vakil, if considered, would show that the most important consideration, namely, the availability of accommodation to the landlord and the tenants, which in this case is conclusive on the question of the relative hardship, would lead to only one conclusion that the landlord has no shop whatsoever while the tenants have sufficient accommodation of two shops and two godowns which would satisfy all their needs and it is, therefore, that they have not made any efforts whatsoever to seek any alternative accommodation. Therefore, the finding as regards greater hardship issue must be in favour of the plaintiff. The next question which, therefore, arises is as to the second part of section 13(2), whether this is a case of partial decree. That issue can be answered only if I come to the conclusion that the resultant hardship, which I have already found, would be equalised by taking into consideration this additional factor so as to result in no hardship to either side. As I have already stated earlier, the lower Court's finding is based on a complete misreading of the plaintiff's evidence. The lower Court has also disregarded the question of hardship which would be caused to the plaintiff's family members and their visitors if they have to go through the corridor where the defendants have been permitted by the learned appellate Judge to display their articles. It would amount to creating a new lease of the space in the corridor which the learned appellate Judge carved out. All this has been done by the learned appellate Judge without considering the fact that the defendants led no evidence whatever to

prove the extent of their business requirement by producing any books of account or their stocks register or any other documentary evidence to show why they needed any more accommodation than what is actually available to them in the shape of the shops and two godowns at least Mr Vakul suggested that if a passage was given of about three feet, the defendants could have access to the rear portion and such a partial decree would not cause any hardship to either side. If from the much needed frontage for the show room purposes of the plaintiff this portion was carved out for a passage of the defendants, what would remain would be the rear portion for the use of the defendants, which they could use for storage or for their manufacturing activities. On the one hand, we have a landlord who himself needs this back portion for his own show room and shop to store his articles which are big articles consisting of all steel furniture, while, on the other hand, we have tenants who have sufficient space so far as the storage of timber and manufacturing articles is concerned in the shape of the various godowns and the two shops. Thus, even on this ground, it would be all hardship on the one side namely, the plaintiff's side, and this would not be a just solution which would strike an even balance to leave no resultant hardship to either side. Therefore, this is not a case where the second part of Section 13(2) would be attracted, because, a partial decree would even result in greater hardship to the plaintiff as against the defendants who have already sufficient available space and who do not even care to find out any more space, even though they have sufficient means for that purpose. Therefore, the finding of the trial Court that this is a case where greater hardship would be caused to the plaintiff must be confirmed, as the defendants have failed to prove that greater hardship would be caused to them if they are evicted from the suit shop. The finding of the lower appellate Court must be set aside that this is a case where no hardship would be caused if a partial decree was passed.

9. In the result, Civil Revision Application No 710 of 1963 filed by the plaintiff must be allowed, while Civil Revision Application No 602 of 1963 filed by defendants 1 and 3 must be rejected. I, therefore, set aside the partial decree passed by the lower appellate Court and I restore the trial Court's decree, with the only modification that the possession of the entire suit shop shall be delivered by the defendants to the plaintiff on or before 31st December 1967, which shall give them sufficient time to adjust their affairs. The rule, therefore, accordingly made absolute in Civil Revision Appli-

cation No. 710 of 1963 with costs, while the rule in Civil Revision Application No. 602 of 1963 discharged with costs

RSK/D.V.C.

Order accordingly.

AIR 1969 GUJARAT 122 (V 56 C 22)

V. B. RAJU, J.

Chaki Jakeria Abdulla, Applicant v. Memon Ismail Umar and another, Opponents

Civil Revn. Appln No. 74 of 1964, D/- 7-4-1967, from decision of Asst. J., Bhuj, D/- 21-12-1963.

Civil P. C. (1908), O. 33, Rr. 5 and 6 and O. 44, R. 1 — *Enquiry into pauperism* — Stage for.

Rules 5 and 6 of Order 33, show that inquiry into pauperism can be made only in cases where the Court sees no reason to reject the application on any of the grounds stated in Rule 5. The same is the effect of sub-rule (1) of Rule 1 and sub-rule (2) of Rule 1 of Order 44.

(Para 3)

Where therefore a suit in forma pauperis was dismissed on the ground of limitation and on appeal, the appellate Court, without applying its mind to the question whether the decree of the trial Court was contrary to law and erroneous or unjust, first admitted the application for permission to file appeal in forma pauperis and having started the enquiry into pauperism held that the decree was not contrary to law and therefore, refused the permission to file appeal.

Held, that the lower appellate Court was not wrong in deciding the point of limitation after the admission of the application. Assuming that it was wrong, the High Court will not interfere in revision. AIR 1958 Punj 437, Rel on

(Para 4)

Cases Referred: Chronological Paras

(1959) AIR 1959 Bom 67 (V 46)=

ILR (1959) Bom 502, Abdul Majid v. Bhaurao

3

(1958) AIR 1958 Punj 437 (V 45)=

ILR (1958) Punj 663, Mohd-Un-Nisa Begum v. Fayaz Ali

3

P. V. Hathi for R. P. Vaidya, for Applicant.

ORDER:— A suit allowed to be filed as a suit in forma pauperis was dismissed by the trial Court on the ground of limitation. In appeal also the same view about limitation was taken and therefore the appellate Court held that there is nothing to show that the decree of the trial Court is contrary to law or some

GL/LL/C881/68

usage having the force of law or is otherwise erroneous or unjust. Therefore, the appellate Court refused to grant permission to file the appeal in forma pauperis.

2. In revision it is contended that having admitted the application for permission to file the appeal in forma pauperis and having started the inquiry into pauperism under the proviso to sub-rule (1) of Rule 2 of Order 44, Civil Procedure Code, it was not open to the appellate Court to hold that the decree is not contrary to law etc.

3. The scheme of Order 44, Civil Procedure Code is like this:

Sub-rule (1) of Rule 1 reads as under:—

"Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

Sub-rule (2) of Rule 1 reads as follows:—

"The appellate court, after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless it sees reason to think that the decree is contrary to law, or is otherwise erroneous or unjust"

Marginal note to sub-rule (2) reads thus:—

"Procedure on application for admission of appeal" Rule 2 relates to the inquiry into pauperism.

Sub-rule (1) therefore applies subject to the provisions relating to suits by paupers contained in Order 33 Rule 5 of this order gives the grounds on which the application for permission to sue as a pauper can be rejected. Rule 6 of Order 33 reads as follows:—

"Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof."

These two rules, namely, Rules 5 and 6 of O 33, C. P. Code show that inquiry into pauperism can be made only in cases where the Court sees no reason to reject the application on any of the grounds stated in Rule 5. The same is the effect of sub-rule (1) of Rule 1 and sub-rule (2)

of Rule 1 of Order 44, C. P. Code. This is also the view taken in Mohd-un-Nisa Begum v Fayaz Ali, AIR 1958 Punj 437. The whole point appears to have not been understood when the learned appellate Judge passed the order "Admit, give notice" The record does not show that the Court applied its mind to the question whether the Court sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. If there is anything on the record of this case that the Court applied its mind, then of course I would have said that the Court had no right to re-open the question. There is no order on the record of this case passed by the Court like the one passed in Abdul Majid v. Bhaurao, AIR 1959 Bom 67, which is as follows:

"There is reason to believe that the trial Court's decree is erroneous. Notice of the pauper application be given to the non-applicants and Collector as similar to O 33, R 6."

4. Even assuming that the Court was wrong and the procedure adopted by the Court was wrong, as this is a revision matter, if it appears that the order of the Courts below on the question of limitation is right, this Court will not interfere in revision. In the criminal complaint, dated 21st May, 1958, the plaintiff clearly stated that the building materials were removed from 11th January 1957 to 22nd February 1957. In his deposition before the appellate Court (Ex. 39) dated 20th December, 1961, he has admitted that he gave the date quite correctly in his complaint (Ex. 23). If the building materials were removed before 22nd February 1957, then the suit, which is filed on 29th February 1960, is obviously barred by limitation. In this view of the matter, I do not propose to exercise my revisional jurisdiction, although it may be that the lower Court was not right in deciding the point at a stage subsequent to what was called 'admission of the application.'

5. If the petitioner pays the court-fees due from him to be paid in appeal, all the questions arising for determination will be determined by the appellate Court without in any way being influenced by the remarks in this judgment. One month's time is given to the petitioner to pay the court-fees to be paid by him in appeal.

HGP/D.V.C.

Order accordingly.

AIR 1969 GUJARAT 124 (V 56 C 23)*

P. N. BHAGWATI AND
N. K. VAKIL, JJ.Navinchandra Babulal Bhavsar, Applicant
v. Bachubhai Dhanabhai Shah,
Opponent.Civil Revn. Appln. No. 79 of 1967, D/-
14-3-1967, against decision of C. J.,
Small Cause Court, Ahmedabad, D/- 13-
12-1966.

(A) Ahmedabad Small Cause Court Rules, R. 39 — Validity — Provision read with O. 37, R. 3 Civil P. C. do not violate Art. 19(1)(f) of the Constitution — Provisions do not constitute an unreasonable restriction on right of a defendant to hold and dispose of property — Procedure contemplated by the provisions does not amount to violation of natural justice.

Rule 39 of the Ahmedabad Small Cause Court Rules read with O. 37, R. 3 do not contravene Art. 19(1)(f) of the Constitution since they do not affect any property right of the defendant, even where the Court passes an order of conditional leave to defend. The restrictions put on the manner in which the defendant will be entitled to defend the cause where the summary procedure applies are in the interest of the public in the sense that all those who have a prima facie case in commercial causes of the nature contemplated by the said rules shall be entitled to speedy disposal and recovery of their rightful claims and, as such, are not unreasonable.

(Paras 18 & 28)

Under the summary procedure contemplated by the provisions (1) if a triable issue is raised, unconditional leave to defend should be granted; (2) if the Court is satisfied beyond doubt that the defence raised is frivolous, false or sham, leave to defend should be refused; (3) however, if the Court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the Judge may impose conditions for granting leave to defend. The intention and the direct and inevitable effect of the rules have to be seen to find out whether they affect the defendant's right to hold property. Unless the applicant proves that the rules affected his particular fundamental right as a direct and inevitable result he cannot succeed. The aim and object of the impugned rules is to provide a machinery for adjudication of commercial disputes involving claims of liquidated amounts, expeditiously and for securing or making it possible to expeditiously recover the

amount, if a decree is passed. It does not deal with any of the fundamental rights to hold property, of the defendant. Looked at even from another angle, what rule 39 does is to provide for the manner and the conditions subject to which the defendant will have a right to defend such a money claim. Even in the wider sense of the word "property", at at this stage no property of the defendant is involved or is concerned. What is affected at the most is the mode of his defence. Right to defend is not a fundamental right and it is open to the State to provide restrictions on the right to defend or regulate his right to defend, and the provisions that prescribe such restriction cannot be attacked as contravening any fundamental right. AIR 1967 S C 1 and AIR 1958 SC 578, Rel. on.; AIR 1965 SC 1698, Ref.; AIR 1963 SC 996, Dist. (Paras 6, 16, 17)

Further, the fact that under the summary procedure contemplated under the provisions full defence at the first stage is not permitted to the defendant by leading of evidence or cross-examining the plaintiff does not amount to non-compliance with the requirements of natural justice so as to amount to unreasonable restrictions. (Para 25)

(B) Constitution of India, Art. 226 — Natural justice — Principles — Principles are not violated under the summary procedure contemplated under R. 39 of Ahmedabad Small Cause Court Rules.

The requirement of natural justice is not a static or a definitive concept and it varies with the nature of the tribunal and the nature or consequence of the order made. In case of orders of a judicial authority, where the order passed affects the defendant's right to hold property, full compliance with the requirement of natural justice has to be insisted upon. Right of cross-examination or leading oral evidence may not be such a principle of natural justice as can be said to be inviolable in all the cases. There are only two broad principles or fundamental requirements which form the basis of the doctrine of natural justice and they are (1) the authority deciding the matter must be independent, unbiased and impartial and (2) the principle of audi alteram partem that is to say, no man shall be condemned unheard. Under the summary procedure contemplated under R. 39 of Ahmedabad Small Cause Court Rules all the three ingredients of notice, opportunity to meet the adversary's case and the right to be heard before the Judge who decides the matter are complied with. The Judge dealing with the matter, where the summary procedure applies, has to decide judicially after taking into account the contents of the affidavit for summons for judgment and the plaint on the one hand

*Only portions approved for reporting by High Court are reported here.

and the affidavit filed in reply thereto by the defendant, whether to grant leave conditionally or unconditionally or refuse leave to defend. Therefore, all the fundamental principles of natural justice are complied with and only on judicial adjudication the defendant's right to hold property, if at all, is affected. (1966) 7 Guj LR 87, Rel. on. (Paras 23 to 25)

(C) Constitution of India, Preamble, Art. 19 — Interpretation of Constitution to be based on words in the Constitution itself — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Interpretation — Constitution).

The provisions of Indian Constitution have to be interpreted by the plain words used in the Constitution and not with reference to the connotation of the doctrine of police power or due process of law, though there may be some similarity in the principle underlying the doctrine of due process of law and of "reasonable restriction" to be found in the Indian Constitution. (Para 24)

(D) Ahmedabad Small Cause Court Rules, R. 39—Provision read with O. 37, R. 3 Civil P. C. do not violate Art. 14 of the Constitution.

Provision of R. 39 of Ahmedabad Small Cause Court Rules read with O. 37, R. 3 Civil P. C. do not violate Art. 14 of the Constitution. It cannot be said that they apply unequally to the plaintiff and the defendant though they are similarly situated in relation to the object of the said provisions. The object and purpose of summary procedure, is to provide a procedure in certain class of commercial claims which conduces not only to speedy disposal of matters but more to the speedy realisation of the amount due by the defendant to the plaintiff by curtailing the opportunity to the defendant to protract the litigation or frustrate the decree the plaintiff may get by lengthy proceedings of the general procedure provided for all types of litigation. Having regard to this primary object of the rules and policy underlying, it is difficult to hold that the plaintiff and the defendant can be said to be persons similarly situated with reference to the object of the rules. Even looked at from the point of view of the disadvantage to be suffered by the plaintiff and the defendant having regard to the object of the legislation, the two of them cannot be said to be similarly situated and the classification made is reasonable. Under the circumstances, it cannot be said that the said provisions are discriminatory. (1955) 57 Bom LR 1118 & AIR 1953 Cal 758 & (1966) 7 Guj LR 87, Rel. on. (Paras 32 and 33)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1 (V 54)=(1966)
3 SCR 744, Naresh v. State of
Maharashtra 19

- (1966) 7 Guj LR 87=ILR (1965)
Guj 1166, Sam M. Haeems v.
Samson J. Benjamin 25
(1966) 7 Guj LR 703=ILR (1966)
Guj 681, Govindbhai v. Union of
India 27
(1965) AIR 1965 SC 1698 (V 52)=
(1966) 2 SCJ 606, Milkhiram
(India) Pvt. Ltd. v. Chaman Lal
Bros. 6, 23
(1963) AIR 1963 SC 996 (V 40)=
(1963) Supp (1) SCR 885, Prem
Chand Garg v. Excise Commr.
U P. 18
(1959) AIR 1959 SC 1376 (V 46)=
(1960) 1 SCR 580, Gullapalli
Nageswara Rao v. State of
Andhra Pradesh 11
(1958) AIR 1958 SC 321 (V 45)=
1958 SCR 1211, Santosh Kumar
v. Bhai Mool Singh 6
(1958) AIR 1958 SC 578 (V 45)=
1959 SCR 12, Express Newspaper
Ltd. v. Union of India 15, 18, 26
(1958) AIR 1958 SC 956 (V 45)=
1959 SCR 995, In re, Kerala Edu-
cation Bill 18
(1955) 57 Bom LR 1118=ILR
(1956) Bom 218, Laxmandas Devi-
das Kapadia v. Mathurdas
Dwarkanadas 34
(1953) AIR 1953 Cal 758 (V 40)=
57 Cal WN 744, Ambalal Pur-
shottamdas & Co. v. Jawahar
Lal 34
(1950) AIR 1950 SC 27 (V 37)=
1950 SCR 88, Gopalan v. State of
Madras 19
(1950) AIR 1950 Mad 226 (V 37)=
ILR (1950) Mad 251, Kesavan v.
South India Bank Ltd. 6
(1935) AIR 1935 Mad 43 (V 22)=
ILR 58 Mad 116, Sundaram
Chettiar v. Valli Ammal 6
Niranjan Mehta, for J. M. Patel, for
Applicant; K. A. Daboo, for N. J. Mody,
for Opponent; K. H. Kaji, Acting Advo-
cate General, amicus curiae.

VAKIL J. :— This Civil Revision Ap-
plication is made under section 115 of
the Civil Procedure Code challenging the
following order made by the Chief Judge
of the Ahmedabad Small Cause Court
in summary suit No. 3018 of 1966:—

"On defendant depositing Rs 1000/-
in court within 6 weeks, leave to defend
is granted On such deposit defendant to
file his written statement within 3 weeks
thereafter."

The opponent had filed the said suit
against the applicant stating that the
applicant had taken Rs 1000/- from him
as loan which amount was advanced
without interest as they were friends and
despite demands the defendant had not
returned the loan. The opponent plain-
tiff relied on a writing passed by the
applicant. The applicant had appeared
before the Court in answer to the sum-

mons for judgment and filed his affidavit, denying his liability to pay the amount on the ground that the loan was not given to him but he believed that it was given to the person who had attested the document. The applicant has, however, not denied his signature on the document. At the hearing of the summons for judgment the impugned order was made under rule 39 of the Ahmedabad Small Cause Court Rules framed by the High Court of Gujarat read with rule 3 of Order 37 of the Civil Procedure Code. By an amendment application which we have allowed, the applicant has augmented some of the grounds originally taken in the revision application. Though a number of grounds were raised, the said order is now challenged before us only on the following grounds and the others have not been pressed—

(1) By compelling the defendant to show a good or genuine defence to the suit before granting leave to defend, the procedure stifles or paralyses the defendant completely in his defence and renders it illusory and thus constitutes an unreasonable restriction on his right to hold and dispose of property under article 19 of the Constitution of India.

(2) Even when the Court has a doubt as to the genuineness of the defence, the procedure allows the Court to impose conditions and thus deprives an impecunious defendant of his valuable right to defend before he is deprived of his property. Therefore, the procedure constitutes unreasonable restriction on his right to hold and dispose of the property under Article 19.

(3) Unlike the English practice, the summary procedure does not provide a right to appeal from an order refusing or granting conditional leave.

(4) Unlike the English practice, the summary procedure does not require the Court to give any reasons for such order.

(5) The summary procedure is heavily weighed in favour of the plaintiff as against the defendant, even though they are similarly situated with respect to the object of the rule and thus contravenes the fundamental right guaranteed by Article 14.

(6) The procedure allows the plaintiff throughout the whole of the trial all the advantages of a fair trial irrespective of the fact whether his case is genuine, fair, false, good or dishonest, but drives the defendant out of Court, if he fails to show that he has a good or genuine defence before the trial.

2. Before we go to consider these contentions, it will be expedient to refer, in short, to some of the provisions of the Civil Procedure Code and the Rules which provide for the summary procedure. The first part of the Civil Proce-

dure Code consists of sections which constitutes the main body of the Code and the second part consists of rules put in the First Schedule which provide for the mode and method in which the main provisions of the Code are to be applied in practice. The object of the Civil Procedure Code is to lay down the law relating to the procedure of the Courts of Civil Judicature and it envelopes within its ambit a variety of causes and civil litigation. In some causes and litigation, looking to their nature, the need of urgency in their disposal and realisation of decretal amount, and which causes are inherently less complex than others being claims of liquidated amounts only, the Legislature has thought fit to provide a different treatment while laying down the rules of procedure. Part X of the main body of the Civil Procedure Code deals with rules. Section 121 provides that the rules in the First Schedule shall have effect, as if enacted in the body of the Code until annulled or altered in accordance with the provisions of this part. Rule 122 gives power to certain High Courts to make rules and lays down that "High Courts not being the Courts of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule." Section 128 lays down that the rules so made shall not be inconsistent with the provisions of the body of the Code but, subject thereto, may provide for matters relating to the procedure of Civil Courts including the summary procedure. Turning to the second part of the Code which consists of various orders and rules made thereunder, we may only refer to Order XXVII which deals with summary procedure and the rules thereunder which have a bearing on the matter on hand. Rule 1 of Order XXVII inter alia provides that the Order shall apply only to (i) the High Courts of Judicature at Fort William, Madras and Bombay and (ii) any District Court or other Court specially empowered in this behalf by the State Government. Originally rule 2 made the summary procedure applicable to suits upon bills of exchange, hundies or promissory-notes only and the defendant was not entitled either to appear or defend unless he applied for leave to appear and defend within 10 days of the service of summons and such leave was granted. Rule 3 is as follows:—

"3 (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the

Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

Rule 7 lays down that "Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner." In 1936, the High Court of Bombay, in exercise of the powers vested in it under section 122 read with Section 128(f) of the Civil Procedure Code, framed rules substituting rules 1 and 2 of Order XXXVII and in 1940 substituted its own rule in place of the original Rule 3. We need not enter into the details thereof here. On the reorganisation of the composite State of Bombay, the two States of Maharashtra and Gujarat came into existence in 1960 and with it came into existence the High Court of Gujarat. On May 15, 1961, the State of Gujarat passed the Ahmedabad City Courts Act, 1961, providing for the constitution of the Ahmedabad Small Cause Courts, which came into existence on November 4, 1961. On the same day the City Civil Court also came into existence having been constituted under the said Act. By Section 17 of the Ahmedabad City Courts Act, 1961, the Presidency Small Cause Courts Act, 1882 (Act 15 of 1882), was extended to and made applicable to the city of Ahmedabad from November 4, 1961. Under section 9 of the Presidency Small Cause Courts Act, 1882, the High Court is empowered, *inter alia*, from time to time by rules having the force of law to prescribe the procedure and practice to be observed by the Small Cause Court either in supersession of or in addition to any provisions which were prescribed with respect to the procedure or practice of the Small Cause Court on or before the 31st day of December 1894, in or under the Act or any other enactment for the time being in force. It has also been empowered to cancel or vary any such rule or rules. The rest of the section need not be referred to.

3. By virtue of this authority under the said Section 9, the High Court of Gujarat prescribed rules regarding the procedure to be followed and the practice to be observed by the Ahmedabad Small Cause Court. Sub-rule (2) of rule 1 of the Rules so prescribed, is as follows:—

"(2) The portions of the Code of Civil Procedure, Act V of 1908, as modified upto 4th November 1961 in its application to the State of Gujarat specified in the last column of the schedule hereto annexed shall, subject to the additions, alterations and modifications specified in the 2nd column of such schedule, extend and shall be applied to the Small Cause

Court and the procedure prescribed thereby shall be the procedure followed in the Court in all suits cognizable by it except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the Presidency Small Cause Courts Act, 1882, or with these rules."

The Schedule provided by the said rules includes the application of the summary procedure of Order XXXVII, Civil Procedure Code, but has deleted Rule 1 and has substituted for the original Rule 2, the following rule:—

"2(1) All suits upon bills of exchange, hundis or promissory notes and all suits in which the plaintiff seeks only to recover a debt or a liquidated demand in money payable by the defendant with or without interest, arising on contract express or implied or an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, may, in case the plaintiff desires to proceed hereunder be instituted by presenting a plaint which shall be instituted as a "Summary Suit" and which shall contain an averment that the plaintiff is suing under the summary procedure under Order XXXVII of the Code of Civil Procedure.

(2) The writ of summons in a suit instituted under sub-rule (1) above shall be in form No 2. The plaintiff shall together with the writ of summons serve on the defendant a copy of the plaint and exhibits thereto, and the defendant may at any time within ten days of such service enter an appearance. The defendant may enter an appearance either in person or by an advocate. In either case an address for service shall be given in the memorandum of appearance and, unless otherwise ordered, all summonses, notices, or other judicial process required to be served on the defendant shall be deemed to have been duly served on him if left at his address for service. On the day of entering appearance, notice of the appearance shall be given to the plaintiff's Advocate (or if the plaintiff sues in person to the plaintiff himself) either by notice delivery at or sent by prepaid letter directed to, the address of the plaintiff's Advocate or of the plaintiff, as the case may be.

(3) In any suit under this Rule the defendant shall not defend the suit unless he enters an appearance and obtains leave from a judge as hereinafter provided so to defend, and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons

together with interest at the rates specified (if any) to the date of the decree, and such sum for costs as may be prescribed unless the plaintiff claims more than such sum, in which case the costs shall be ascertained in the ordinary way and such decree may be executed forthwith."

Again, in the body of the rules under the heading "Summary Procedure", the High Court has provided rules Nos. 39 to 44. As we are concerned particularly with the validity of Rule 39, it will be convenient to reproduce it here:—

"39. (1) In a suit filed under Order XXXVII of the Code of Civil Procedure, if the defendant enters an appearance or files a Vakalatnama, the plaintiff shall, on affidavit made by himself, or by any other person who can swear, to the facts of his own personal knowledge verifying the cause of action and the amount claimed, and stating that in his belief there is no defence to the action, apply by summons for judgment returnable not less than ten clear days from the date of service to the court for the amount claimed, together with interest (if any) and costs. The Judge may, thereupon, unless the defendant by affidavit or declaration shall satisfy him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly."

Rule 40 lays down the procedure where part of the claim is admitted. Rule 41 provides for the contingency of one of the defendants having a good defence and the others not having such defence. Rule 42 prescribes the form No. 3 for summons for judgment. Rule 43 deals with the situation where the defendant does not complete his security or carry out any other direction of the Court and Rule 45 provides for putting down for hearing summary suits where even leave to defend is given, for early hearing before a Judge appointed for the purpose by the Chief Judge unless it is transferred to long cause list.

4. It will be expedient to also mention that, under the authority given, the Bombay High Court had made application of the summary procedure of Order XXXVII with amended rules to the Bombay City Civil Court. The Gujarat High Court also framed Rules for the Ahmedabad City Civil Court in exercise of the powers conferred by Sections 122 and 128 of the Civil Procedure Code and Article 227 of the Constitution and by other powers enabling it to make such rules. Rules 142 to 148 contained in Chapter XI of the said Rules are in pari materia with those of the Small Cause Court Rules. We have referred to these provisions as they have been the subject

matter of the decisions of the Bombay High Court as well as this Court wherein also a challenge was made against the provisions of the summary procedure of Order XXXVII and the City Civil Court Rules framed by the High Courts on their constitutional validity on the ground of contravention of the guarantee of equal application of laws given under Article 14 as also on the ground that they violate the fundamental principles of natural justice. We shall refer to these decisions at the proper place. These are all the provisions of law which we need refer to for the purposes of appreciating the contentions raised.

5. The aforesaid provisions prima facie show that the object of the summary procedure is that in a large commercial town certain types of litigation concerning the commercial community should be expeditiously handled and brought to an end, including the realisation of the decretal amount, if a decree is passed. This is intended to give impetus to commerce and industry and thereby benefit the place as a whole by inspiring confidence in the large commercial population of the town that their causes in respect of monetary claims of liquidated amounts would be justly and expeditiously disposed of and their claims will not hang on for years blocking their money and transactions for long periods with a comparatively greater disadvantage to them than in litigation of other types. Out of long experience and tried methods, legislature thought fit to include Order XXXVII in the Civil Procedure Code for application to certain suits in certain High Courts only and empower the States to make them applicable wherever and to whichever Courts they thought proper to apply. It also empowered, under Section 128, all the High Courts, subject to the approval by Government, to frame rules extending the summary procedure to certain other types of suits as we have already noticed. The High Court has also been empowered, so far as small Cause Courts are concerned, by the Presidency Small Cause Courts Act, to extend the summary procedure to Small Cause Courts when they deem it expedient so to extend. That is how we find the summary procedure in the Small Cause Court at Ahmedabad. The city of Ahmedabad is an important commercial town. There can be no doubt as regards the rational basis on which this procedure is applied to a town where such litigation is much larger than at other places and also to such Courts where such litigation has to be handled in a large measure.

6. Having seen generally the objects and purpose of the provisions of the summary procedure, we now proceed to consider what exactly are the powers conferred on the Court under these pro-

within the stipulated period the appointment shall take effect and the teacher shall be entitled to salary till disapproval of his appointment is duly intimated to him
BNP/D.V.C. Order accordingly.

AIR 1969 KERALA 97 (V 56 C 22)

T C. RAGHAVAN, J.

V. Madhavan Nair, Petitioner v. M. P. Gopala Panicker and another, Respondents

Criminal Revn. Petn. No. 138 of 1968, D/- 3-6-1968, against order of Sub-Magistrate's Court, Manjeri, in C. C. No. 274 of 1968.

Criminal P. C. (1898), Ss. 190, 156 (3), 4 (1) (h) — Complaint to Magistrate — Magistrate sending it for investigation under S. 156 (3) — No objection can be taken to the case being conducted by Public Prosecutor on submission of chargesheet by police. AIR 1967 All 468 & 1968 Ker LT 57, held no longer good law in view of AIR 1964 SC 1541.

The Code does not contain any definition of the words "institution of a case". It is, however, clear that a case can be said to be instituted in a Court only when the Court takes cognisance of the offence alleged therein. Consequently where the Magistrate sends the complaint filed before him, to the police for investigation under S 156 (3) and after such investigation the police submits chargesheet, no objection, when the case comes for the further trial, can be raised to the effect that the Public Prosecutor should not conduct the prosecution and that the complainant must make his own arrangements for prosecution of the case. AIR 1967 All 468, 1968 Ker LT 57 held no longer good law in view of AIR 1964 SC 1541 (Para 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 372 (V 55)=
- (1968) 1 SCR 455, Tribhovandas Purshothamdas Thakkar v. Ratilal Motilal Patel 4
- (1968) 1968 Ker LT 57=1968 Mad LJ (Cri) 70, State of Kerala v. Wilfred 5
- (1967) AIR 1967 All 468 (V 54)= 1967 Cri LJ 1255, Badri Prasad Gupta v. Kripa Shankar 3
- (1966) 1966 Ker LT 635=1966 Mad LJ (Cri) 812, Cheeran Sankaran v Narayanan Rajappan 5
- (1965) AIR 1965 SC 1767 (V 52)= (1965) 3 SCR 218, Lala Sri Bhagwan v Ram Chand 4
- (1964) AIR 1964 SC 1541 (V 51)= 1964 (2) Cri LJ 468, Jamuna Singh v Bhadai Shah 6

- (1962) AIR 1962 SC 83 (V 49)= (1962) 2 SCR 558, Jaisri Sahu v. Rajdevan Dubey 4
- (1961) AIR 1961 SC 986 (V 48)= 1961 (2) Cri LJ 39, Gopal Das v. State of Assam 6
- (1960) AIR 1960 SC 936 (V 47)= (1960) 3 SCR 578, Mahadeo Lal Kanodia v. Administrator General of West Bengal 4
- (1960) AIR 1960 Ker 389 (V 47)= 1960 Cri LJ 1600, K. Damodaran v. V. K. Sippi 3
- (1951) AIR 1951 SC 207 (V 38)= 52 Cri LJ 775, R. R. Chari v. State of U. P. 6

K. P. Ramunni Menon, K. T. Harindranath, N. V. Prabhakaran and P. Ramaranjan, for Petitioner; M. M. Abdulkhader and State Prosecutor, for Respondents Nos. 1 and 2 respectively.

ORDER:— The recent decision in State of Kerala v. Wilfred, 1968 Ker LT 57 by Sadasivan, J., has been responsible for this revision petition.

2. The petitioner filed a complaint before the magistrate; and the magistrate sent the complaint under Section 156 (3) of the Code of Criminal Procedure to the police for investigation. After investigation the police laid a charge-sheet; and when the case came up for further trial, objection was taken that in view of the decision mentioned above, the Public Prosecutor should not conduct the prosecution and the petitioner, as complainant, must make his own arrangements for the prosecution of the case. This the magistrate has accepted; and the correctness of this decision is being challenged before me.

3. Sadasivan J. refers to the Division Bench ruling of the Allahabad High Court in Badri Prasad Gupta v. Kripa Shankar, AIR 1967 All 468 and observes:

"The Magistrate may initiate action either on a complaint or on a police report and the gist of the above decision is that the case is "conceived" as soon as a complaint is filed or a police report is made and even if cognizance is taken by the Magistrate in the strict sense of the term only after the final report of the Police, and the case proceeds only from that stage, it does not cease to be a case instituted on complaint. Pursuing the analogy further it must be held that until the police report is received the case conceived by the filing of the complaint remains in the womb, and it is brought forth — either alive or still-born — after the receipt of the police report. When a complaint is sent by the Magistrate to the Police it must be presumed that such a step was resorted to by the Magistrate for a further assurance about

the truth of the complaint. Putting it differently, the Magistrate is not prepared to proceed on the complaint alone; but thinks it necessary that a police report also should be obtained. The action of the Magistrate will not change the character of the complaint. In other words, the complaint originally filed will not, on that account, assume a different garb when the police report is received. The proceedings will continue to be proceedings instituted on complaint."

Sadasivan, J., also refers to the decision of this Court in *K. Damodaran v. V. K. Sippi*, AIR 1960 Ker 389, wherein Raman Nayar, J. has held, in interpreting Section 417 (3), Code of Criminal Procedure, that any case instituted upon complaint means 'any case of which the Court has taken cognizance upon complaint'. Raman Nayar, J., has also held that 'complaint' does not include a police report.

4. In paragraph 22 of their judgment, the Allahabad High Court has expressly disagreed with the view that a case is instituted only when it is taken cognizance of — the view expressed by Raman Nayar, J., and Sadasivan, J., appears to have followed this ruling of the Allahabad High Court. In view of a decision by a learned Judge of this Court taking one view, one would have normally expected the case to be placed before a larger bench rather than another learned Judge deciding the case in a different way; and judicial decorum and legal propriety have always demanded that, vide *Mahadeolal Kanodia v. Administrator General of West Bengal*, AIR 1960 SC 936, *Jaisri Sahu v. Rajdewan Dubey*, AIR 1962 SC 83, *Lala Shri Bhagwan v. Ram Chand*, AIR 1965 SC 1767 and *Tribhovandas Purshothamdas Thakkar v. Ratilal Motilal Patel*, AIR 1968 SC 372.

5. There is yet another decision of our High Court by Madhavan Nair, J., in *Cheeran Sankaran v. Narayanan Rajappan*, 1966 Ker LT 635 coming to the same conclusion as Raman Nayar, J., following a decision of the Supreme Court. (The decision of Raman Nayar, J., does not appear to have been noted by Madhavan Nair, J.). However, the decision of Madhavan Nair, J., does not appear to have been brought to the notice of Sadasivan J. In these circumstances, I would have referred the case before me to a Division Bench to dissolve the conflict of opinion between Raman Nayar, J., and Madhavan Nair, J., on one side and Sadasivan, J., on the other. But, the passage extracted by Madhavan Nair, J., from the decision of the Supreme Court refers to two earlier decisions of the Supreme Court, and these three Supreme Court decisions appear to put the matter

beyond controversy and obviate the necessity of a reference to a Division Bench. I have only to consider whether the Supreme Court decisions cover the case; and if they cover the case, I need not refer the case to a Division Bench, as I am bound to follow the Supreme Court decisions.

6. The decision of the Supreme Court pointed out by Madhavan Nair, J., and brought to my notice by the petitioner's Counsel is *Jamuna Singh v. Bhadaai Shah*, AIR 1964 SC 1541. Paragraph 6 of the judgment puts beyond any shadow of doubt the law on the question. Paragraph 6 says:

"The Code does not contain any definition of the words 'institution of a case'. It is clear however and indeed not disputed that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein".

The second sentence extracted above is clear and definite that a case instituted means a case taken cognizance of, as pointed out by Raman Nayar, J., in other words, a case is instituted only when the Court takes cognizance of the offence alleged therein. The Supreme Court also refers to two earlier decisions of the same Court; *R. P. Chari v. State of U. P.*, AIR 1951 SC 207 and *Gopal Das v. State of Assam*, AIR 1961 SC 986. This clear pronouncement of the Supreme Court leaves no room for any distinction between 'institution of a case' and 'taking cognizance thereof' or for the analogy that the institution of a case is like conceiving a child and taking cognizance of the offence is like the delivery of the child. The two later decisions of the Supreme Court (of 1961 and 1964) do not appear to have been considered by the Allahabad High Court.

7. In the light of the decisions of the Supreme Court, the ruling of the Allahabad High Court and the decision of Sadasivan, J., following the Allahabad decision do not lay down the law correctly. Consequently, the order of the magistrate is erroneous.

8. The criminal revision petition is allowed; the order of the lower Court is set aside; and the lower Court is directed to proceed with the case as one instituted on a police report.

CWM/D.V.C.

Petition allowed.

AIR 1969 KERALA 99 (V 56 C 23)

FULL BENCH

M MADHAVAN NAIR, T. S.
KRISHNAMOORTHY IYER AND
K. SADASIVAN JJ.

City Corporation of Calicut, Appellant
v. Thachambalath Sadasivan and others,
Respondents

W. A. Nos 107 and 108 of 1967, D/- 2-7-1968, against judgment of Gopalan Nambiar, J., in O. P. Nos. 2962 and 3037 of 1965

Municipalities — Kerala Municipal Corporation Act (13 of 1964), Ss. 299, 387 — Calicut City Municipal Act (30 of 1961), Ss. 299, 387 and 98 to 138 — Levy by Corporation of licence fee for soaking coconut husks in soaking pits in payer's property — Levy is not valid — Constitution of India, Art. 265.

The levy by Corporation of licence fee for soaking coconut husks in soaking pits in payers' own property is not valid. The reasons are, (a) as a "fee for licence", the levy cannot be justified for the reason that it has no correlation with the cost of issuing the licence. (b) as a "fee for services rendered" it cannot be supported as no service is rendered particularly to the payer of fee, and (c) as a "fee in the nature of a tax", it is illegal since the mandatory provisions of the Act in relation to the imposition of a tax have not been followed. AIR 1968 SC 1119 & AIR 1954 SC 388 & AIR 1965 SC 1107 & AIR 1954 SC 282 & AIR 1966 SC 1502 & AIR 1967 SC 1801, Rel. on; AIR 1965 SC 1561, Dist. (Para 7)

Without a special benefit accruing to the payer in return, the levy cannot be justified. The fee collected must have correlation to the expenses incurred in issuing the same. If more than what is required to issue the licence is levied, the tax element will predominate since the excess collected will go to the general fund to be utilised for matters of general public utility and in such cases the levy would assume the character of a tax and not fee. The Corporation cannot impose a tax in the guise of a fee. The Corporation cannot impose a levy on an activity as if they are imposing a tax on land. Without following the procedure contemplated in Ss 98 to 138 of the Act, a tax cannot be imposed. Case law Disc. (Paras 2, 3, 4)

No fee can be imposed in return for the Corporation discharging its statutory duties as a Corporation. By the supervision, control and regulation of the activity the payer of the fee cannot be said to be benefited. The object behind such measures is to detect lapses from or violation of the rules by the licensees and that in effect is the exercise of the

"police power" vested in the Corporation. No cess or fee can justifiably be imposed on the licensees for such measures which the Corporation is bound under the statute to adopt or undertake.

(Para 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 1119 (V 55)=
Civil Appeal No. 558 of 1967,
Nagar Mahapalika, Varanasi v.
Durga Das 2, 5, 6, 7
- (1967) AIR 1967 SC 1801 (V 54)=
(1967) 2 SCR 679, N. M. C S &
W Mills v. Ahmedabad Municipality 4
- (1966) AIR 1966 SC 1502 (V 53)=
(1966) 2 SCR 891, Hardwar Municipality v Raghuraj Singh 3
- (1965) AIR 1965 SC 1107 (V 52)=
(1965) 2 SCR 477, Corporation of Calcutta v Liberty Cinema 3, 6
- (1965) AIR 1965 SC 1561 (V 52)=
(1965) 3 SCR 47, Ajoy Kumar v. Local Board 6
- (1954) AIR 1954 SC 282 (V 41)=
1954 SCR 1005 Commr. Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shrirur Mutt 2, 3
- (1954) AIR 1954 SC 388 (V 41)=
1954 SCR 1055, Ratilal v. State of Bombay 2
- (1954) AIR 1954 SC 400 (V 41)=
1954 SCR 1046, Sri Jagannath v. State of Orissa 2
- (1927) AIR 1927 Rang 183 (V 14)=
ILR 5 Rang 212, Municipal Corporation of Rangoon v. Sooratee Bara Bazar, Co Ltd. 3

W. A. No. 107/67

K. P. Ramunni Menon and K. P. G. Menon, for Appellant, K. Prabhakaran, for Respondents Nos 1 to 12 & 14 to 16; Govt. Pleader, for Respondent No. 17.

W. A. No. 108/67

K. P. G. Menon, for Appellant; T. C. Karunakaran, P. K. Shamsuddin and V. M. Kurien, for Respondents Nos 1 to 3 and 5 to 12, Government Pleader, for Respondent No 13.

SADASIVAN, J.— These appeals have been preferred by the City Corporation of Calicut against the judgment of Gopalan Nambiar, J., in Original Petition Nos 2962 & 3037 of 1965. The petitioners challenged the validity of the levy by the Corporation, of licence fee for soaking coconut husks in soaking pits in their property. The Corporation would justify the impost under Section 299 read with Section 387 and Schedule IV of the Calicut City Municipal Act. (Act 30 of 1961) renamed as the Kerala Municipal Corporation Act (Act 13 of 1964). The case of the petitioners is that as a fee the levy is not justified by the provisions of the statute and as a tax, it is beyond

the power of taxation conferred on the Corporation. The stand taken by the Corporation on the other hand is that the levy is a tax. Alternatively it is also contended by the Corporation that it is a "fee for licence". The learned Single Judge has held in his judgment dated 8-2-1967 that as a fee the levy is unsustainable since no positive service is rendered by the Corporation in return for the fee levied. As a tax the learned Judge's view is that it is beyond the power of taxation conferred on the Corporation. Accordingly it has been held by the learned Judge that the levy of licence fee for soaking coconut husks is illegal.

2. The question for decision in these appeals is whether the levy of licence fee for soaking coconut husks is sustainable under any of the provisions of the Calicut City Municipal Act (hereinafter to be referred to as "the Act"). The Corporation would trace its power to impose the impugned levy to Sections 299 and 387 of the Act. We are extracting these two sections:

"299.

(1) No place within the limits of the city shall be used for any of the purposes mentioned in Schedule IV without a licence obtained from the Commissioner and except in accordance with the conditions specified therein."

x x x x x

387.

(1) Every licence or permission granted under this Act or any rule or bye-law made under it shall specify the period, if any, for which and the restrictions, limitations, and conditions subject to which the same is granted, and shall be signed by the Commissioner.

(2) (a) Save as otherwise expressly provided in, or may be prescribed under, this Act, for every such licence or permission, fees shall be paid in advance on such units and at such rates as may be fixed by the council.

x x x x x

The above Sections speak of the imposition of licence fee. The learned counsel for the Corporation classified fees referred to in the above sections under three heads and they are: (a) fee for licence, (b) fee for services rendered and (c) fee in the nature of a tax. We have carefully examined all these three heads, in the light of relevant decisions of the Supreme Court and we are not satisfied that the impugned fee could be brought under any one of them. The law stands settled by a series of decisions of the Supreme Court beginning with AIR 1954 SC 282, 388 and 400, *Shrirur Mutt case*, *Ratilal v. State of Bombay* and *Sri Jagannath v. State of Orissa* and ending, as told at the Bar, in the recent decision in *Nagar Mahapalika Varanasi v. Durga Das*

Bhattacharya, Civil Appeal No. 558 of 1967=(AIR 1968 SC 1119), that without a special benefit accruing to the payer in return, the levy cannot be justified. The position has been placed beyond doubt by the Supreme Court in the following words in AIR 1954 SC 388:—

"Fees are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax."

Distinguishing licence fee from a tax the learned Judges would further observe:—

"A tax is in the nature of a compulsory exaction of money by a public authority for public purpose, the payment of which is enforced by law. The other characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax. Thus, although a tax may be levied upon particular classes of persons or particular kinds of property, it is imposed not to confer any special benefit upon individual persons and the collections are all merged in the general revenue of the State to be applied for general public purposes. Tax is a common burden and the only return which the tax-payer gets is participation in the common benefits of the State."

Adverting to some of the characteristics of a fee the learned Judges would again observe:—

"In order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be ear-marked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purpose."

3. In the above background we would approach the first head namely a fee for licence. The fee coming under this head is the money paid for a licence or permission to run a particular trade or calling:

"A licence is merely a permission granted to a particular person to do a particular thing at a fixed place during a determinate period. The fee attached to such a permit is a specific sum of money to be collected from the licensee

for the purpose of covering the expenses of the licence, its registration, inspection and supervision. Fees levied on licences of premises ought not to be greater than a sum to cover the costs of the regulation." (Cunliffe J., in ILR 5 Rang 212=(AIR 1927 Rang 183) quoted by their Lordships in the Liberty Cinema Case.)

In the Corporation of Calcutta v. Liberty Cinema, AIR 1965 SC 1107 their Lordships held:—

"The licence fees are in respect of what are called dangerous and offensive trades, that is to say, it is necessary in the interests of the City that the Corporation shall know where such trades are being carried on and shall be in a position to see that they are carried on in a proper manner without causing unnecessary nuisance to other people or danger to the public generally."

But it is to be remembered that in such cases the fee collected must have correlation to the expenses incurred in issuing the same. To quote the words of their Lordships in AIR 1954 SC 282:—

"If as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred."

If more than what is required to issue the licence is levied, the tax element will predominate since the excess collected will go to the general fund to be utilised for matters of general public utility and in such cases the levy would assume the character of a tax and not fee. In the cases before us we are not told that the fee collected from the petitioners for soaking husks is set apart for the purpose of meeting the expenses of the licence. Nor is there any data placed before us by which the expenses incurred could be gauged. It was argued before us that for a simple fee for licence granted for carrying on an activity, no quid pro quo is needed. In such cases the fee will in fact be a tax and thus we are taken to the third category namely fee in the nature of a tax. The Corporation, in our view, cannot impose a tax in the guise of a fee. In Hardwar Municipality v. Raghubir Singh, AIR 1966 SC

1502, the question arose whether the toll on vehicles leaving the Municipality could be justified when the Municipal Act provided levy of tolls only on vehicles entering the Municipality. The learned Judges held:—

"Toll as such can only be collected under the Municipalities Act from vehicles entering the Municipal limits. This, exhausts all the powers delegated by the Legislature to the municipal Boards and that power cannot be extended either by considerations derived from the nature of tolls or from the residuary clause." Thus even if the licence fee is construed as a tax, the levy cannot be justified.

4. In N. M. C. S. & W. Mills v. Ahmedabad Municipality, AIR 1967 SC 1801 the validity of the assessment-book relating to Special Property section, prepared and published by the Municipal Corporation of the city of Ahmedabad which sought to impose property tax on properties described as special properties like textile Mills, factories, buildings etc. on a flat rate, was challenged. The Court held:—

"If the State Legislature had power to levy a tax, only on land and buildings the same cannot be levied on machinery contained in or situate on the building even though the machinery was there for the use of the building for a particular purpose. Therefore, Rule 7 (2) of the rules framed under the Bombay Act 59 of 1949 was beyond the legislative competence of the State. The rule also suffers from another defect, namely, that it does not lay down any principle on which machinery is to be specified by public notice by the Commissioner to be deemed to form part of such building for the purpose of fixing the rateable value. It, therefore, depends on the arbitrary will of the Commissioner as to what machinery he would specify and what he would not. Moreover, he is the only person who can examine this question." The levy was accordingly cancelled.

5. It is thus clear that the Corporation cannot impose a levy on an activity as if they are imposing a tax on land. Without following the procedure contemplated in Sections 98 to 138 of the Act, a tax cannot be imposed. In the present case it was conceded that the procedure was not complied with. This question came up before the Supreme Court in the recent case, Civil Appeal No 558 of 1967=(AIR 1968 SC 1119) and their Lordships have laid down the law in the following terms:—

"It was, however, contended for the appellant that under Section 294 of the Act the Municipal Board has authority to impose a licence fee by enacting a bye-law for that purpose under Section 298 of the Act. It was said that Section 294 of the Act contemplates the charge of a

fee not only in the restricted sense of a fee for which a quid pro quo is provided but also in the sense of a fee in which the taxation element is predominant. It was hence argued that the procedural machinery for the imposition of tax contemplated under Sections 131 to 135 of the Act need not be followed in such a case. We are unable to accept this argument as correct. According to the scheme of the Act there is a sharp and clear distinction between taxes properly so called and fees. There is a logical and clear-cut division of the Act into several Chapters, and taxes, by whatever designation they may be called, are all comprehended and dealt with in Chapter V and by that Chapter alone. And what is permitted to be imposed by Section 294 which occurs in Chapter VIII is only a fee in the restricted sense as distinguished from a tax. To put it differently, the Act contemplates only two categories of impost, i.e., taxes enumerated in Chapter V and fees mentioned in Sections 293, 293-A and 294 of Chapter VIII. It is not contemplated in the scheme of the Act that there should be a third category of impost of licence fee which is in the nature of a tax for which the procedure contemplated by Chapter IX is applicable. In our opinion, the scheme of Chapter VIII of the Act shows that the provisions contained therein are meant for the purpose of regulation of certain trades and professions and for maintenance of public safety and convenience of the inhabitants of the municipality. The fees mentioned in Section 294 are meant to be imposed for the purpose of regulation of trade and professions and for rendering services. It is not contemplated by the Act that licence fees imposed by Section 294 should be merged in the public revenues of the municipality and should go for the upkeep of the roads and other matters of general public utility. It is therefore not permissible for the Municipal Board to impose a tax on the respondents under the guise of a licence fee without following the mandatory procedure for imposition of the taxes prescribed by Sections 131 to 135 of the Act, otherwise there will be a circumvention of the provisions of Sections 131 to 135 of the Act. It is manifest that Section 294 of the Act must be interpreted in such a manner as to prevent the circumvention of the safeguards of the provisions of Sections 131 to 135 of the Act."

6. Our attention in this connection was invited by the learned Counsel for the appellants to the decision of the Supreme Court in *Ajoy Kumar v. Local Board*, AIR 1965 SC 1561. There, the question was raised as to the constitutionality of an annual "tax" levied by Local Boards for the use of any land for

the purpose of holding markets as provided by Section 62 of the Assam Local Self-Government Act (Act No. XXV of 1953). That section reads:—

"62. The board at a meeting may grant within the local limits of its jurisdiction a licence for the use of any land as a market and impose an annual tax thereon"

The Supreme Court held that the word "thereon" in the section shows that the tax is on the land though the charge would arise only when the land is used as a market. The levy was thus clearly a tax on land and not a fee in the nature of a tax. The case, therefore, has little comparison with the present case. On the dictum of the Supreme Court in Civil Appeal No. 558 of 1967=(AIR 1968 SC 1119) quoted already, the Corporation's attempt to justify the levy as fee in the nature of a tax must fail. In dealing with the fee coming under the second category namely 'fee for services rendered', the Corporation would raise the contention that the payer of the fee is benefited by the control and regulatory measures taken by them in relation to his business. We are not impressed by this contention either. A like contention raised in the *Liberty Cinema Case*, AIR 1965 SC 1107 was repelled by the Supreme Court. Their Lordships observed:

"The word 'fees' in List II Entry 66 cannot be construed to mean fees for services specially rendered to the payer but has to be read as including fees for supervision, control and regulation of an activity which the legislature desires to control. The placing of an activity, industrial or commercial, under regulation and control is no doubt done in furtherance of public interest, but so are most of the activities of public bodies. It was also contended that the levy authorised by the section would be in return for work done for securing public health, safety and convenience and was hence a fee. We are wholly unable to accept this contention. Whether a particular levy is a fee or tax has to be decided only by reference to the terms of the section as we have earlier stated. The reference to the heading of Part V can at most indicate that the provisions in it were for conferring benefit on the public at large. The cinema house owners paying the levy would not as such owners be getting that benefit. We are not concerned with the benefit, if any received by them as members of the public for that is not special benefit meant for them. We are clear in our mind that if looking at the terms of the provision authorising the levy, it appears that it is not for special services rendered to the person on whom

the levy is imposed. It cannot be a fee wherever it may be placed in the statute."

7. The principle is well known that no fee can be imposed in return for the Corporation discharging its statutory duties as a Corporation. On this point the Supreme Court has observed thus in Civil Appeal No 558 of 1967=(AIR 1968 SC 1119) cited above—

"The expenditure under these two items was incurred by the Municipal Board in the discharge of its statutory duty and it is manifest that the licence fee cannot be imposed for reimbursing the cost of ordinary municipal services which the Municipal Board was bound under the statute to provide to the general public."

By the supervision, control and regulation of the activity the payer of the fee cannot be said to be benefited. The object behind such measures is to detect lapses from or violation of the rules by the licensees and that in effect in the exercise of the "police power" vested in the Corporation. No cess or fee can justifiably be imposed on the licensees for such measures which the Corporation is bound under the statute to adopt or undertake. On the police power exercisable by the Municipal Corporations the Supreme Court would observe in Civil Appeal No 558 of 1967=(AIR 1968 SC 1119) cited above:

"It in this context it is important to notice that the power to tax is not included in the police power in the American Municipal Law. (Dillon on "Municipal Corporation", Vol. IV, 5th Edn., p. 2400). It has been held that the police and taxing powers of the legislature though co-existent, are distinct powers. Broadly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitations, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous business occupations, or activities, and is not subject to the constitutional restrictions applicable to the taxing power. "It may consequently be said that if the primary purpose of a statute or ordinance exacting an imposition of some kind is to raise revenue, it represents an exercise of the taxing power, while if the primary purpose of such an enactment is the regulation of some particular occupation, calling, or activity, it is an exercise of the police power, even if it incidentally produces revenue." (American Jurisprudence, 2nd Edn.; Vol. 16, p 519)"

To sum up, our conclusions are: (a) as a "fee for licence", the levy cannot be justified for the reasons that it has no

correlation with the cost of issuing the licence. (b) as a "fee for services rendered" it cannot be supported as no service is rendered particularly to the payer of fee, and (c) as a "fee in the nature of a tax", it is illegal since the mandatory provisions of the Act in relation to the imposition of a tax have not been followed.

8. The decision under appeal in the circumstances is correct and we would dismiss these appeals but in the circumstances without costs.

SSG/D.V.C.

Appeals dismissed.

AIR 1969 KERALA 103 (V 56 C 24)

FULL BENCH

M. MADHAVAN NAIR, T. S. KRISHNAMOORTHY IYER AND V. BALAKRISHNA ERADI, JJ

Vareed s/o Kunnan Ouseph, Appellant v. Mary, daughter of Adattukaran Perinchu, Respondent.

C R. P. 1710 of 1967, D/- 29-5-1968, from order of Dist. Court, Trichur, in R. C. R. P No. 18 of 1967

Civil P. C. (1908), S. 115 — Houses and Rents — Kerala Buildings (Lease and Rent Control) Act (2 of 1965). Ss. 20 (1) and 18 (5) — Revision — High Court has jurisdiction under S. 115, C. P. C. to revise order passed by District Court under S. 20 (1) of Kerala Act. 1960 Ker LT 1248, Overruled.

In exercising the revisional power under S. 20 (1) of the Kerala Buildings (Lease and Rent Control) Act the revisional authority, viz., the District Court functions as a Court and not as a persona designata inasmuch as the jurisdiction has been conferred under the Act on the Court itself. Hence the ordinary incidents of the procedure of that Court, including any rights of appeal or revision, will attach to the decision rendered by the District Court in the exercise of the jurisdiction conferred by Section 20, so long as there is no statutory provision excluding such right of appeal or revision. Case law discussed. (Paras 5, 6, 9)

A decision of the Subordinate Court is amenable to the revisional jurisdiction of the High Court unless that jurisdiction is clearly barred by a special law or an appeal lies therefrom. No appeal is provided against the decision of the District Court under Section 20 and in S 18 (5) which contains the provision for finality there is nothing which says that the decision of the revisional authority under S 20 shall be final and shall not be called in question in any higher Court. Therefore so long as there is no specific provision in the statute making the de-

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termination by the District Court final and excluding the supervisory power of the High Court under S. 115 of the Civil P. C. the decision rendered by the District Court under S. 20 (1) of the Kerala Act, being 'a case decided' by a Court subordinate to the High Court in which no appeal lies thereto, is liable to be revised by the High Court under S. 115, C. P. C. Case law discussed. 1950 Ker LT 1248, Overruled. (Paras 10, 11)

Cases Referred: Chronological Paras

- (1958) AIR 1958 SC 384 (V 55)=
(1966) 1 SCR 372, Collector,
Varanasi v. Gauri Shankar Misra 9
(1955) AIR 1955 SC 1442 (V 52)=
(1955) 1 SCWR 819, South Asia
Industries (P) Ltd. v. S. B. Sarup
Singh 11
(1954) AIR 1954 SC 497 (V 51)=
1953 All LJ 1058, S. S. Khanna
v. F. J. Dillon 10
(1950) 1950 Ker LT 1248=1950 Ker
LJ 1254, Kurien v. Chacko 1, 11
(1953) AIR 1953 SC 357 (V 40)=
1953 SCR 1028, National Sewing
Thread Co., Ltd. v. James Chad-
wick and Bros. Ltd. 8, 9
(1945) AIR 1945 PC 12 (V 35)=
ILR (1948) Mad 505, B. M. A. R. A.
Adaikappa Chettiar v. R. Chandra-
sekharan Thevar 8
(1934) AIR 1934 PC 81 (V 21)=61
Ind App 158, Maung Ba Thaw v.
Ma Pin 8, 11
(1916) AIR 1916 PC 21 (V 3)=43
Ind App 192, Secy. of State v.
Chellikani Rama Rao 7, 8, 9
(1913) 1913 AC 545=82 LJB 1197,
National Telephone Co. Ltd. v.
Postmaster-General 6, 9

C. J. Antony, for Appellant; K. K. Abdul Rahiman, for Respondent.

BALAKRISHNA ERADI, J.— This Civil Revision Petition has been placed before a Full Bench pursuant to an order of reference made by one of us (Madhavan Nair, J.) since it was felt that the decision of a Division Bench of this Court in Kurien v. Chacko, 1950 Ker LT 1248, required reconsideration.

2. In the ruling above cited the Division Bench has expressed the view that the revisional powers of this court under Section 115 of the Code of Civil Procedure cannot be invoked or exercised in respect of an order passed by a District Court in the exercise of the jurisdiction conferred on it under Section 20 (1) of the Kerala Buildings (Lease and Rent Control) Act, 1959. Section 20 (1) of the aforesaid Act of 1959 was identical in terms with Section 20 (1) of the current Act, namely the Kerala Buildings (Lease and Rent Control) Act, 1955. The correctness of this view is under challenge in this Civil Revision Petition and has to be examined by us.

3. Thus the question to be considered is whether a decision rendered by a District Court in the exercise of the revisional powers conferred on it by Section 20 (1) of the Kerala Buildings (Lease and Rent Control) Act, 1955 is not liable to be revised by this Court under Section 115 of the Code of Civil Procedure.

4. The Kerala Buildings (Lease and Rent Control) Act, 1955, hereinafter referred to as the Act, is a statute enacted for the avowed purpose of regulating the leasing of buildings and for controlling the rents of such buildings in this State. For adjudication of all disputes arising between landlords and tenants of buildings in regard to the matters specified in the Act, provision is made in Section 3 (1) for constitution of Rent Control Courts and jurisdiction is conferred on such Courts by Sections 5, 10, 11, 13 etc. for determining fair rent, for making direction regarding deposit of rent in cases of doubt or dispute as to the person who is entitled to receive the rent, for passing orders of eviction of tenants on grounds specified in the Act, for directing the landlord to restore amenities previously enjoyed by the tenant but subsequently illegally cut off or withheld by the landlord without just and sufficient cause etc. etc. Section 18 provides for the constitution of appellate authorities to whom appeals shall lie from all orders passed by the Rent Control Courts at the instance of any person aggrieved. It is clear from an examination of the relevant provisions of the Act that the Rent Control Courts as well as the appellate authorities are special tribunals created by the statute and do not form part of the hierarchy of the established Civil Courts of the State. Although the person appointed to function as the Rent Control Court or as the appellate authority may be a Munsiff or a District Judge in the judicial service of the State, his appointment to such post under this Act is as a *persona designata* and he will be functioning only as such and not as a Court while exercising jurisdiction as Rent Control Court or as an appellate authority under the Act. But the position is different when we come to Section 20 of the Act because it is seen that the remedy by way of revision from the decision of the appellate authority provided for by this Section is to be sought from the District Court in cases where the appellate authority is a Subordinate Judge and in other cases, the High Court.

5. Section 20 (1) is in the following terms—

"In cases where the appellate authority under Section 18 is a Subordinate Judge, the District Court, and in other cases the High Court may, at any time,

on the application of any aggrieved party, call for and examine the records relating to any order passed or proceedings taken under this Act by such authority for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceedings, and may pass such order in reference thereto as it thinks fit."

It is seen from the aforesaid Section that the revisional power is conferred not upon any special tribunal or authority constituted under this statute but on an established Court, viz., the District Court or the High Court, as the case may be. In exercising the revisional power under this Section the revisional authority functions as a Court and not as a *persona designata* inasmuch as the jurisdiction has been conferred under the Act on the Court itself.

6. It is now well established that where by a statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is that the Court will determine the matter "as a Court". Its jurisdiction is enlarged, but all the incidents of such jurisdiction including the rights of appeal from its decision remain the same. The legal position has been stated thus by Viscount Haldane L. C., in *National Telephone Co., Ltd. v. Postmaster-General*, 1913 AC 546:—

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

Since the statute in the case before us has conferred the revisional jurisdiction on one of the ordinary Courts of country, viz., the District Court, the procedure as well as the orders and decrees of that Court will be governed by the ordinary rules of civil procedure.

7. In *Secretary of State v. Chellikani Rama Rao*, AIR 1916 PC 21, a question arose as to whether the decision rendered by a District Court in an appeal preferred to it under Section 10 (ii) of the Madras Forest Act (V of 1882) could be taken up in appeal to the High Court and in further appeal therefrom to the Judicial Committee of the Privy Council. Under Sections 6 to 8 of the Madras Forest Act, jurisdiction is conferred on a Forest Settlement Officer to enquire into and to determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over any land constituted as reserved forest. Section 10 (ii) of that Act provides that if a claim is rejected wholly or in part the claimant may prefer an appeal to the District Court in

respect of such rejection. In the two appeals that went up to the Privy Council two such claims had been rejected by the Forest Settlement Officer and appeals had been filed before the District Court by the aggrieved claimants. The District Court affirmed the decisions of the Forest Settlement Officer. The claimants took up the matter in further appeals to the High Court of Madras and the High Court reversed the decisions of the District Court. The two appeals were thereupon filed before the Privy Council by the Secretary of State for India and one of the principal contentions raised before their Lordships was that the High Court had no jurisdiction to entertain any appeals from decisions rendered by the District Court under Section 10 (ii) of the Forest Act. Rejecting this contention Lord Shaw who delivered judgment of the Board observed as follows:—

"What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply."

8. The aforesaid principle was reaffirmed by the Privy Council in *Maung Ba Thaw v. Ma Pin*, AIR 1934 PC 81, where it was held that an appeal lay to the Privy Council against an appellate decision rendered by the High Court in the exercise of the jurisdiction conferred on it by Section 75 (2) of the Provincial Insolvency Act. It has to be noted that Section 4 (2) of the Provincial Insolvency Act specially provides that the decision of the District Court shall be final subject only to the limited right of appeal to the High Court provided for under Section 75 (2). On the strength of this provision for finality contained in Section 4 it was urged before the Privy Council that any further right of appeal as against the decision of the High Court was thereby excluded. This contention was rejected by their Lordships as being opposed to the dictum laid down in AIR 1916 PC 21. The same view has again been expressed by their Lordships of the Privy Council in *B. M. A. R. A. Adaikappa Chettiar v. R. Chandrasekhara Thevar*, AIR 1948 PC 12, wherein it was stated:

"..... where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal."

The aforesaid decisions of the Privy Council were referred to and relied on by the Supreme Court in *National Sewing Thread Co. Ltd., Chidambaram v. James Chadwick and Bros., Ltd.*, AIR 1953 SC 357, where it was held that an appeal lay under Clause 15 of the Letters Patent (Bombay) from the decision of a single Judge of the High Court in the exercise of the appellate jurisdiction conferred on the High Court under Section 76 of the Trade Marks Act. Section 76 (1) of the Trade Marks Act provides that an appeal shall lie to the High Court from any decision of the Registrar of Trade Marks rendered under the Act or Rules made thereunder. Dealing with the contention that the judgment rendered by the Single Judge of the High Court in an appeal preferred under Section 76 was not subject to further appeal under Clause 15 of the Letters Patent his Lordship Mahajan, J., (as he then was), observed as follows at pp. 359 and 360:—

"The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed Section 77 of the Act provides that the High Court can, if it likes, make rules in the matter. Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court.

x x x x x

Section 76, Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by Section 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

9. In *Collector, Varanasi v. Gauri Shanker Misra*, AIR 1968 SC 384, a ques-

tion arose before the Supreme Court as to whether it was within the competence of the Supreme Court to grant special leave under Article 136 of the Constitution in respect of a judgment rendered by the High Court while acting under Section 19 (1) (f) of the Defence of India Act, 1939. It was contended before their Lordships that special leave could not be granted by the Supreme Court as the judgment appealed against was neither that of a court nor of a tribunal and that the High Court while exercising its appellate function under S. 19 (1) (f), was acting only as a *persona designata*. Overruling this contention Hegde, J., who spoke for the Court, observed thus:—

"There was no dispute that the arbitrator appointed under Section 19 (1) (b) was not a Court. The fact that he was the District Judge, Varanasi, was merely a coincidence. There was no need to appoint the District Judge of Varanasi or any other District Judge as an arbitrator under that provision. Section 19 (1) (f) provides for an appeal against the order of the arbitrator. That section reads: 'An appeal shall lie to the High Court against an award of an arbitrator excepting in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government.' It is not in dispute that in the instant case, the amount fixed by the arbitrator exceeded the amount prescribed by the rules and therefore the claimants had a right to go up in appeal to the High Court. We were informed that neither the Act nor the rules framed thereunder, prescribed any special procedure for the disposal of appeals under Section 19 (1) (f). Appeals under that provision have to be disposed of just in the same manner as other appeals to the High Court. Obviously after the appeal had reached the High Court, it had to be determined according to the rules of practice and procedure of that Court. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court. This rule was stated by Viscount Haldane, L. C., in 1913 AC 546 thus: 'When a question is stated to be referred to an established Court without more, it in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches.' This statement of the law was accepted as correct by this Court in 1953 SCR 1028= (AIR 1953 SC 357). It may be noted that the appeal provided in Section 19 (1) (f) is an appeal to the High Court and not to any Judge of the High Court.

The fact that the arbitrator appointed under Section 19 (1) (f) is either a designated person or a tribunal — as to whether he is a person designated or a tribunal we express no opinion — does not in any way bear on the question whether the 'High Court' referred to under Section 19 (1) (f) is a Court or not. Our statutes are full of instances where appeals or revisions to Courts are provided as against the decisions of designated persons and tribunals. See for example, Advocates Act, Trade Marks Act. Reference in this connection may usefully be made to the decisions in 1953 SCR 1028= (AIR 1953 SC 357) (to which reference has already been made), and 43 Ind App 192=(AIR 1916 PC 21).

Prima facie it appears incongruous to hold that the High Court is not a 'Court'. The High Court of a State is at the apex of the State's judicial system. It is a Court of record. It is difficult to think of a High Court as anything other than a 'Court'. We are unaware of any judicial power having been entrusted to the High Court except as a 'Court'. Whenever it decides or determines any dispute that comes before it, it invariably does so as a 'Court'. That apart, when Section 19 (1) (f) specifically says that an appeal against the order of an arbitrator lies to the High Court, we see no justification to think that the legislature said something which it did not mean.

In our judgment, while acting under Section 19 (1) (f), the High Court functions as a 'Court' and not as a designated person. Our conclusion in this regard receives support from the decision of the Judicial Committee in 43 Ind App 192= (AIR 1916 PC 21) referred to earlier.

x x x x x

We have already come to the conclusion that the decision rendered by the High Court under Section 19 (1) (f) is a 'determination'. Hence, it was within the competence of this Court to grant special leave under Article 136."

In the light of the aforesaid statements of law as laid down by the Privy Council and our Supreme Court we have no hesitation to hold that in exercising the revisional power under Section 20 (1) of the Kerala Buildings (Lease and Rent Control) Act the revisional authority, viz., the District Court functions as a Court and that the ordinary incidents of the procedure of that court, including any rights of appeal or revision, will attach to the decision rendered by the District Court in the exercise of the jurisdiction conferred by Section 20, so long as there is no statutory provision excluding such right of appeal or revision.

10. As observed in *S. S. Khanna v. F. J. Dillon*, AIR 1964 SC 497 at p. 505

"a decision of the Subordinate Court is therefore amenable to the revisional jurisdiction of the High Court unless that jurisdiction is clearly barred by a special law or an appeal lies therefrom". It is not disputed before us that no appeal lies from the decision rendered by the District Court under Section 20. Hence the only question that remains to be considered is whether there is anything in the special law which excludes the revisional jurisdiction of the High Court in respect of order passed by the District Court under Section 20 (1) of the Act.

11. The contention of the respondent that the decision of the District Court rendered under Section 20 (1) is not amenable to revisional jurisdiction of the High Court under Section 115 of the Civil Procedure Code is based mainly on the provision for finality contained in Section 18 (5) of the Act. That Section is in the following terms:—

"The decision of the appellate authority, and subject to such decision, an order of the Rent Control Court shall be final and shall not be liable to be called in question in any Court of law, except as provided in Section 20"

What is to be noted here is that there is nothing in the section which says that the decision of the revisional authority under Section 20 shall be final and shall not be called in question in any higher Court. Notwithstanding an exactly similar provision for finality contained in Section 4 (2) of the Provincial Insolvency Act, the Privy Council held in AIR 1934 PC 81, that the appellate decision rendered by the High Court under Section 75 (2) of the Provincial Insolvency Act was liable to be called in question by way of further appeal to the Judicial Committee of the Privy Council.

That the absence of a statutory provision conferring finality on the decision of the established Civil Court to which the remedy by way of appeal or revision is provided for by the statute is highly significant is pointed out by their Lordships of the Supreme Court in *South Asia Industries (P) Ltd. v. S. B. Sarup Singh*, AIR 1965 SC 1442 at p. 1447, wherein it has been observed as follows:—

"In 61 Ind App 158=(AIR 1934 PC 81) the Judicial Committee had to consider whether an appeal lay to the Privy Council against the order of the High Court under Section 75 (2) of the Provincial Insolvency Act, 1920. The said Act provided by Section 4 (2) that subject to the provisions of the Act and notwithstanding anything contained in any other law for the time being in force, the decision of the District Court under the Act was final, but under Section 75 (2), however, there was a right of appeal to the High Court from the decision of

the District Court. The Judicial Committee held that in a case where the Act gave a right to appeal to the High Court, an appeal from the decision of the High Court lay to the Privy Council under, and subject to, the Code of Civil Procedure. It reiterated the principle that where a Court is appealed to as one of the ordinary Courts of the country, the ordinary rules of the Code of Civil Procedure applied. It will be noticed at once that the order of the District Court was final subject to the provisions of the said Act and under the said Act a right of appeal was given to the High Court. The order of the High Court in the appeal was not made final. Therefore, the Judicial Committee held that an appeal lay to the Privy Council against the order of the High Court."

It is therefore clear that so long as there is no specific provision in the statute making the determination by the District Court final and excluding the supervisory power of the High Court under Section 115 of the Civil Procedure Code, it has to be held that the decision rendered by the District Court under Section 20 (1) being 'a case decided' by a Court subordinate to the High Court in which no appeal lies thereto, is liable to be revised by the High Court under Section 115, C. P. C. We are constrained to hold that the contrary view taken by the Division Bench in 1960 Ker LT 1248, cannot be regarded as correct.

12. It accordingly follows that there is no merit in the preliminary objection taken by the respondent that no revision lies to this Court against the order passed by the District Court under Section 20 (1) of the Act. The case will now be sent back to the learned Single Judge for disposal on the merits in the light of the decision on the preliminary point.
LGC/D.V.C. Order accordingly.

AIR 1969 KERALA 108 (V 56 C 25)

T. C. RAGHAVAN, J.

Parameswara Moothar, Petitioner v. Balameenakshi, Respondent.

Criminal Revn. Petn. No. 178 of 1968, D/- 2-7-1968, from order of Sessions Court, Palghat in Cri. R. P. No 3 of 1968

Criminal P. C. (1898), Ss 489, 488 — Enhancement of maintenance allowance — Can take effect from date of application — AIR 1949 Cal 584, Dissented from

Under S. 489, an enhancement of the maintenance allowance can be made to take effect from the date of the application for enhancement instead of from the date of the order. Section 489 is only consequent on S. 488. Therefore, even

if elaborate provisions are not made under that section on the same lines as under S. 488, it cannot be said that a Court acting under S. 489 has not all the powers it has under S. 488. The result is that if the Magistrate has power under Section 488 to award maintenance from the date of the application, he must have the same power to award increased allowance also from the date of the application for enhancement. But, there is a distinction between an order reducing the maintenance allowance and an order increasing the allowance. In the former case, the principle that amounts already accrued cannot be retrospectively varied, has to be applied. In the other case i.e., of an enhancement of the allowance, there is no scope for the application of that principle. The magistrate is free to enhance the allowance either from the date of the application for enhancement or from the date of the order. AIR 1949 Cal 584, Dissented from. (Para 3)

Even the order of cancellation falling under S. 489 (2) in consequence of the decision of a Civil Court, should take effect from the decision of the Civil Court and not from the date of the order or from the date of the application for cancellation. AIR 1967 Ker 54, Dissented from. 1962 (1) Cri LJ 681 (All), Ref. (Para 4)

Cases Referred: Chronological Paras

(1967) AIR 1967 Ker 54 (V 54)=

1966 Ker LT 194, Bhargavi Amma v. Kuttikrishnan 4

(1962) 1962 (1) Cri LJ 681=1961 All LJ 168, Brij Pal Singh v. Sukh-biri Devi 4

(1954) AIR 1954 Hyd 53 (V 41)= 1954 Cri LJ 444, Basvarala Sattayya v. Malsoor 4

(1949) AIR 1949 Cal 584 (V 36)= 50 Cri LJ 1006, J. H. Amroon v. Miss R. Sassoon 2

(1935) AIR 1935 Lah 24 (V 22)= 37 Cri LJ 68, Mt. Lilawanti v. Madan Gopal 2

(1926) AIR 1926 Bom 419 (V 13)= 27 Cri LJ 940, Hiralal Valavdas v. Bai Amba 2

2 Weir 650, Parvatham v. Muthu Pillai 2

K. Chandrasekharan and T. Chandrasekhara Menon, for Petitioner; T. L. Viswanatha Iyer and E. R. Venkiteswaran, for Respondent.

ORDER:— A short question devoid of many precedents under Section 489 of the Code of Criminal Procedure is raised in this case. The question is whether an enhancement of the maintenance allowance can be made to take effect from the date of the application for enhancement instead of from the date of the order.

2. Mr. T. Chandrasekhara Menon, the Counsel of the petitioner (the husband),

invites my attention to the decision of the Calcutta High Court in *J. H. Amroon v. Miss R. Sasoon*, AIR 1949 Cal 584 by Blank, J. That was a case where the maintenance allowance was raised from Rs. 12/- to Rs. 50/- per month; and Blank, J., held that the enhancement could not be made retrospective from the date of the application, in other words, the enhancement could be only from the date of the order. An old decision in *Parvatham v. Muthu Pillai*, 2 Weir 650 was cited before Blank, J. That was a case where the maintenance allowance was reduced; and the learned Chief Justice held that since the allowance had already accrued at the original rate till the date of the order of enhancement, the same could not be reduced retrospectively. Another decision cited before Blank, J., was *Hiralal Valavdas v. Bai Amba*, AIR 1926 Bom 419. That was a Division Bench ruling dealing with enhanced maintenance allowance. Their Lordships of the Bombay High Court held that if under Section 488 the magistrate had power to make the allowance payable from the date of the application, he had the same power to award increased allowance also from the date of the application for enhancement. Yet another decision cited before Blank, J., was *Mt. Lilawanti v. Madan Gopal*, AIR 1935 Lah 24. In that case the maintenance allowance was reduced; and the Lahore High Court held that the reduction of the allowance retrospectively was improper. Blank, J., disagreed with all the three decisions and held that since no power was given to the magistrate under Section 489 to award maintenance from the date of the application as was the position under Section 488 of the Code, the increase of the allowance could not be retrospective.

3. In my opinion, Section 489 is only consequent on Section 488. Therefore, even if elaborate provisions are not made under Section 489 on the same lines as under Section 488, it cannot be said that a Court acting under Section 489 has not all the powers it has under Section 488. The result is that if the magistrate has power under Section 488 to award maintenance from the date of the application, he must have the same power to award increased allowance also from the date of the application for enhancement. But, there is a distinction between an order reducing the maintenance allowance and an order increasing the allowance. In the case of an order of the former category, the principle enunciated by the two decisions already discussed (*Parvatham's* case and *Mt. Lilawanti's* case), that amounts already accrued cannot be retrospectively varied, has to be applied. In the other case of an enhancement of the allowance, there is no scope for the application of

that principle; and the magistrate is free to enhance the allowance either from the date of the application for enhancement or from the date of the order.

4. Lastly, Mr. Chandrasekhara Menon draws my attention to a decision of our High Court by Govinda Menon, J., in *Bhargavi Amma v. Kuttikrishnan*, 1966 Ker LT 194=(AIR 1967 Ker 54). In that case the learned Judge has followed the Calcutta decision of Blank, J. But, I find that that was a case of cancellation of the allowance under Section 489 (2) in consequence of the decision of a Civil Court. Before Govinda Menon, J., the decision of the Allahabad High Court in *Brij Pal Singh v. Sukhbiri Devi*, 1962 (1) Cri LJ 681 (All) was cited; but the learned Judge has disagreed with the view expressed therein. And Govinda Menon, J., has followed the decision of the Hyderabad High Court in *Basvarala Sateyya v. Malsoor*, AIR 1954 Hyd 53 laying down that "the order of cancellation always operates prospectively and not retrospectively". In my opinion, in a case falling under sub-section (2) of Section 489, the cancellation order should take effect from the decision of the Civil Court and not from the date of the order or from the date of the application for cancellation. In the decision of the Hyderabad High Court, I do not find any discussion of the question; and the only observation that appears therein is the sentence extracted above. In principle, it is evident that the order should take effect from the date of the decree of the Civil Court; and I doubt the correctness of the decision of Govinda Menon, J., on this point. For myself, I am inclined to agree with the Allahabad view. However, since the case before me does not fall under sub-section (2) of Section 489, I need not place the case before a Division Bench.

5. In the aforesaid view, I regret I cannot agree with the view of Blank, J.

6. The order of the lower Court is confirmed; and the revision petition is dismissed.

HGP/D.V.C.

Revision dismissed.

AIR 1969 KERALA 109 (V 56 C 26)
FULL BENCH

M. MADHAVAN NAIR, T. S.
KRISHNAMOORTHY IYER AND
K. SADASIVAN, JJ.

Commissioner, Municipal Council, Tellicherry and another, Appellants v. Ramesh S. M. Prabhu and another, Respondents.

Writ Appeal No. 148 of 1967, D/- 12-7-1968 from judgment of High Court Kerala in O. P. No. 3553 of 1966.

JL/KL/E714/68

Municipalities — Kerala Municipalities Act, 1960 (14 of 1961), Ss. 284, 135, 96 to 151, Sch. III Item 20 — Demand by municipality of licence fee for running medical shop — Levy is not valid — Licence fee cannot be imposed for reimbursing cost of ordinary municipal services — Mandatory provisions of Ss. 96 to 151 not followed — Levy in nature of tax cannot be justified — AIR 1965 SC 1107 & AIR 1968 SC 1119 & AIR 1969 Ker 99 (FB), Foll. — (Constitution of India, Art. 265). (Paras 1, 2)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 Ker 99 (V 56)=
Writ Appeals Nos. 107 and 108 of
1967 (FB), City Corporation of
Calicut v Sadasivan | 1, 2 |
| (1968) AIR 1968 SC 1119 (V 55)=
Civil Appeal No 558 of 1967,
Nagar Mahapalika Varanasi v.
Durga Das Bhattacharya | 1, 2 |
| (1965) AIR 1965 SC 1107 (V 52)=
(1965) 2 SCR 477, Corporation of
Calcutta v. Liberty Cinema | 1 |
| (1954) AIR 1954 SC 388 (V 41)=
1954 SCR 1055, Ratilal v. State
of Bombay | 1 |

M M Abdulkhader, for Appellants; V. M. Nayanar and K. Prabhakaran, for Respondent 1; Govt. Pleader, for Respondent 2

SADASIVAN, J.:— In this, as in Writ Appeals Nos. 107 and 108 of 1967=(AIR 1969 Ker 99) (FB), which we have already disposed of, the questions are common. The present appellant is the Municipal Council, Tellicherry represented by its Commissioner. The Municipality demanded from one Ramesh S. M. Prabhu, Proprietor of Medical & Allied Supplies, Tellicherry, licence fee for running the medical shop. The demand was made under Section 284 of the Kerala Municipalities Act (hereinafter to be referred to as "the Act") which reads:—

"284. Purposes for which places may not be used without licence — (1) The council may publish a notification in the Gazette and by beat of drum that no place within municipal limits shall be used for any one or more of the purposes specified in Schedule III without the licence of the Commissioner and except in accordance with the conditions specified therein and where the licence is for keeping hostels, restaurants, eating houses, coffee houses laundries or running barber saloons the licence issued by the Commissioner shall always contain and be deemed to contain a condition that admission or service therein shall be available to any member of the public:

x x x x x".

In the respondent's medical shop he has stored chemical preparations which would

fall under Item 20 of Schedule III. The item reads:—

"Chemical preparations — Storing, packing, pressing, cleansing, preparing or manufacturing by any process whatever." So, under Section 284 read with Item 20 of Schedule III, a person running a medical shop where chemical preparations are stored, packed or manufactured has to take a licence on payment of a licence fee. The Municipality seeks to justify the levy, as a fee for licence imposed for raising revenue for the Municipality, and also for the regulation of the trade in question. In the alternative, the Municipality would also contend that the levy is sustainable as a 'tax'. But according to the respondent, the levy is unsustainable either as a fee for licence, or as a tax. As a fee it is wanting in quid pro quo and as a tax it is beyond legislative competence, and cannot be brought under any of the legislative entries in the State List of the Constitution. In Writ Appeals Nos 107 and 108 of 1967=(AIR 1969 Ker 99) (FB), we had occasion to advert in detail to these questions and there we have held that a fee for licence like the one under consideration cannot be sustained either as a "fee" or as a "tax" or "fee in the nature of a tax". There the levy impugned was fee sought to be imposed on soaking of husks. We have held in that case on the authority of relevant decisions of the Supreme Court that without quid pro quo a fee can on no account be sustained.

"Fees are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. (Ratilal v. State of Bombay, AIR 1954 SC 388)". This has been reaffirmed by the Supreme Court in subsequent decisions like the Liberty Cinema case, AIR 1965 SC 1107 and the recent case of Nagar Mahapalika Varanasi v. Durga Das Bhattacharya, Civil Appeal No 558 of 1967=(AIR 1968 SC 1119). The Municipality was not able to point out any service being rendered to the respondent, to justify the exaction of the fee from him. The levy cannot be justified on the ground, that to meet the statutory needs of the municipality money is required and unless its revenue is augmented from such sources, the day to day administration of the municipality would be difficult. Licence fee cannot be imposed for reimbursing the cost of the ordinary municipal services which the municipality is bound under the statute to provide to the general public. Unless special service is rendered to the payer of the fee, the levy cannot be justified. Section 135 of the Act provides that 'all moneys received by the municipi-

pal council shall constitute a fund which shall be called the municipal fund and shall be applied and disposed of subject to the provisions of the Act". The fee collected from the impugned source would also go to the municipal fund which is a common fund utilised for common purposes and it is not enough if along with other residents of the municipality, the petitioner is also benefited.

2. For the municipality, it was also contended that the element of quid pro quo need not be present when the fee is viewed merely as a "fee for licence". The fact of the issuance of the licence is itself the service rendered to the payer of the fee. But there, only the actual cost incurred by the municipality in issuing the licence can be collected. The fee attached to the licence in such cases should be the specific sum of money necessary to cover the expenses of the licence. More than that if collected, the tax element will predominate since the excess so collected will go to the general fund to be utilised for matters of general public utility and in such cases the levy would assume the character of a tax and not fee. We have no data before us by which the expenses incurred in issuing the licence could be measured. It is difficult, therefore, to sustain the levy under this head. We have also held in Writ Appeals Nos. 107 and 108 of 1967=(AIR 1969 Ker 99) (FB) that it is not possible for the Municipality to levy a tax in the guise of a fee. For the imposition of a tax it is mandatory that the procedure contemplated under Sections 96 to 151 of the Act should be complied with. The Supreme Court has observed in Civil Appeal No. 558 of 1967=(AIR 1968 SC 1119).—

"It is therefore not permissible for the Municipal Board to impose a tax on the respondents under the guise of a licence fee without following the mandatory procedure for imposition of the taxes prescribed by Sections 131 to 135 of the Act; otherwise there will be a circumvention of the provisions of Secs. 131 to 135 of the Act."

It was conceded on behalf of the Municipality that the procedure contemplated in Sections 96 to 151 of the Act was not complied with in imposing the levy. So the impost cannot be justified on the above head also

3. The decision of the learned Single Judge, in the circumstances, is correct and in confirmation of it, this appeal is dismissed. No costs.

4. **MADHAVAN NAIR, J.**—I concur. In view of the dicta of the Supreme Court in the decisions cited by my learned brother, no other conclusion appears possible, even though the Supreme Court had not to consider a provision like Sec-

tion 135 of the Kerala Municipalities Act, 1960 that reads:

"All moneys received by the Municipal Council shall constitute a fund which shall be called the municipal fund and shall be applied and disposed of subject to the provisions of this Act or other laws"

5. **T. S. KRISHNAMOORTHY IYER, J.**—I agree.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 111 (V 56 C 27)

K. K. MATHEW AND M U ISAAC, JJ.

In the matter of, 1. State of Kerala, 2. P. Komu and 3. Mammootty, Revn Petitioners; 4. Executive Officer, Nedyiruppu Panchayat, Complainant, Respondent

Criminal Ref. Nos. 30 and 31 of 1967, D/- 5-4-1968.

(A) Constitution of India, Art. 254 (2) — Repugnancy to existing Central law — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 as it stood prior to 14-12-67 — Not void on ground of repugnancy to S. 190 Criminal P. C. — Criminal P. C. (1898), Ss. 5 (2), 29 (2) and 190.

Rule 3 of the Kerala Panchayats (Trial of Offences by Magistrates) Rules, 1964, as it stood prior to amendment of 14-12-67 which provided that a Second Class Magistrate alone would be competent to take cognizance of any panchayat offence or try such offence was not void on the ground of repugnancy to the provisions of S 190 of the Criminal Procedure Code within the meaning of Art. 254(2) of the Constitution of India (Paras 5, 6)

By virtue of S. 5 (2) Cr. P. C. the provisions of the Criminal Procedure Code would apply to the manner and place of trial of offences under the Panchayat Act, only subject to the provisions of the Act or the Rules thereunder. If the Act empowers the Government to make rules as to the class of Magistrates by whom offences thereunder shall be tried, and if in exercise of that power, the Government made rules, prescribing the class of Magistrates who shall try such offences, the provisions of the Criminal Procedure Code would yield to the said provisions contained in the Rules (Para 5)

A law creating a special or particular Court for the trial of offences under that law is not repugnant to the provisions of the Criminal Procedure Code, but it is in accordance with its provisions in view of S 29 (2) Cr. P. C. (Para 6)

(B) Panchayats — Kerala Panchayats Act (32 of 1960), Ss. 119, 129 (2) (xxxix) — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 before

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amendment of 14-12-67 — Rule is not ultra vires — S. 119 of Act and R. 3 deal with different powers and there can be no conflict between them — (Criminal P. C. (1898), Ss. 28, 36, 37, 190 (1) (c) & Schs. II, III & IV).

Under the Code of Criminal Procedure, a Magistrate has got various powers. (1) power to try cases, (2) power to commit cases for trial, and (3) power to take cognizance of offences.

The power to take cognizance of an offence under S. 190 of the Code is not one of the ordinary powers of a Magistrate of the First, Second or Third Class; but it is an ordinary power of a Sub-Divisional Magistrate and a District Magistrate. As regards a Magistrate of the First, Second or Third Class, this is an additional power with which he can be invested, subject to the provisions of the Fourth Schedule. A scrutiny of the provisions of Ss. 28, 36, 37 read with Schs. II, III & IV would make it clear that the aforesaid powers are different. What S. 129 (2) (xxxix) of the Act has empowered the Government is to make rules prescribing the class of Magistrates by whom offences under the Act shall be tried, in other words to constitute an authority empowered to try such offences. This is all what was done by the Rules, and Rule 3 prescribes that those offences shall be tried by a Magistrate of the Second Class. The second part of S. 119 of the Act only refers to the power of certain Magistrates to take cognizance of an offence under Section 190 (1) (c) of the Criminal Procedure Code, and that power is saved, notwithstanding anything contained in that section. Rule 3 of the Rules and the Second Part of Section 119 deal with different powers; and there cannot possibly be any conflict between the said provisions. Therefore, R. 3 was not ultra vires on this ground.

(Para 7)

(C) Criminal P. C. (1898), S. 192 — Transfer of case — To whom can be made — Transfer does not confer power to try when it is wanting.

A transfer can only be to a Magistrate having the power to try the case. A Magistrate, who has no power to try a case, cannot get the authority to try it, by the case being transferred to him under Section 192 of the Code. (Para 8)

(D) Criminal P. C. (1898), Ss. 4 (1) (h), 190 (1) (a) & (c), 191 — Taking cognizance on invalid complaint — Can be treated as taking cognizance on information — Sub-Divisional Magistrate taking cognizance of panchayat offence on complaint of Executive Officer and trying case himself under bona fide belief that he had such power — Cognizance cannot be said to have been taken under S. 190 (1) (c).

Where on a complaint filed by an Executive Officer of a Panchayat, a Sub-Divisional Magistrate has taken cognizance of the complaint and tried the case himself on the assumption and bona fide belief that he had power to take cognizance of a panchayat offence, it cannot be said that the Magistrate had taken cognizance of the offence under S. 190 (1) (c) Criminal P. C. It is true that if a complaint is not a valid complaint, it does not cease to be an information and, therefore, can be treated as such under Cl. (c) of S. 190 (1) and it is open to the Magistrate to whom an invalid complaint is lodged to treat it as an information under S. 190 (1) (c), Criminal P. C. subject, of course, to the limitations imposed by S. 191, Criminal P. C., in this behalf. It is doubtful whether a complaint would be an invalid complaint, either because the person making the complaint is not competent to make it or the Magistrate before whom it is made is not competent to take cognizance of it or try the case. The question whether an allegation is a complaint must be decided on the basis of the definition of that term in Section 4 (1) (h) of the Criminal Procedure Code. 1967 Ker LT 309 & AIR 1949 All 692, Rel. on. (Para 9)

(E) Criminal P. C. (1898), S. 190 — Taking cognizance of offence — Meaning of — Magistrate having no power to try accused or to commit him for trial is not competent to take cognizance — AIR 1952 All 873 & AIR 1967 Pat 416 & AIR 1959 Bom 437, Diss. from.

Taking cognizance of an offence can only be for the purpose of initiating legal proceedings under any of the provisions of the Code. If a Magistrate has no power to take any proceedings in respect of an offence brought to his notice, he is not competent to take cognizance of that offence. Taking notice of the commission of an offence and keeping the matter to himself without being able to take any action thereon for want of power, would not amount to taking cognizance. In other words, the power to initiate proceedings against a person accused of an offence, is a condition precedent for taking cognizance of an offence. A Magistrate, who has no power to try a person charged with an offence or to commit him for trial, is not competent to take cognizance of that offence. AIR 1951 SC 207 & AIR 1950 Cal 437 & AIR 1959 SC 1118 & AIR 1961 SC 986, Rel. on, AIR 1952 All 873 & AIR 1967 Pat 416 & AIR 1959 Bom 437, Dissented from.

(F) Panchayats — Kerala Panchayats Act (32 of 1960), S. 119 — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 prior to amendment of 14-12-1967 — Panchayat offence — Sub-Divisional Magistrate has no power to take cognizance under S. 190 (1) (c) Cri-

iminal P. C. — Power not saved by S. 119 — Criminal P. C. (1898), S. 190 (1) (c).

A Magistrate, whose power to take cognizance of an offence under S. 190 (1) (c), Criminal P. C. is saved by the second part of S. 119 of the Act is a Magistrate, who has jurisdiction to try the offences mentioned in S. 119 of the Act. It follows therefrom that, in view of the provisions contained in Rule 3 of the Rules, no Magistrate other than a Second Class Magistrate has power to take cognizance of any of the said offences upon information received or upon his own knowledge or suspicion. Hence a Sub-Divisional Magistrate has no power to take cognizance of a Panchayat offence under S. 190 (1) (c), Criminal P. C. (Para 11)

(G) Panchayats — Kerala Panchayats (Trial of Offences by Magistrates) Rules (1964), R. 3 as it stood prior to amendment of 14-12-1967 is valid — Panchayat offences committed within panchayat area in respect of which no second class Magistrate is appointed — First Class Magistrate having jurisdiction over that area is not competent to take cognizance and try those offences. 1967 Ker LT 314, Approved; AIR 1955 SC 435, Dist.

(Paras 12, 13)

Cases Referred: Chronological Paras (1967) 1967 Ker LT 309=ILR (1967)

2 Ker 160, Thankappan v. Ganapathy Iyer 7, 9

(1967) 1967 Ker LT 314=1967 Mad LJ (Cri) 523, Viswanathan v. Akathethara Panchayat 3, 4, 13

(1967) AIR 1967 Pat 416 (V 54)= 1967 Cri LJ 1677, Pancham Singh v. State 11

(1964) AIR 1964 SC 1673 (V 51)= 1964 (2) Cri LJ 606, State of U. P. v. Sabir Ali 3

(1961) AIR 1961 SC 986 (V 48)= 1961 (2) Cri LJ 39, Gopaldas v. State of Assam 10

(1959) AIR 1959 SC 1118 (V 46)= 1959 Cri LJ 1368, Narayandas Bhagwandas v. State of West Bengal 10

(1959) AIR 1959 Bom 437 (V 46)= 1959 Cri LJ 1153, State v. Shankar 11

(1955) AIR 1955 SC 435 (V 42)= 1955 Cri LJ 1010, Bhim Sen v. State of U. P. 12

(1952) AIR 1952 All 873 (V 39)= 1952 Cri LJ 1556, Jaddu v. State 11

(1951) AIR 1951 SC 207 (V 38)= 52 Cri LJ 775, R. R. Chari v. State of U. P. 10

(1950) AIR 1950 Cal 437 (V 37), Supdt and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerji 10

(1949) AIR 1949 All 692 (V 36)= 51 Cri LJ 199, Channu Lal v. Rex 9

No 1 by State Prosecutor; Nos. 2 & 3 by M. M. Abdulkhader; No. 4 by K. P. Radhakrishna Menon.

ISAAC, J.:— These two cases have come before us pursuant to an order of reference made by our learned brother Sadasivan, J. The question arising for decision relates to the validity of Rule 3 of the Kerala Panchayats (Trial of Offences by Magistrates) Rules 1964, as it stood before its recent amendment as per Notification G.O.Ms. 440/67/DD dated 14-12-1967.

2. We shall briefly state the circumstances under which the above references have been made. Section 74 of the Kerala Panchayats Act, 1960 (hereinafter referred to as the Act) provides for the recovery of arrear of tax, cess etc. due to a Panchayat; and prosecution of the defaulter before a Magistrate is one of the modes provided thereunder. Section 129 of the Act contains the rule-making power of the Government; and Section 129 (2), clause (xxxix) reads as follows:—

"129(2). In particular, and without prejudice to the generality of the foregoing power, the Government may make rules—

x x x x x
(xxxix) as to the class of Magistrates by whom offences against this Act shall be tried;

x x x x x
The Kerala Panchayats (Trial of Offences by Magistrates) Rules 1964 (hereinafter referred to as the Rules) were made by the Government in exercise of the aforesaid power. Section 3 of the Rules, as it originally stood, read as follows:—

"All offences against the Act or the Rules or bye-laws framed thereunder shall be tried by a Magistrate of Second Class."

Most of the offences under the Act and the several rules made thereunder are, according to the Second Schedule of the Criminal Procedure Code, triable by any Magistrate; and there are no offences which cannot be tried by a Magistrate of the Second Class.

3. There are District Magistrates, Sub-Divisional Magistrates and Magistrates of the First and Second Classes in this State; and the State Government have defined the local areas within which such persons may exercise their powers. There are some local areas in the State for which the Government have not appointed any Second Class Magistrate, but only a First Class Magistrate. This is because under the third schedule to the Criminal Procedure Code, a First Class Magistrate has all the ordinary powers of a Second Class Magistrate, and there may not be sufficient work for both a First Class Magistrate and a Second Class Magistrate to function in the same local area. Then the First Class Magistrate would take cognizance of and try also Second Class Offences committed within his local limits. Accordingly, complaints in respect of offences under the Act or

the rules made thereunder committed within the local limits of a first Class Magistrate, in respect of which there is no Second Class Magistrate, used to be filed before the First Class Magistrate; and he would take cognizance of the same and try and dispose of them. The question was raised before this Court in *Viswanathan v. Akathethara Panchayat*, 1967 Ker LT 314 whether, in view of Rule 3 of the Rules, a First Class Magistrate was competent to try an offence under the Act. That case was decided by one of us; and it was held therein on the authority of the decision of the Supreme Court in *State of U. P. v. Sabir Ali*, AIR 1964 SC 1673 that such offences are triable only by a Second Class Magistrate, and that a First Class Magistrate was not competent to try them. Apparently, it was on the basis of this decision, Rule 3 was amended on 14-12-1967 by adding the following proviso thereto.—

"Provided that in the case of a Panchayat the area of which does not fall within the jurisdiction of any Second Class Magistrate, such offences shall be tried by a Magistrate of the First Class having jurisdiction over the Panchayat area."

4. These references arise out of two complaints, which the Executive Officer of Nediyruppu Panchayat filed before the Sub-Divisional Magistrate, Malapuram, against two persons for failure to take out licences under Section 96 of the Act for conducting their respective trades within that Panchayat. The learned Magistrate took cognizance of the offence, tried the cases and convicted and sentenced both the accused. They took the matter in revision before the District Magistrate, Kozhikode, who referred the cases to this Court under Section 438 of the Criminal Procedure Code for passing necessary orders, with the recommendation that the conviction of the accused has to be set aside in the light of the decision of this Court in 1967 Ker LT 314. When the cases came before our learned brother, it appears that two contentions were advanced before him:

1. The power conferred on a Magistrate under Section 190 of the Criminal Procedure Code to take cognizance of offences is protected by Section 119 of the Act; and so Rule 3 of the Rules, which conferred jurisdiction exclusively in the Second Class Magistrates, is ultra vires of the provisions contained in the above Section.

2. The Act has not been reserved for the consideration of the President; and his assent thereto has not been received. Rule 3 of the Rules, as it is repugnant to Section 190 of the Criminal Procedure Code, is therefore void under Article 254 of the Constitution.

Adverting to the above contentions, our learned brother said:—

"It is this power conferred on the Magistrates that is protected under Section 119 of the Act and in view of that it is argued that the Rule is ultra vires and cannot have any binding force. It is also argued that under Article 254 (2) of the Constitution a State law of this nature can prevail, only if it receives the assent of the President; but the Panchayat Act has not received the assent of the President. The question is not seen to have been approached in this perspective in the Single Bench decision of this Court in 1967 Ker LT 314. I should therefore, think that for an authoritative pronouncement in the matter, this has to go before a larger Bench."

5. We shall first deal with the contention based on Art. 254 of the Constitution. This Article reads:—

"Inconsistency between laws made by Parliament and laws made by the Legislatures of States.—

(1) If any provision of law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State." We shall assume that the Act has not been reserved for the consideration of the President, and his assent thereto was not received. The Criminal Procedure Code is an existing law with respect to one of the matters enumerated in the Concurrent List. Therefore any provision in the Act or the rules made thereunder, if it is repugnant to any provision in the Criminal Procedure Code, would be void to the extent of the

repugnancy. The argument was that the Criminal Procedure Code empowers a Magistrate competent to try an offence to take cognizance of the same and try it, and that accordingly a First Class Magistrate is competent to take cognizance of any Panchayat offence and try it, but Rule 3 of the Rules provides that a Second Class Magistrate alone would be competent to take cognizance of or try such an offence. It was, therefore, submitted that the rule is repugnant to the provisions of the Criminal Procedure Code, and hence void. Particular reliance was made in support of this argument on Section 190 of the Criminal Procedure Code. A reference to Sections 5, 28 and 29 of the Criminal Procedure Code is sufficient to repeal the above argument. Section 5 reads as follows:—

"Trial of offences under Penal Code.—

(1) All offences under the Indian Penal Code (Act XLV of 1860) shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

Trial of offences against others laws.—

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Sub-section (2) clearly provides that all offences under any law other than the Indian Penal Code shall be tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, subject to any enactment regulating the manner or place of trying or otherwise dealing with such offences. So, regarding offences under the Act, the provisions of the Criminal Procedure Code would apply to the manner and place of trial of said offences, only subject to the provisions of the Act or the Rules thereunder. If the Act empowers the Government to make rules as to the class of Magistrates by whom offences thereunder shall be tried, and if in exercise of that power, the Government made rules, prescribing the class of Magistrates who shall try such offences, the provisions of the Criminal Procedure Code would yield to the said provision contained in the Rules.

6. Section 28 of the Criminal Procedure Code mentions the Courts by which offences under the Indian Penal Code may be tried. Section 29 deals with place of trial of offences under other laws; and it reads:—

"Offences under other laws.— (1) Subject to the other provisions of this Code, any offence under any other law shall, when any Court is mentioned in this

behalf in such law, be tried by such Court.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the Second Schedule to be triable." This section provides that offences under laws other than the Indian Penal Code shall, when any court is mentioned in such laws, be tried by that Court. Therefore, a law creating a special or particular Court for the trial of offences under that law is not repugnant to the provisions of the Criminal Procedure Code; but it is in accordance with its provisions. Hence there is no merit in the contention that R. 3 of the Rules is void, on the ground of repugnancy.

7. We now come to the attack on the rule based on Section 119 of the Act. This section reads as follows:—

"Persons empowered to prosecute.— Save as otherwise expressly provided in this Act, no person shall be tried for any offence against this Act or any rule or bye-law made thereunder unless complaint is made by the police, the executive authority or a person expressly authorised in this behalf by the Panchayat or executive authority within three months of the commission of the offence; but nothing herein shall affect the provisions of the Code of Criminal Procedure, 1898, in regard to the power of certain Magistrates to take cognizance of offences upon information received or upon their own knowledge or suspicion."

(This section has a proviso; and it is not extracted here, being not relevant to the controversy).

This section came for comment in a decision rendered by one of us in *Thankappan v. Ganapathy Iyer*, 1967 Ker LT 309. There it was observed that it was a specimen of bad draftsmanship; and there was considerable difficulty to understand its true scope. The contention before us was based on the latter part of the section; and it was pointed out in the above decision that the reference therein to the power of certain Magistrates to take cognizance of offences is to the power vested in a Magistrate under Section 190 (1) (c) of the Criminal Procedure Code. Very elaborate arguments were addressed at the Bar on the interpretation of this section. We shall, therefore, quote it:—

"190. Cognizance of offences by Magistrates.— (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police-officer;

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed."

(2) The State Government, or the District Magistrate subject to the general or special orders of the State Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The State Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial."

The learned Counsel, who appeared for the Panchayat, first submitted that a Sub-Divisional Magistrate was empowered under the Criminal Procedure Code to take cognizance of a Panchayat offence under Section 190 (1) (c) of the Code, that this power was specifically saved by the latter part of Section 119 of the Act, and that Rule 3 of the Rules which provides that such an offence shall be tried by a Magistrate of the Second Class, was repugnant to and inconsistent with the said part of the Section, and was, therefore, void. This contention cannot stand on a close scrutiny of some of the relevant provisions of the Code. Under the Code, a Magistrate has got various powers. One is a power to try cases, another is a power to commit cases for trial, and a third is a power to take cognizance of offences. Chapter II of the Criminal Procedure Code deals with the constitution of Criminal Courts. The power to try cases is derived by virtue of the constitution of a Court, and Section 28 of the Code. This Section reads:-

"Subject to the other provisions of this Code any offence under the Indian Penal Code may be tried—

(a) by the High Court, or

(b) by the Court of Session, or

(c) by other Court by which such offence is shown in the eighth column of the second schedule to be triable."

So, if a person is appointed a First Class Magistrate, and if according to the eighth column of the Second Schedule of the Code, an offence is triable by a Magistrate of the First Class, he has the power to try it. But this is subject to the other provisions of the Code. The powers of a Magistrate are generally classified as ordinary powers and additional powers. Section 36 of the Code states that the various Magistrates shall have the powers specified in the Third Schedule of the Code; and such powers are called ordinary powers. Section 37 deals with additional powers; and they are

enumerated in the Fourth Schedule. These are powers which a Magistrate can be invested with in accordance with the said schedule. Now if we examine these two schedules, it may be seen that a power to commit for trial under Sec. 206 is an ordinary power of a Magistrate of the First Class; whereas in the case of a Magistrate of the Second Class, it is an additional power with which he may be invested by the State Government. Again, the power to take cognizance of an offence under Section 190 of the Code is not one of the ordinary powers of a Magistrate of the First, Second or Third Class; but it is an ordinary power of a Sub-Divisional Magistrate and a District Magistrate. As regards a Magistrate of the First, Second or Third Class, this is an additional power with which he can be invested, subject to the provisions of the Fourth Schedule. It is, therefore, clear that the aforesaid powers are different. What S. 129(2)(xxxix) of the Act has empowered the Government is to make Rules prescribing the class of Magistrates by whom offences under the Act shall be tried; in other words to constitute an authority empowered to try such offences. This is all what was done by the Rules; and Rule 3 prescribes that those offences shall be tried by a Magistrate of the Second Class. The second part of Section 119 of the Act only refers to the power of certain Magistrates to take cognizance of an offence under Section 190 (1) (c) of the Criminal Procedure Code; and that power is saved, notwithstanding anything contained in that section. Rule 3 of the Rules and the Second Part of S. 119 deal with different powers; and there cannot possibly be any conflict between the said two provisions.

8. The next contention of the learned counsel for the Panchayat was that a Sub-Divisional Magistrate has got the power to take cognizance of a Panchayat offence under Section 190 (1) (c) of the Code; that, in the two cases with which we are concerned, the Sub-Divisional Magistrate, Malapuram has really taken cognizance of the offences complained of; and that, if he has no jurisdiction to try the cases, he must transfer them under Section 192 of the Code to a Magistrate Subordinate to him for trial. This contention has so many difficulties for being accepted. In the first place, a transfer can only be to a Magistrate having the power to try the case. A Magistrate, who has no power to try a case, cannot get the authority to try it by the case being transferred to him under Section 192 of the Code. This proposition was not disputed. Rule 2 (ii) of the Rules defines the term "Magistrate" as follows:—

" "Magistrate" means the Magistrate having jurisdiction over the Panchayat

area, and in the case of a Panchayat area comprised within the jurisdiction of more than one Magistrate, such Magistrate as may be authorised by the Sub-Divisional Magistrate having jurisdiction over the area."

Admittedly, there is no Second Class Magistrate having jurisdiction over the area of the Panchayat from which these cases have arisen. So even assuming that the Sub-Divisional Magistrate is competent to take cognizance of the cases under Section 190 (1) (c) of the Code, and that he has exercised that power, there is no scope for transferring the cases to a Magistrate having jurisdiction to try them. In other words, he is not able to take any action in the matter.

9. Secondly, it is not possible to accept the contention that the Sub-Divisional Magistrate has taken cognizance of these cases under Section 190 (1) (c) of the Code. The facts are very clear from the records. The Executive Officer of the Panchayat filed complaints; and on the assumption and on the bona fide belief that he has got the power to take cognizance of the cases on the complaints, the learned Sub-Divisional Magistrate took cognizance, and tried them. To take cognizance of them under S. 190(1)(c) was beyond his contemplation. What he did was something entirely different; and to say that he took cognizance of them under S. 190(1)(c) is to attribute to him something which he never did, though he could have done it. In 1967 Ker LT 309 it was observed by this Court:—

"Every complaint to a Magistrate is an information that an offence has been committed; but every such information may not amount to a complaint. So, under Section 190 of the Criminal Procedure Code, a Magistrate can treat a complaint as an information, and take cognizance of the offence."

The above observation has got support in the decision of a Division Bench of the Allahabad High Court in *Channu Lal v. Rex*, AIR 1949 All 692. The Court said:—

"In its ordinary sense "information" is a wider term and includes any communication relating to the commission of an offence. A complaint is a particular kind of information and is more or less formally made with the definite object that the person to whom the complaint is made will take action under the Criminal Procedure Code. "Information" is the genus of which a "complaint" is a specie. In Section 190 (1) (c), however, the word "information" must be construed as referring to information which is not a valid complaint falling under clause (a) of that section. If a complaint is not a valid complaint, it does not cease to be an information and, therefore, can be

treated as such under Clause (c) of Section 190 (1) and it is open to the Magistrate to whom an invalid complaint is lodged to treat it as an information under Section 190 (1) (c), Criminal P. C. subject, of course, to the limitations imposed by Section 191, Criminal P. C., in this behalf."

It is doubtful whether a complaint would be an invalid complaint, either because the person making the complaint is not competent to make it or the Magistrate before whom it is made is not competent to take cognizance of it or try the case. The question whether an allegation is a complaint must be decided on the basis of the definition of that term in Section 4 (1) (h) of the Criminal Procedure Code. Whatever that may be, the Sub-Divisional Magistrate has not taken cognizance of the offence under Section 190 (1) (c). If he did so, he was bound to act under Section 191 of the Code. He has not done so. What he did was to take cognizance under Section 190 (1) (a), and try the cases, for either of which he had no power.

10. We now come to the question whether the Sub-Divisional Magistrate has power to take cognizance of a Panchayat offence under Section 190 (1) (c) of the Code, though he has no power to try it. To a large extent, the answer to this question depends on the meaning of taking cognizance of an offence under the Criminal Procedure Code. There are a number of decisions of the Indian High Courts and the Supreme Court on this question. We shall refer only to a few decisions of the Supreme Court. In *R. R. Chari v. State of U. P.*, AIR 1951 SC 207, the question arose whether cognizance of an offence under Section 165 of the Indian Penal Code was taken by the Magistrate, when he issued a warrant for the arrest of the accused on the application of the police, or only when he issued a notice to the accused under Section 190 of the Criminal Procedure Code for his appearance. The Court quoted the following passage from the judgment of *Das Gupta, J.*, in *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerji*, AIR 1950 Cal 437 as stating the correct approach to the question:

"What is taking cognizance has not been defined in the Crl. P. C. & I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190 (1) (a), Crl. P. C. he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of the Chapter, proceeding under Section 200 and thereafter

sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter but for taking action of some other kind e. g. ordering investigation under Section 156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

Then the Court said:—

"In the present case, on 25-3-1949, the Magistrate issued a notice under Section 190, Criminal Procedure Code against the appellant and made it returnable on 2-5-1949. That clearly shows that the Magistrate took cognizance of the offence only on that day and acted under Section 190, Criminal Procedure Code."

In *Narayandas Bhagwandas v. State of West Bengal*, AIR 1959 SC 1118 and in *Gopaldas v. State of Assam*, AIR 1961 SC 986, the Supreme Court again quoted the above passage from the judgment of Justice Das Gupta as stating the correct law. In the latter case, it adds:—

"It would be clear from the observations of Mr Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI, but for taking action of some other kind, e.g., ordering investigation under Section 156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence."

11. It appears to us on the authority of the statements of law contained in the above decisions that taking cognizance of an offence can only be for the purpose of initiating legal proceedings under any of the provisions of the Code. If a Magistrate has no power to take any proceedings in respect of an offence brought to his notice, he is not competent to take cognizance of that offence. Taking notice of the commission of an offence and keeping the matter to himself without being able to take any action thereon for want of power, would not amount to taking cognizance. In other words, the power to initiate proceedings against a person accused of an offence, is a condition precedent for taking cognizance of an offence. A Magistrate, who has no power to try a person charged with an offence or to commit him for trial is not competent to take cognizance of that offence. There is an observation in the judgment of a learned Single Judge of the Allahabad High Court in *Jaddu v. State*, AIR 1952 All 873 which seems to take a contrary view. The learned Judge said:—

"It seems to me that Section 529 (e) is applicable only if the Magistrate is not empowered to take cognizance of the

offence in question. A perusal of Section 15 (2), U. P. Private Forests Act shows that what is barred under it is not the cognizance of the offence by a Magistrate of the First Class, but a trial of the same by him. A First Class Magistrate could take cognizance of the offence, but he could not proceed to try it."

A decision of a Division Bench of the High Court of Patna in *Pancham Singh v. State*, AIR 1967 Pat 416 and another decision of a Division Bench of the High Court of Bombay in *State v. Shankar*, AIR 1959 Bom 437 seem to give some apparent support to the above view. Both of them were cases which arose under the Prevention of Corruption Act, 1947. Section 7 of the Criminal Law Amendment Act, 1952 provided that notwithstanding anything contained in the Criminal Procedure Code, offences mentioned in Section 6 (1) of that Act shall be triable only by special Judges appointed thereunder. Section 8 (1) of this Act provides that a Special Judge may take cognizance of offences without the accused being committed to him for trial. Section 8 (3) provides that the Court of the Special Judge shall be deemed to be a Court of Session. The question arose in the above two decisions whether a Magistrate, who was empowered to take cognizance of offence under Section 190 (1) of the Criminal Procedure Code, was entitled to take cognizance of offences mentioned in Section 6 (1) of the Criminal Law Amendment Act, 1952. Both Courts held that there was nothing to show that the provisions of Section 190(1) of the Code have been amended by the Criminal Law Amendment Act, and that the Magistrate was entitled to take cognizance of such offences, even though he had no jurisdiction to try the accused for the said offence. It was, however, pointed out in those decisions that all that the Magistrate taking cognizance of such an offence can do is to send the accused to the Special Judge for trial. Then the Special Judge may take cognizance of it, and try the accused. With great respect, we find it difficult to accept the above view. It did not require a magistral intervention for the Special Judge to take cognizance of the offence. What the Magistrate does in such a case is what the police itself could and should have done. The act of the Magistrate in sending the accused to the Special Judge for taking cognizance of the offence and trying the case cannot amount to taking cognizance of the offence by the Magistrate himself. If it were that a Magistrate, who has no jurisdiction to try an accused or commit him for trial for an offence, could take cognizance of an offence, a Magistrate of the third class on whom the additional power

of taking cognizance of offences under Section 190 is conferred, can take cognizance of a first class offence. But it was conceded correctly that it was not possible, and the only reason for that, as far as we can see, is that the power to take cognizance of an offence presupposes the existence of a power to take some proceedings as provided in the Criminal Procedure Code against the person charged with the said offence. We, therefore, hold that a Magistrate, whose power to take cognizance of an offence under Section 190 (1) (c) is saved by the second part of Section 119 of the Act is a Magistrate, who has jurisdiction to try the offences mentioned in Section 119 of the Act. It follows therefrom that, in view of the provisions contained in Rule 3 of the Rules, no Magistrate other than a Second Class Magistrate has power to take cognizance of any of the said offences upon information received or upon his own knowledge or suspicion.

12. It was lastly contended by the learned Counsel for the Panchayat, that the Rules have no application to a Panchayat area, which does not fall within the jurisdiction of any Second Class Magistrate. In other words, if there is no Second Class Magistrate having jurisdiction over a Panchayat area, the First Class Magistrate having jurisdiction in that area can take cognizance of and try the Panchayat offences committed within the area of that Panchayat. The argument was based on the decision of the Supreme Court in *Bhim Sen v. State of U. P.*, AIR 1955 SC 435. In that case, a few persons were prosecuted for the offence of theft before a Railway Magistrate. The U. P. Panchayat Raj Act, 1947, provided, among other things, that certain offences including thefts committed within the jurisdiction of a Panchayat Adalat shall be cognisable by such Adalat. The Rules made thereunder provided for the constitution of the Adalats in cases where the accused were residents of the same district as well as different districts. But in the case which came before the Supreme Court one of the accused belonged to Madhya Pradesh. Neither the U. P. Panchayat Raj Act nor the Rules made thereunder provided for the constitution of the Adalat for trial of such a case. It was, however, contended in that case that the trial of the appellant by the Railway Magistrate was without jurisdiction. In rejecting the above contention the Court said:—

"In the present case in which at least one of the accused (though not this very appellant) is a person coming from an area outside the local extent of the Act, any bench of the Adalat that can be validly formed thereunder cannot try the three accused together and hence can have no jurisdiction over the whole case.

The jurisdiction of the regular Criminal Court in respect of such a case cannot be taken away by the operation of Section 55 of the Act. It is to be remembered that the jurisdiction of the Criminal Courts under Section 5 of the Criminal Procedure Code is comprehensive

That section enjoins that all offences under the Penal Code shall be investigated, enquired into, tried and otherwise dealt with "according to the provisions hereinafter contained". To the extent that no valid machinery is set up under the U. P. Panchayat Raj Act for the trial of any particular case the jurisdiction of the ordinary Criminal Court under Section 5, Criminal P. C., cannot be held to have been excluded. Exclusion of jurisdiction of a Court of general jurisdiction, can be brought about by the setting up of a Court of limited jurisdiction, in respect of the limited field, only if the vesting and the exercise of that limited jurisdiction is clear and operative. Where, as in this case, there is no adequate machinery for the exercise of this jurisdiction in a specific case, we cannot hold that the exercise of jurisdiction in respect of such a case by the Court of general jurisdiction is illegal."

The learned Counsel made special emphasis on the last three sentences appearing in the above passage, and contended that, in so far as machinery has not been set up by the State Government for trial of Panchayat offences in any Panchayat area as provided by Rule 3 of the Rules, the jurisdiction of the ordinary Criminal Court under Section 5 of the Criminal Procedure Code cannot be held to have been excluded, and that the First Class Magistrate would have jurisdiction to try offences committed in such an area. The above sentences have to be read in the light of the facts of the case and in the context in which they appear. That was a case, where the special law did not provide a machinery for the trial of certain types of cases, and not one where the State Government did not create a machinery in accordance with the law. Here the Act and the Rules have created a machinery for the trial of Panchayat offences committed within the areas of the Panchayats. Under Section 5 of the Criminal Procedure Code, the provisions thereof yield only to any other law regulating the manner, place of trial etc. The omission to take executive action pursuant to the special law is irrelevant. We, therefore, hold that the above decision has no application to this case, and that the contention of the learned Counsel that a First Class Magistrate is competent to try Panchayat offences in Panchayat areas, where no Second Class Magistrate has been appointed, cannot be sustained.

13. In the result we hold that Rule 3 of the Kerala Panchayats (Trial of Offences by Magistrates) Rules 1964, as it stood before its amendment made on 14-12-1967, is valid, and that the decision of this Court in 1967 Ker LT 314 is correct. We accordingly accept the references made by the District Magistrate and set aside the conviction of the accused and the sentences passed against them by the Sub-Divisional Magistrate, Malapuram in S. T. Nos. 378 and 414 of 1966. The amounts of fines, if recovered from the accused pursuant to the decisions in the above cases, will be refunded to them.

KSB Reference accepted; Convictions and sentences set aside.

AIR 1969 KERALA 120 (V 56 C 28)

T. C. RAGHAVAN, J. (On difference of opinion between K. K. MATHEW AND M. U. ISAAC, JJ.)

Mudathamoo Sankappa Rai, Accused-Appellant v. State of Kerala, Complainant-Respondent.

Ref. Trial No. 16 of 1967 and Criminal Appeal No. 322 of 1967, D/- 8-3-1968 from order of Sessions Court, Tellicherry in S. C. No. 57 of 1967.

(A) Penal Code (1860), S. 302 — Sentence — Capital punishment awarded by Sessions Court — Reduction of, by Appellate Court.

The discretion to choose the punishment is on the trial Court, and if the trial Court imposes the lesser punishment, the Appellate Court will not interfere and award capital punishment unless it finds that no normal judicial mind would have awarded the lesser punishment in such a case. The position is different in a case where the trial Court awards capital punishment and the Appellate Court reduces it to life imprisonment. In such a case, any extenuating circumstance will justify the Appellate Court's action. AIR 1953 SC 364 & ILR (1968) 1 Kerala 218, Rel. on. (Para 2)

After the deceased person had used provocative words against his uncle, the latter went to his house, situated about 75 marus from the place of exchange of words, came with a gun to the place where the deceased and others were working and then shot the deceased. The murder took place within 30 minutes of the exchange of words. On the question whether capital punishment awarded by the Sessions Court should be confirmed:

Held, that the lesser punishment of imprisonment for life was quite sufficient to meet the ends of justice, in view of

the relationship between the parties, the implication of the words used and the short time lag between the provocative incident and the murder. (Para 6)

(B) Penal Code (1860), Ss. 300, 302 — Provocation — Proof — Nature of — Evidence of any witness is not essential.

The standard to see whether there was provocation or not must, be the reasonable man's standard. No witness need speak that the accused person was actually provoked. On the other hand, if the words used, coupled with the relationship of the parties and the circumstances of the case, were sufficient to provoke a reasonable man and if the Court thinks that there was such provocation, the absence of witnesses who speak that the accused person was, in fact, provoked is no reason for holding that there was no provocation. If the standard is not the reasonable man's standard, then, a person who is short-tempered and who allows himself to be provoked easily will have an advantage in the eye of law over a person who is not so easily provoked and who controls himself and keeps a more equable temper. (Para 4)

Cases Referred: Chronological Paras (1968) ILR (1968) 1 Kerala 218,

Raman v. State of Kerala 2 (1953) AIR 1953 SC 364 (V 40)= 1953 Cri LJ 1465, Dalip Singh v. State of Punjab 2

P. R. Nambiar (S. B.), for Appellant; State Prosecutor, for Respondent.

(On difference of opinion between K. K. Mathew and Isaac, JJ.) RAGHAVAN, J.:— The Sessions Judge awarded capital punishment to the accused person; and Isaac, J., agreed with the Sessions Judge, while Mathew, J., preferred to award the lesser sentence of imprisonment for life. The cases have been placed before me to resolve the tie.

2. The Supreme Court has said in Dalip Singh v. State of Punjab, AIR, 1953 SC 364 that the discretion to choose the punishment is on the trial Court, and if the trial Court imposes the lesser punishment, the Appellate Court will not interfere and award capital punishment unless it finds that no normal judicial mind would have awarded the lesser punishment in such a case. This Court has also pointed out this principle in Raman v. State of Kerala, ILR (1968) 1 Kerala 218. The position is different in a case where the trial Court awards capital punishment and the Appellate Court reduces it to life imprisonment. In such a case, any extenuating circumstance will justify the Appellate Court's action.

3. In these cases, Mathew, J., is of opinion that there was no provocation, while

Isaac, J., is of opinion that there was no provocation. Isaac, J., observes:

"There is no evidence that the accused was provoked by this incident. In the light of his persistent denial of this incident, there has not been even a suggestion put to the witnesses that the accused was provoked by the exchange of words between him and the deceased." And Mathew, J., observes on this question:

"I do not think it necessary that any witness should have said that by these words the accused was provoked. If the court comes to the conclusion that the words used by the deceased would provoke a reasonable man, I think, that would be sufficient, though no witness has spoken to the provocation."

4. The standard to see whether there was provocation or not must, as observed by Mathew, J., be the reasonable man's standard. No witness need speak that the accused person was actually provoked. On the other hand, if the words used, coupled with the relationship of the parties and the circumstances of the case, were sufficient to provoke a reasonable man and if the Court thinks that there was such provocation, the absence of witnesses who speak that the accused person was, in fact, provoked is no reason for holding that there was no provocation. If the standard is not the reasonable man's standard, then, a person who is short-tempered and who allows himself to be provoked easily will have an advantage in the eye of law over a person who is not so easily provoked and who controls himself and keeps a more equable temper! Therefore, I agree with Mathew, J., that the standard should be a reasonable man's standard, and for that, no evidence of any witness is essential.

5. Now I shall come to the facts of the cases before me. Admittedly, a previous incident took place about half an hour prior to the murder. Fairly (or even considerably) provocative words were used; and the words used are mentioned in the judgment of Mathew, J. "Selling one's wife" cannot be said to be an innocent expression which should not provoke. Considering the relationship of the parties (the deceased person was a nephew of the accused person) and also the import of the words used and taking into consideration the circumstances of the case, it is clear that there was provocation. (The question whether the provocation was grave and sudden need not be considered in these cases, because if it was grave and sudden, the offence itself would have been only culpable homicide and not murder. The question here is only whether the provocation can be considered as a sufficient ground for giving the

lesser punishment for the offence of murder). If the accused person had a gun at the time and if he shot the deceased person immediately after the provocative words were uttered, no serious objection could have been taken if the lesser punishment alone was inflicted: since there was provocation, the proper punishment would have been only life imprisonment.

6. The question then is whether the provocation disappeared, in other words, whether there was sufficient time for the provocation to cool down and disappear. The murder took place within 30 minutes of the exchange of words: the accused person did not then have a gun with him: he went to his house situated about 75 marus from the scene, took the gun and came to the place where the deceased person and others were working; and he then shot the deceased person. Can it be said, in these circumstances, that there was sufficient time for the provocation to cool down? Can it be characterised that the murder was a calculated and deliberate one not influenced in any way by the provocation? In such a situation, I venture to say, I would rather err on the side of leniency than on the side of stringency and harshness. Considering the relationship between the parties, the implication of the words used and the short time lag between the provocative incident and the murder, I agree with Mathew, J., and hold that the lesser punishment of imprisonment for life is quite sufficient to meet the ends of justice in these cases.

7. **K. K. MATHEW and M. U. ISAAC, JJ.**—Following the opinion of the third Judge, we reject the reference for confirmation of the sentence, and sentence the accused to undergo imprisonment for life.

CWM/D.V.C.

Order accordingly.

AIR 1969 KERALA 121 (V 56 C 29)

M. S. MENON, C. J. AND P. GOVINDAN NAIR, J.

Kattil Raman Kunhi's sons Chathu and others, Appellants v. Vadakke Poduvath Devaki Amma's daughter Janaki Amma, Respondent.

S. A. No. 1452 of 1963, D/- 7-2-1968, from order of Dist. Court, Palghat in A. S. No. 384 of 1962.

(A) Civil P. C. (1908), S. 47 and O. 21, R. 36 — Delivery of symbolical possession to decree holder in execution — Suit for recovery of possession of property on the basis of execution sale maintainable. **AIR 1959 Ker 133 & AIR 1958 Ker 309, Foll.** (Para 3)

IL/KL/D946/68

(B) Limitation Act (1908), Art. 138 — Limitation Act (1963), Art. 65 — Suit for recovery of possession of property by decree holder auction purchaser on basis of execution sale within 12 years of delivery of symbolical possession — Not barred by limitation — Symbolical possession has the effect of giving a fresh starting point of limitation — (Civil P. C. (1908), O. 21 R. 35 — Symbolical possession and limitation). (Paras 2, 4)

(C) Tenancy Laws — Kerala Land Reforms Act (1 of 1964), Ss. 7 and 13 — Rule of *lis pendens* not abrogated.

The rule of *lis pendens* is based on public policy. The provisions contained in a statute will not have the effect of abrogating the rule of *lis pendens*. This rule, therefore, cannot be said to be entirely abrogated by the provisions of Sections 7 and 13 of Kerala Land Reforms Act which deal with fixity of tenure. 1961 Ker LT 639 & 1963 Ker LT 709 & 1967 Ker LT 1060, Rel. on.

(Para 6)

Cases Referred: Chronological Paras

(1967) 1967 Ker LT 1060=1968 Ker LR 32, P. I. Idicula v. Padmanabhan Nair 6

(1963) 1963 Ker LT 709=ILR (1963) 2 Ker 181, Kochappu v. Mani & Co., Ltd. 6

(1961) 1961 Ker LT 639=1961 Ker LJ 708, Sankaran Nambiar v. Pilliathiri Amma 6

(1959) AIR 1959 Ker 133 (V 46)=1958 Ker LT 925, People's Co-operative Bank Ltd. v. Parvathy Ayyana Pillai 3

(1958) AIR 1958 Ker 309 (V 45)=1957 Ker LT 1094, State of Travancore-Cochin v. Lakshmi Ammal Meenakshi Ammal 3

V R. Krishna Iyer and K. Raghavan Nair, for Appellants; K. P. Ramunni Menon, K. Ramakumar and P. Ramaranjan, for Respondent.

JUDGMENT:— Defendants 10, 12 and 13 are the appellants. The suit was for recovery of possession of the properties scheduled to the plaintiff. The only questions arising in this appeal are whether the three appellants are entitled to the protection conferred by Sections 7 and 13 of the Kerala Land Reforms Act, 1963, Act 1 of 1964, and whether the suit is barred by limitation as against any of these appellants. We shall deal with these questions.

2. The suit was instituted on 15-9-1954. On that day only the 10th defendant was on the party array. Defendants 12 and 13 were impleaded in the suit in the year 1959. The suit has been filed on the basis of an execution sale held in O. S. 306 of 1942 of the Chowghat Municipality's Court. That sale was on 1-7-1942

and was confirmed on 17-8-1942. The decree holder took what is called symbolical delivery of the properties on the 14th and 15th of September, 1942.

3. A question has been raised as to whether a suit would lie in view of Section 47 of the Code of Civil Procedure. This question has been found against the defendants by the trial Court relying on the rulings of this Court in *People's Co-operative Bank Ltd. v. Parvathy Ayyana Pillai*, 1958 Ker LT 925=(AIR 1959 Ker 133) and in *State of Travancore-Cochin v. Lakshmi Ammal Meenakshi Ammal*, 1957 Ker LT 1094=(AIR 1958 Ker 309). We are of the view that this conclusion is correct and the appellants' contention that the suit as such is not maintainable and the suit is barred by limitation under Article 138 of the Limitation Act cannot stand for the suit has been filed within 12 years of the date on which symbolical delivery was given. It has been held that that date will give a fresh cause of action for a suit for recovery of possession.

4. The further question regarding limitation that arises relates only to defendants 12 and 13. This is based on Section 22 of the Limitation Act. It is not disputed before us that the suit as against these defendants can be taken to have been instituted only in the year 1959. This is clearly beyond 12 years of the date of symbolical delivery, namely, 16-9-1942. *Prima facie* therefore the suit as against these defendants is not maintainable. Counsel for the respondents has not been able to make out any special circumstances which will entitle him to contend that the suit instituted beyond 12 years of the date of symbolical delivery is maintainable. It was faintly suggested that the 12th defendant came into possession only in 1948 and that the suit was instituted in 1959 within 12 years as against him. He had not perfected his title by adverse possession at that time and therefore the suit is maintainable against him. We do not think this contention is entitled to any weight. The plaintiff must prove subsisting title or possession within 12 years of suit. The last date on which he can be said to be in possession is only 15-9-1942 and the suit instituted only in 1959, is clearly barred by limitation. We have accordingly to hold that the suit as against defendants 12 and 13 is not maintainable and the suit as against them will have to be dismissed.

5. As far as the 10th defendant is concerned, the suit is not barred by limitation as the 10th Defendant was on the party array when the suit was instituted in 1954. The only question as far as this defendant is concerned, is whether he is entitled to protection conferred by

Sections 7 and 13 of the Land Reforms Act, 1 of 1964. We shall read these sections:

"7. Certain persons occupying land honestly believing to be tenants, to be deemed tenants.—Notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of Court, any person who, on the 11th day of April, 1957, was continuously in occupation of the land of another situate in Malabar, for not less than two years, honestly believing himself to be a tenant and continued to be in occupation of such land at the commencement of this Act, shall be deemed to be a tenant.

13. Right of tenants to fixity of tenure.—(1) Notwithstanding anything to the contrary contained in any law, custom, usage or contract, or in any decree or order of Court, every tenant shall have fixity of tenure in respect of his holding, and no land from the holding shall be resumed except as provided in Sections 14 to 22.

(2) Nothing in sub-section (1) shall confer fixity of tenure on a tenant holding under a landlord—

(i) who is a member of the Armed Forces or is a seaman, if the tenancy was created by such landlord within a period of three months before he became a member of the Armed Forces or a seaman or while he was serving as such member or seaman; or

(ii) who is the legal representative of the landlord referred to in clause (1);

Provided that no such landlord shall resume any land from his tenant, if he is already in possession of an extent of land not less than the ceiling area, and, where he is in possession of an extent of land less than the ceiling area, the extent of land that may be resumed shall not, together with the land in his possession, exceed the ceiling area;

Provided further that such tenant shall be deemed to have fixity of tenure in respect of his holding if—

(a) the landlord referred to in clause (i) has not claimed resumption of the land comprised in the holding within one year from the date on which he ceased to be a member of the Armed Forces or a seaman, or within one year from the commencement of this Act, or within one year from the expiry of tenancy, whichever period expires last;

(b) the landlord referred to in clause (ii) has not claimed resumption of the land comprised in the holding within one year from the date on which he received intimation of the death of the member of the Armed Forces or a seaman, or within

one year from the commencement of this Act, or within one year from the expiry of the period of tenancy, whichever period expires last;

Provided also that the provisions of this sub-section shall not apply to tenants who were entitled to fixity of tenure immediately before the 21st January 1961, under any law then in force."

6. It is urged that the conditions imposed by Section 7 about the commencement of the possession have been satisfied. It is further urged that the 10th defendant was honestly under the belief that he is a tenant and that he held the property under that belief. It is therefore urged that the 10th defendant must be deemed to be a tenant entitled to the benefits conferred by the Act regarding the fixity of tenure under Section 13. The arguments turned on the questions as to whether the 10th defendant can be said to have had the honest belief that he was a tenant and various aspects have been referred to by counsel for the appellant as well as by the respondent. It is unnecessary to deal with these aspects for we will assume for the purpose of discussion without deciding the question that the 10th defendant is a person who would normally be entitled to the benefit of Section 7. We said normally because there is a further contention raised on behalf of the respondent that the 10th defendant cannot be heard to say that he is a tenant by virtue of the rule of *lis pendens* enunciated in Section 52 of the Transfer of Property Act. This is met by counsel for the appellant by urging that the provisions in Sections 7 and 13 would include the law enunciated in Section 52 of the Transfer of Property Act and notwithstanding therefore the rule of *lis pendens* there should be a fixity of tenure in favour of the 10th defendant. We are unable to accept this contention. This court has consistently taken the view that the provisions contained in a statute where similar wording is used, will not have the effect of abrogating the rule of *lis pendens*. The earliest decision of this court is in *Sankaran Nambiar v. Pilliathiri Amma*, 1961 Ker LT 639 where Mr. Justice Madhavan Nair has expressed this view. A Division Bench of this Court in *Kochappu v. Mani and Company Ltd.*, 1963 Ker LT 709 has accepted this decision and has ruled that the provision in Sec. 64 of the Civil Procedure Code is not abrogated by the provision in the Kerala Agrarian Relations Act. Recently Justice Raman Nayar has taken the same view in *P. I. Idicula v. Padmanabhan Nair*, 1967 Ker LT 1060 with reference to Section 106 of Act 1 of 1964. The wording in Section 106 is very similar, if not identical, to that contained in Section 13. Our attention has not been invited to

any decision wherein it has been held that the rule of *lis pendens* is abrogated by the provisions in Sections 7 and 13. The rule of *lis pendens* is based on public policy. It is difficult to accept the argument that that rule is entirely wiped out by the provisions of the Act which deals with fixity of tenure.

7. In the result, we reject this contention. We dismiss this appeal but direct the parties to bear their costs.

NR/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 124 (V 56 C 30)

M. U. ISAAC, J.

Trinity Pharmaceuticals (India) Pvt. Ltd., Trichur, Petitioner v. Secretary, Board of Revenue (Excise) Trivandrum and others, Respondents.

Original Petn. No. 718 of 1966, D/- 9-1-1968.

Medicinal and Toilet Preparations (Excise Duties) Act (1955), S. 3 Sch. Item No. 2 (substituted by Finance Act (5 of 1964)) — Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverage and to which alcohol has also been added — Levy of duty will be under Item 2 (iii), only on quantity of alcohol added. (Para 5)

K. V. Surianarayana Iyer, V. Bhaskaran Nambiar, C. R. Natarajan and M. K. Ananthakrishnan, for Petitioner; Govt. Pleader, for Respondents.

JUDGMENT:— This case arises under the Medicinal and Toilet Preparations (Excise Duties) Act 1955, (hereinafter referred to as the Act). The Act provides for the levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium, Indian hemp or other narcotic drug or narcotic. Section 3 of the Act contains the charging provision. It reads:

"3. Duties of Excise to be levied and collected on certain goods.— (1) There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India.

(2) The duties aforesaid shall be leviable—

(a) Where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded-warehouse for home consumption, whether such State is the State of manufacture or not;

(b) Whether the dutiable goods are not manufactured in bond, in the State in which such goods are manufactured.

(3) Subject to the other provisions contained in this Act, the duties aforesaid

shall be collected in such manner as may be prescribed.

Explanation.— Dutiable goods are said to be manufactured in bond within the meaning of this section if they are allowed to be manufactured without payment of any duty of excise leviable under any law for the time being in force in respect of alcohol, opium, Indian hemp or other narcotic drug or narcotic which is to be used as an ingredient in the manufacture of such goods."

The Schedule in the Act has been amended from time to time; and what applies to this case is Item No. 2 in the Schedule substituted by the Finance Act, 5 of 1964. This item reads as follows:

(For Item see next page)

2. The petitioner is a manufacturer of an Ayurvedic Preparation called "protovine". Admittedly it contains self-generated alcohol; and alcohol is also added to it as preservative. Protovine is manufactured out of bonds. Where a medicinal preparation is manufactured out of bonds, the rectified spirit required for its manufacture is obtained by the manufacturer in accordance with the Medicinal and Toilet Preparations (Excise Duties) Rules 1956 (hereinafter referred to as the Rules) from the distillery on payment of its price and the duty payable thereon. Thus the duty payable on protovine in respect of the alcohol added to it has been levied and recovered by the State Government in accordance with the Act and the Rules. Subsequently a controversy arose whether the petitioner is liable to pay duty on the said preparation in respect of the self-generated alcohol also.

The Board of Revenue took the view that "protovine" falls under Item No. 2 (iii) in the schedule to the Act, and that the duty payable thereon is on the quantity of alcohol found in the preparation, and not added to the preparation. Accordingly, the Excise Department made an analysis of the preparation, determined the quantity of self-generated alcohol therein, by deducting the added alcohol from the total alcoholic content as found on analysis, and demanded the petitioner to pay duty on the said preparation also in respect of the self-generated alcohol. Ext. P-7 dated 28-1-1966 is a memorandum issued by the Secretary of the Board of Revenue, communicating the above decision of the Board to the petitioner. Thereupon the petitioner filed this Original Petition to quash Ext. P-7; and it has prayed for the issue of a writ of mandamus or prohibition to the respondents forbearing or restraining them from imposing or collecting any duty on "protovine", not only in respect of the quantity of self-generated alcohol therein, but also from collecting any duty thereon.

Item No.	Description of dutiable goods.	Rate of duty.
Medicinal Preparations		
2.	Medicinal preparations in Ayurvedic, Unani or other indigenous systems of medicine —	
	(i) Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages.	Nil
	(ii) Medicinal preparations containing self-generated alcohol which are capable of being consumed as ordinary alcoholic beverages.	Thirty-eight naye paise per litre of the strength of London proof spirit.
	(iii) All others containing alcohol which are prepared by distillation or to which alcohol has been added.	Rupees fifteen and fifty naye paise per litre of the strength of London proof spirit.
	(iv) Medicinal preparations not containing alcohol but containing opium, Indian hemp, or other narcotic drug or narcotic.	Ten per cent ad valorem.

3. The question raised in this case is one of first impression. Protovine is admittedly "not capable of being consumed as ordinary alcoholic beverage"; and it contains "self-generated alcohol". The petitioner's learned Counsel, therefore, contended that it falls under clause (i) of Item 2 of the Schedule in the Act, and that the duty is nil. On the other hand, the learned Government Pleader, appearing for the respondents, contended that medicinal preparations falling under Item 2 are divided into two categories, namely (i) those containing self-generated alcohol and (ii) those which are prepared by distillation and containing alcohol or to which alcohol is added.

Medicinal preparations mentioned in clauses (i) and (ii) of Item 2 fall under the first category; and all others fall under the second category. According to him, the first category relates to medicinal preparations containing self-generated alcohol only; and a medicinal preparation to which alcohol is added falls under the second category. The learned Government Pleader submitted that protovine, being a preparation "to which alcohol has been added", falls under clause (iii) of Item 2, and duty is payable thereon at Rs. 15.50 per litre of the strength of London proof spirit.

4. Clause (iii) of Item 2 in the schedule of the Act relates to:—

"All others containing alcohol which are prepared by distillation or to which alcohol has been added."

It is common case that "all others" means medicinal preparations which do not fall under clause (i) or clause (ii) of Item 2. Shri K. V. Suryanarayana Iyer, the

learned Counsel for the petitioner, submitted that protovine, being a medicinal preparation containing self-generated alcohol and to which alcohol has been added, cannot fall under clause (iii) of Item 2. In other words, the argument is this: Protovine, without alcohol being added to it, is admittedly a medicinal preparation falling under clause (i) of Item 2. Clause (iii) of Item 2 deals with "all others", namely all other medicinal preparations not dealt with in clauses (i) and (ii), and which satisfy the further requirements of clause (iii).

As protovine falls under clause (i), it cannot fall under clause (iii), by alcohol being added to it. According to the learned Counsel, it would still fall under clause (i); or it would not fall under any item in the schedule; and in other case, it is not liable to duty. This contention has considerable force on a plain reading of clauses (i) to (iii) of Item 2 in the schedule; and it is quite a plausible construction. But such a construction would not be consistent with the legislature intent of the Act, and would lead to an absurd result. If Shri Suryanarayana Iyer's contention is accepted, it would follow that a medicinal preparation containing self-generated alcohol and falling under clause (i) of Item 2 would not be liable to duty, and that such preparation falling under clause (ii) of Item 2 would be liable only to a very small rate of duty, whatever may be the quantity of added alcohol in it; whereas, if it does not contain self-generated alcohol, it would fall under Item 2 (iii) and be liable to the high rate of duty chargeable thereunder on the basis of the quantity of alcohol added to it.

That means that the presence of self-generated alcohol, however small it may be, would create all the difference. I can find no sense in such a classification, and I have no doubt that it was not the legislative intent. On the other hand, the object of the Act was to levy a duty on medicinal preparations containing alcohol. It is also clear from the rate of duty fixed in the schedule that the Legislature fixed a very high rate of duty on medicinal preparations containing alcohol, which are prepared by distillation as well as medicinal preparations to which alcohol has been added. I am, therefore, constrained to interpret the expression "all others" in clause (iii) of Item No. 2 as meaning "all medicinal preparations". I do not read clause (iii) as a residuary clause, in the sense a medicinal preparation which falls under clause (i) or clause (ii) would not fall under clause (iii). Such a construction would not be one consistent with the legislative intent.

This leads me to the conclusion that "protovine" falls under clause (iii) of Item 2 in the schedule, and it is liable to duty at Rs 1550 per litre of the strength of London proof spirit, though without alcohol being added to it, it would have fallen under clause (i), and the duty would have been nil.

5. The controversy, whether in respect of a medicinal preparation, to which alcohol has been added and which consequently falls under clause (iii) of Item 2 in the schedule to the Act, is liable to duty only on the alcohol added to it or on the alcohol found in the preparation, now remains for consideration. It appears to me on a reading of the above clause that the duty payable on a preparation made by distillation and containing alcohol is on the quantity of alcohol contained therein, whereas the duty payable on a preparation to which alcohol has been added is on the quantity of alcohol added thereto.

Similarly, the duty payable under clause (ii) of Item 2 will be on the quantity of self-generated alcohol contained in the preparation. It, therefore, follows that protovine is liable to duty only on the quantity of alcohol added to it, and not on the quantity of alcohol found therein. Nothing has been pointed out to me either from the language of the Act or the Rules to justify the contention of the respondents that duty payable on a medicinal preparation to which alcohol has been added is on its total alcoholic content, and not on the quantity of alcohol added to it.

The result of giving effect to such a contention would be to levy a high rate of duty fixed under clause (iii) of Item 2 on a medicinal preparation containing self-generated alcohol as well as added

alcohol, on the basis of the total quantity of alcohol therein, however small may be the quantity of the added alcohol, even though the said preparation without this small quantity of alcohol added to it, would fall under clause (i) of Item 2, and would be completely exempt from duty in respect of the self-generated alcohol. There is no justification for construing clause (iii) in Item 2 in such a way, and it can hardly be the legislative intention.

6. In the result, I quash Ext. P-7, and prohibit the respondents from levying or collecting any duty on protovine except in respect of the alcohol added to it. In other words, the respondent will not be entitled to levy a duty also on the basis of the self-generated alcohol contained in the said preparation. The parties will bear their own costs.

BDB/D.V.C. Petition partly allowed.

AIR 1969 KERALA 126 (V 56 C 31) FULL BENCH

M. MADHAVAN NAIR, T. S.
KRISHNAMOORTHY IYER AND
K SADASIVAN, JJ

S. Narayanan, Petitioner v. Kannamma Bhargavi and others, Respondents.

Criminal Revn. Petn. No. 198 of 1967,
D/- 26-6-1968

Criminal P. C. (1898), Ss. 435, 438 and 439 — Revision — No legal bar to a party coming direct to High Court without first moving Sessions Judge or District Magistrate — AIR 1967 Ker 280, Overruled; AIR 1956 Andh 97, Dissented from — Limitation Act (1963), Art. 131.

There is no legal bar to a party coming direct to the High Court in revision without first moving the Sessions Judge or the District Magistrate and the practice in Kerala High Court, all along has been to entertain such petition in the High Court direct. A party invoking the jurisdiction of the High Court under Sec. 439 read with Sec. 435 should be permitted to come to the High Court direct, without first moving the Sessions Judge or the District Magistrate. The jurisdiction vested in the High Court under S 439 is very wide, and the High Court in exercising the jurisdiction so vested, is not expected to enquire whether the party seeking the remedy had moved the Sessions Judge first. Case law discussed. AIR 1967 Ker 280, Overruled. AIR 1956 Andhra 97, Dissented from. (Para 1)

The Sessions Judge or the District Magistrate is incompetent to render adequate relief to an aggrieved party invoking the revisional jurisdiction vested

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in them under S. 435. If the Court is satisfied that the revision is frivolous, the petition will be dismissed; but on the other hand if it is satisfied that the order of the Subordinate Magistrate has to be vacated, a report to that effect will have to be forwarded to the High Court under S. 438. In either case, the party will have to appear in the High Court and present his case again. It would be improper to compel a party having a strong case in his favour under S. 438 of the Code, to approach first the Sessions Judge or the District Magistrate. He should not be compelled to do so except in cases where the Sessions Judge or the District Magistrate is capable of passing effective orders, as in a case of discharge or dismissal of complaint. In all other revisional matters the aggrieved party may approach the High Court direct if so inclined. (Paras 3, 4)

It is not correct to say that the jurisdiction vested in the Sessions Judge and the District Magistrate on the one hand, and the High Court on the other, is concurrent in the strict sense of the terms. The expression 'concurrent' connotes joint and equal in authority. In other words the two agencies or units should possess co-equal powers; but in the present instance the power is not co-equal. (Para 3)

Further, Article 131 of the new Limitation Act prescribes a period of 90 days for entertaining an application of this nature and the period would run from the date of the decree or order or sentence sought to be revised. The period has to be reckoned from the date of the order of the Magistrate and not of the Sessions Judge declining to make the reference. Normally some time would elapse before the Sessions Judge is able to pass an order either declining to refer or making a reference and by that time the period of ninety days would in most cases run out. When the law confers a right on a party he must be able to enjoy the right without shackles or snag obstructing him. (Para 4)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Guj 126 (V 54)=
1967 Cri LJ 767, Suraj Mohan v. State 2
(1967) AIR 1967 Ker 280 (V 54)=
1967 Ker LT 31=1967 Cri LJ 1640, Devaki v. Kitta 1
(1967) AIR 1967 Pat 223 (V 54)=
ILR 46 Pat 435, Sahdeo Mandal v. Honga Murmu 2, 4
(1956) AIR 1956 Andhra 97 (V 43)=
1956 Cri LJ 571 (2), Veera Ramayya v. Udayagiri Venkata Seshavatharam 1
K. Velayudhan Nair, K. J. Joseph and N. R. K. Nair, for Petitioner; K. George

Varghese and Thomas V. Jacob, for Respondents

SADASIVAN, J.:— The question referred for the decision of the Full Bench is whether a party invoking the revisional jurisdiction vested under Section 435 Code of Criminal Procedure can straightway move the High Court or that he should first move the Sessions Judge or the District Magistrate and then only the High Court. The aggrieved party comes to this Court normally under S. 439 read with Section 435 of the Code. Section 435 reads:—

"The High Court or any Sessions Judge or District Magistrate, or any Sub-Divisional Magistrate empowered by the State Government in this behalf may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence or order be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

If after perusal of the record called for under the above section, the Sessions Judge or the District Magistrate is of opinion that the order of the inferior Court needs correction or setting aside, he must under Section 438, report for the orders of the High Court, the result of such examination and when such report contains a recommendation that a sentence (or an order) be reversed or altered, he may order the execution of the sentence or order be suspended and, if the accused is in confinement, he be released on bail. In the case of the High Court on the other hand, when any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, it is open to it in exercise of any of the powers conferred on a Court of Appeal by Sections 423, 426, 427 and 428, to impose the sentence. Thus the High Court alone can pass effective orders in correction of the order of the Subordinate Magistrate, and so the question is whether the party aggrieved can straightway come to this Court by-passing the Sessions Judge or the District Magistrate as the case may be.

We do not see any legal bar to a party coming direct to this Court without first moving the Sessions Judge or the District Magistrate and the practice, here, all along has been to entertain such petitions in the High Court direct. But in

some States "a practice of long standing has grown up under which the High Court does not ordinarily entertain an application in revision unless the District Magistrate or the Sessions Judge has been moved first." A Division Bench of this Court in *Devaki v. Kitta*, 1967 Ker LT 31=(AIR 1967 Ker 280) upholding the above practice and laying down and settling the procedure for this Court, has held that a party invoking the revisional jurisdiction under Section 435 has no right to approach the High Court direct, without moving in the first instance, the Sessions Judge, who according to the learned Judges has concurrent revisional jurisdiction, with the High Court. The aforesaid Division Bench decision now stands in the way of a petition in revision under Section 435 being received in this Court direct. The learned Judges of the Division Bench have followed in support of their view a Division Bench ruling of the Andhra Pradesh High Court in *Veera Ramayya v. Udayagiri Venkata Seshavatharam*, AIR 1956 Andhra 97. Chief Justice Subba Rao, on a review of the relevant authorities, observed in that case that the practice followed by all the High Courts except Madras, was, not to entertain revision directly in the High Court from orders of the Subordinate Magistrate, unless the aggrieved party in the first instance had moved the Sessions Judge or the District Magistrate as the case may be. Gopalan Nambiyar, J., speaking for the Bench in 1967 Ker LT 31=(AIR 1967 Ker 280) would observe:—

"But what is contended by the Counsel for the petitioner is that the Sessions Judge cannot pass an effective order in revision, but must refer the case to the High Court under Section 438 of the Code to be dealt with under Section 439. Even so, the question arises whether as a matter of salutary practice, and in the interests of the better and efficient administration of justice, the party should first move the inferior Court having concurrent revisional jurisdiction, before approaching the High Court."

We doubt very much whether the practice is really salutary and conducive to the better and efficient administration of criminal justice. Chief Justice Subba Rao seems to have weighed in the decision cited, the points for and against the alleged practice and has observed that the weight of authority and reasoning is in favour of continuing the practice. The points in favour are.—

(a) The time of the High Court will not be wasted with frivolous applications;

(b) The High Court will have the advantage of the considered opinion of the Sessions Judge or the District Magistrate as the case may be and in most of the

cases its work would be facilitated or minimised in disposing of revisions;

(c) The Subordinate Courts are within the easy reach of the parties and the expenditure to be incurred will be comparatively less than in the High Court;

(d) It avoids conflict of jurisdiction; and

(e) The legislature in conferring concurrent jurisdiction may reasonably be assessed to have intended that the inferior Court should exercise jurisdiction in the first instance.

The points against are:—

(1) The Subordinate Courts have no inherent power to make interim orders of stay and, therefore, an aggrieved party may not get the entire relief he seeks if he approaches the Sessions Court or the District Magistrate's Court in the first instance;

(2) The Sessions Court or the District Magistrate's Court will not be in a position to make a final order and a party has to make arrangements for representing him in two Courts i.e., in the Sessions Court or the District Magistrate's Court as the case may be and also in the High Court; and

(3) The order of the High Court would be final whereas if the revision petition was dismissed by the Subordinate Court, another revision may have to be filed in the High Court.

The learned Chief Justice would conclude finally that the prevailing practice namely, to prevent a revision under Section 435 being preferred direct to the High Court, "would carry out the intention of the Legislature and would better serve the interests of the public from the administrative and judicial points of view". On a careful survey of the authorities bearing on the point and on considering carefully the points for and against, we are of the view that a party invoking the jurisdiction of this Court under Section 439 read with Section 435 should be permitted to come to this Court direct, without first moving the Sessions Judge or the District Magistrate. The jurisdiction vested in this Court under Section 439 is very wide, and this Court in exercising the jurisdiction so vested, is not expected to enquire whether the party seeking the remedy had moved the Sessions Judge first. Chief Justice Subba Rao himself has made this position clear in the following words:—

"We should not be understood to have laid down that the High Court has no jurisdiction to entertain a revision in the first instance. The Criminal Procedure Code in terms expressly confers the jurisdiction. Nor do we say that it is an inflexible rule of law that under no circumstances should the High Court entertain a revision if the aggrieved party did not file a revision in the first instance in the inferior Court. Nor do we intend to

R. S. Dabir, for Petitioner; Ku. Rama Gupta, Govt. Advocate, for the State.

SINGH J.: The petitioner, which is a firm consisting of four partners, took a mining lease for a period of three years from the erstwhile State of Gwalior in the year 1947. By a notice issued on 12th November 1965, under section 146 of the Madhya Pradesh Land Revenue Code, 1959 the petitioner was called upon by the Additional Tahsildar, Gwalior to deposit Rs. 20,290.84 paise towards the dues in respect of the aforesaid mining lease within four days from the receipt of the notice. This notice also intimated the petitioner that in case of default the amount due will be recovered as an arrear of land revenue. The petitioner by this petition under Article 226 of the Constitution challenges this notice on the ground that the mining lease did not contain any term that the amount due under it, will be recoverable as an arrear of land revenue and therefore the threatened recovery proceedings are in excess of jurisdiction of the revenue authorities. In reply to the Writ Petition, the State does not deny that the mining lease did not contain any condition enabling recovery of the sums due under it as arrears of land revenue. The recovery proceedings are, however, supported on the basis of section 25 of the Mines and Minerals (Regulation and Development) Act, 1957. In answer to the stand taken by the State, the learned counsel for the petitioner contends that section 25 is not retrospective and does not apply to a mining lease executed prior to or to any sum falling due before the coming into force of the Act.

2. The question raised in this petition thus pertains to the construction of section 25 of the Mines and Minerals (Regulation and Development) Act, 1957 which reads as follows:

"S. 25 Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made thereunder or under the terms and conditions of any prospecting licence or mining lease, may on a certificate of such officer as may be specified by State Government in this behalf by general or special order, be recovered in the same manner as an arrear of land revenue"

3. The first part of the section relates to recovery of "any rent, royalty, tax, fee or other sum due to the Government under this Act or the Rules made thereunder". This is clearly prospective and refers to sums falling due after the operation of the Act or the Rules, for a sum cannot become due under an Act or Rules made thereunder unless the Act or Rule, as the case may be, has come into force.

4. The second part of the section relates to recovery of "any rent, royalty,

tax, fee or other sum due to the Government under the terms and conditions of any prospecting licence or mining lease." There is no reason to restrict this part of the section to mining leases executed or sums falling due after the coming into force of the Act. The word 'due' merely means 'payable' without reference to any time and is not limited to rent etc. falling due in future. The section does not create any liability but provides a procedure for enforcing liability and being a procedural section, will enable recovery after coming into force of the Act of any rent, royalty or other sum due under any prospecting licence or mining lease in the same manner as an arrear of land revenue irrespective of whether the sum to be recovered became payable prior to or after the coming into force of the Act. This construction is supported by the decision of the Supreme Court in *Abdul Karim v. Deputy Custodian General*, AIR 1964 SC 1256 where the Court considered section 48 of the Administration of Evacuee Property Act, 1950 as amended by Act 91 of 1956. The amended section 48 makes any sum payable to the Government or to the Custodian in respect of any evacuee property, under any agreement, express or implied, lease or other document, recoverable as an arrear of land revenue. The Supreme Court held that the amended section 48 was procedural and applied even for recovery of such claims which arose before the amended section was inserted in the Act.

Applying the same reasoning, it must be held that the mode of recovery as an arrear of land revenue prescribed by section 25 of the Mines and Minerals (Regulation and Development) Act, 1957 can be applied for recovering any rent, royalty or other sum due to the Government under the terms and conditions of any prospecting licence or mining lease whether the sum to be recovered became due before or after the coming into force of the Act. The question whether the section applies to sums payable under a mining lease executed prior to the coming into force of the Act was also examined by this Court in *Veljee Chawra v. State of M. P.*, Misc Petn. No. 384 of 1964 D/- 18-11-1964 (MP), and was answered in the affirmative. In our opinion, section 25 of the Mines and Minerals (Regulation and Development) Act, 1957 enables the Government to recover any sum due under a mining lease as an arrear of land revenue irrespective of whether the sum became due or the mining lease was executed prior to or after coming into force of the Act.

5. The petition fails and is dismissed with costs, Counsel's fee Rs. 150/-. The

outstanding amount of security deposit shall be refunded to the petitioner.
YPB/D V.C. Petition dismissed.

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(V 56 C 17)

P. V. DIXIT, C. J. AND G. P. SINGH, J.

Smt Bimla Devi Sud, Applicant v. Controller of Estate Duty, M. P., Nagpur and Bhandara, Nagpur, Opposite Party.

Misc Civil Case No. 8 of 1967, D/-19-9-1968.

(A) Estate Duty Act (1953), S. 13 — National Savings Certificates purchased by deceased jointly in his and wife's name — Deceased's will purporting to gift away absolutely such certificates but not transferred to her name exclusively — S. 13 applies and such amount cannot be excluded from the property passing on death of deceased.

The provision of section 13 applies where (a) a person is entitled absolutely to any property or to the funds with which the property was purchased; (b) he transferred the property to the joint ownership of himself and another; (c) with the result that the beneficial interest in some part of the property accrues or arises by survivorship to the other person on his death. If these three conditions are satisfied then the whole property is deemed to pass on the death of the person who was the absolute owner of the property prior to the transfer.

Where the National Savings Certificates were purchased by the deceased out of his own funds; the certificates stood in the joint name of the deceased and his wife; and the beneficial interest in the entire lot of certificates arose to the accountable person by survivorship, all the conditions mentioned in section 13 are satisfied and it must be taken that the amount of the National Savings Certificates passed on the death of the deceased. Hence such amount cannot be excluded from the property passing on the death of the deceased.

(Para 4)

(B) Estate Duty Act (1953), S. 14 (1) — Insurance policies on life of deceased and assigned to wife — Policies kept up by regular payment of premia wholly for her benefit — Entire amount of policies must be deemed to have passed on deceased's death — Burden of proving that such policies did not pass on the death of the assured is on the person accountable. 1944 A. C. 372, Foll.

(Para 6)

(C) Estate Duty Act (1953), S. 7—Debt due to deceased — Cannot be excluded from Estate Duty solely because it had become barred by time — Though right

to recover such debt is extinguished by law of limitation, debt itself is not extinguished — Limitation Act (1908), section 3. AIR 1932 PC 178, Foll.

(Para 7)

Cases Referred: Chronological Paras (1944) 1944 AC 372=113 LJ KB 465,

Barclays Bank Ltd. v. Attorney General

(1932) AIR 1932 PC 178 (V 19) = 1932-6 ITC 453, Commr. of Income Tax, C. P. and Berar v. S. M. Chitnavis

Y. S. Dharmadhikari, for Applicant; M. Adhikari with P. S. Khirwadkar, for Opposite Party.

DIXIT, C. J.: This is a reference under section 64 (1) of the Estate Duty Act, 1953, (hereinafter called the Act), by the Appellate Tribunal (Central Board of Direct Taxes, New Delhi) at the instance of the accountable person. The questions, which the Tribunal has placed before us for decision, are—

"(1) Whether on the facts and in the circumstances of the case, the sum of Rs. 62,300/- being the realisable value of the National Savings Certificates held in the joint names of the deceased and his wife was property passing on death or deemed to pass on death having regard specially to section 13 of the Estate Duty Act.

(2) Whether on the facts and in the circumstances of the case, the sum of Rs. 33,694/- being the proceeds of life insurance policies on the life of the deceased was property passing on death or deemed to pass on death having regard to the provisions of section 14 of the Estate Duty Act.

(3) Whether on the facts and in the circumstances of the case, the sum of Rs. 19,374/- being debt due to the deceased from M/s Kishandas Shamlal was rightly included in the principal value of the estate of the deceased."

2. The estate duty assessment pertains to the assessment of the property of Nandlal Sud who died on 26th November 1957. His widow, as the accountable person, furnished to the Assistant Controller of Estate Duty, Nagpur, a statement of the property passing on the death of the deceased. The Assistant Controller included in the property of the deceased liable to estate duty the following items amongst others—

(i) National Savings Certificates of the face value of Rs. 50,000/- purchased by the deceased in the joint names of himself and his wife. The encashable value of these securities was Rs. 62,300/- on the date of death of Nandlal Sud;

(ii) Rs. 33,694/- being the amount of insurance policies on the life of the deceased assigned to his wife; and

(iii) an amount of Rs. 19,374/- being the amount of a debt owed to the deceased by M/s Kishandas Shamlal.

The Assistant Controller determined the principal value of the estate left by the deceased at Rs. 4,16,396/- and the estate duty payable at Rs 30,387.64 P.

3. The accountable person then preferred an appeal before the Appellate Tribunal objecting to the inclusion of the aforesaid three amounts in the property of the deceased passing on his death. The accountable person, relying on paragraph 7 of a registered will executed on 15th September 1955 by Nandlal Sud, contended that the amount of the National Savings Certificates and of the insurance policies had been gifted to her by the deceased more than two years before his death and could not, therefore, be regarded as property of the deceased passing on his death to the accountable person. In regard to the debt of Rs. 19,374/- owed by M/s Kishandas Shamlal, the contention of the accountable person was that it had become barred by time and should not have been, therefore, included in the estate of the deceased liable to estate duty. All these contentions were rejected by the Tribunal.

4. Taking first the question of the inclusion of the amount of the National savings certificates in the property of the deceased passing on his death, the paragraph of the will executed by Nandlal Sud, on which the accountable person relies, for contending that the amount had been gifted to her more than two years before her husband's death, is as follows —

"My wife, Shrimati Bimla Devi, has been given the following properties:—

(a) Rs 50,000/- only; and this amount now stands in the shape of National Savings Certificates in her own name;

(b) My seven life insurance policies for an aggregate sum of Rs. 31,000/- only have been already assigned to her. The said properties were given to her absolutely and she is full and absolute owner thereof with complete and full powers of disposal at all times before or after my death. She can cash the National Savings Certificate and receive payment herself without anybody's intervention, whatsoever, as also the amounts of the life policies. No person shall have any right to challenge that right of hers in any manner whatsoever." It will be seen that this paragraph of Nandlal Sud's will merely contains a recital that the amount of the National Savings Certificates has been given to the accountable person absolutely. That recital by itself is no proof of the fact that the amount of the National Savings Certificates had been gifted by the

deceased to his wife more than two years before his death. In fact, as the Tribunal has found, no evidence whatsoever was produced before it by the accountable person to establish the alleged gift. On the other hand, the facts found by the Tribunal altogether militate against there being any gift of the amount of the National Savings Certificates by Nandlal Sud to his wife. It was not disputed before the Tribunal that the National Savings Certificates had been purchased by the deceased out of his own moneys. It has been found as a fact that the Certificates were purchased between the years 1949 to 1951 and stood in the joint names of the deceased and his wife. If the amount of Certificates had been gifted absolutely by Nandlal Sud to his wife, then the Certificates would have been transferred to her name exclusively. But this was not done. The accountable person made no attempt whatsoever to show that after the alleged gift her name alone was entered in respect of the Certificates. Indeed in the memorandum of appeal, which the accountable person filed before the Tribunal, one of the grounds raised was that—

"the amount of Rs. 62,300/- which is the encashable value of the National Savings Certificates could not be treated as the property of the deceased, particularly in face of the fact that the amount of Rs 50,000/- in the National Savings Certificates was in the name of Smt. Bimla Devi along with that of the deceased."

It is plain that this ground was taken on the acceptance of the position that the National Savings Certificates stood in the joint names of the accountable person and the deceased at the time of his death. These being the facts, section 13 of the Act, which runs thus—

"13. Where a person, having been absolutely entitled to any property or to the funds with which any property was purchased, has caused it to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, either by himself alone, or in concert, or by arrangement, with any other person so that the beneficial interest in some part of that property passes or accrues by survivorship on his death to the other person, the whole of that property shall be deemed to pass on the death"

comes into play. It will be seen that this provision applies where (a) a person is entitled absolutely to any property or to the funds with which the property was purchased, (b) he transferred the property to the joint ownership of himself and another; (c) with the result that the beneficial interest in some part of the property accrues or arises by survivor-

ship to the other person on his death. If these three conditions are satisfied, then the whole property is deemed to pass on the death of the person who was the absolute owner of the property prior to the transfer. Here, all these conditions are found to exist in regard to the National Savings Certificates. They were purchased by the deceased out of his own funds; the certificates stood in the joint names of the deceased and his wife, and the beneficial interest in the entire lot of Certificates arose to the accountable person by survivorship. It must, therefore, be taken that the amount of the National Savings Certificates passed on the death of Nandlal Sud. The Tribunal, therefore, rightly rejected the contention of the accountable person for exclusion of this amount from the property passing on the death of the deceased.

5. In regard to the amount of Rupees 33,694/- under insurance policies on the life of the deceased, the policies, as found by the Tribunal, were no doubt assigned by Nandlal Sud to his wife. The recital in paragraph 7 of the will is of no avail whatsoever for showing that the amount payable under the insurance policies had been gifted away to the accountable person by the deceased even before his death or before the amount became payable on his death. In paragraph 7 of the will there is only a recital of the fact that seven insurance policies on the life of the deceased had been assigned to Nandlal Sud's wife. The Tribunal has found as a fact that the policies on the life of the deceased were wholly kept up by him for the benefit of his wife to whom the policies had been assigned. On this finding, the Tribunal held that by virtue of section 14 (1) of the Act the amount of the insurance policies must be deemed to have passed on the death of the assured.

6. Shri Dharmadhikaree, learned counsel appearing for the accountable person, however, submitted that section 14 (1) of the Act could not be applied when there was no evidence to show that after assignment the policies were wholly kept up by the deceased for the benefit of his wife to whom the policies had been assigned. Learned counsel suggested that if all the premiums in respect of the policies had been fully paid up before the assignment, then there would not be "keeping up" of the policies within the meaning of section 14 of the Act. Section 14 (1) is as follows—

"14. (1) Money received under a policy of insurance effected by any person on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy

is partially kept up by him for such benefit, shall be deemed to pass on the death of the assured."

Under this provision, when an insurance policy is kept up by the deceased wholly for the benefit of a donee, whether nominee or assignee, then the whole of the policy-money shall be deemed to pass on the death of the assured. To "keep up" an insurance policy means to keep it "live" by regular payment of the premiums which is the normal method of keeping up a policy. If the premiums are not paid as and when they fall due, then the policy lapses and is not "kept up". Section 14 (1) is somewhat analogous to section 2 (1) (c) of the English Finance Act, 1894. A detailed analysis of section 2 (1) (c) of the English Act is to be found in the decision of the House of Lords in *Barclays Bank Ltd. v. Attorney-General*, 1944 AC 372. It will be sufficient here to reproduce what Lord Wright said about the import of "keeping up" a policy and of section 2 (1) (c) of the English Act. In his speech, Lord Wright observed—

"I think that 'keeping up' a policy according to the ordinary use of language connotes payment of the premiums, which is the normal method of keeping up a policy. This generally involves periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not, apparently, contemplate this contingency, but, however that may be, the insertion of the words 'in proportion to the premiums paid by him' is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially. In that case the death duty is to fall on the deceased's estate in proportion to the premiums paid by him. The change in expression from 'kept up' to 'premiums paid' is necessary to give the basis of apportionment, but at the same time it identifies 'paying the premiums' with keeping up the policy. It is not necessary to speculate why this apportionment was provided for. The language of the sub-section seems sufficiently plain. It supports the view that when the Act refers to keeping up the policy it means the method of paying the premiums as they fall due."

It is thus plain that if the deceased kept up the policies wholly for the benefit of his wife to whom the policies had been assigned, then the entire amount of the policies must be deemed to have passed on the death of the assured. The Tribunal has found that the policies were on the life of the deceased and were kept up by him. Before the Tribunal, the accountable person made no attempt

whatsoever to show that after the assignment the policies were not kept up by the deceased by paying any premium amount and that it was the assignee-wife who thereafter paid the amount of the premium or that even before the assignment the amount of all the premiums in respect of the policies had been paid. The burden of proving that the amount of the policies either wholly or partly did not pass on the death of the assured was clearly on the accountable person who claimed the exclusion of that amount from the property of the deceased passing on his death. It is noteworthy that even in the memorandum of appeal filed before the Tribunal the assessee did not raise the contention that the policies had not been kept up by the deceased. The ground taken in the memorandum of appeal by the accountable person for the exclusion of the insurance amount was formulated thus—

"Regarding the Insurance amount of Rs. 33,694/- it should have been seen that the said amount was duly assigned by the insured in favour of his wife before more than two years of his death. The amount having been so assigned could not have constituted the property of the deceased and consequently the insurance amount was not liable to Estate Duty assessment."

In our judgment, on the facts found by the Tribunal it must be held that under section 14 (1) of the Act the whole amount of the insurance policies passed on the death of the assured and could not, therefore, be excluded from the property of the deceased passing on his death and liable to estate duty.

7. The Tribunal was also right in rejecting the accountable person's contention with regard to the exclusion of Rs. 19,374/- due to the deceased from M/s Kishandas Shamlal. The accountable person founded the claim for exclusion solely on the ground that it had become barred by time. The Tribunal held that even though by the law of limitation the right of the deceased to take civil action for recovery of the debt was extinguished, the debt itself was not extinguished; that in income-tax proceedings M/s Kishandas Shamlal had stated that the firm was in a position to repay the loan amount and that the firm had also shown the debt amount as a liability even as late as 31st October 1959. In our judgment, the Tribunal was right in coming to the conclusion that it did on this point. The matter seems to be concluded by the decision of the Privy Council in Commissioner of Income Tax, C P. & Berar v. S. M. Chitnavis, AIR 1932 PC 178=6 ITC 453. In that case the Privy Council said—

"Whether a debt is a bad debt, and if so at what point of time it became

a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal and not by the ipse dixit of anyone else. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt; still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad; neither is a debt which is not statute barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact to be determined after consideration of all relevant circumstances."

It is clear from these observations of the Privy Council that the finding of the Tribunal that the debt in question did not become a bad debt is a finding of fact. On that finding, the contention of the accountable person that the amount of Rs. 19,374/- should have been excluded from the property of the deceased passing on his death and liable to estate duty was rightly rejected.

8. In conclusion, all the three questions referred to us for decision are answered in the affirmative. The accountable person shall pay costs of this reference. Counsel's fee is fixed at Rs. 250/-.

DGB/D.V.C.

Reference answered affirmatively.

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(V 56 C 18)

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

M/s Orient Paper Mills Ltd. Amlai, Petitioner v. The Commissioner of Sales Tax, Madhya Pradesh, Indore and another, Respondents.

Misc. Petn. No. 386 of 1967, D/- 11-9-1968.

(A) Sales Tax — Central Sales Tax Act (1956), Ss. 7 (3), (4) (b), 8 (1) and (3)—Number of goods that a dealer can purchase for purposes of S. 8 (1) — Cannot be restricted by authority issuing registration certificate — No provision either under Act or Rules authorising him to do so — Restriction on ground of possible misuse of certificate, cannot be justified.

There is no provision in the Act or the Rules made thereunder, giving to the authority issuing certificate of registration a power to restrict the number of goods that a dealer can purchase for the purposes of section 8 (1) of the Act. On the other hand sections 7 (3) and 8 (3) speak of the "goods" to be

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specified in the certificate of registration as "goods of the class or classes" for the purposes of section 8 (1). The expression "goods of the class or classes" clearly does not carry the implication of specification of the goods in the certificate of registration by the number of goods. The possible misuse of the certificate cannot afford any justification for putting a restriction on the number of goods the dealer can purchase. If a registered dealer misuses the certificate of registration granted to him, then the authority granting it has the power under section 7 (4) of the Act to cancel it. (Para 3)

(B) Sales Tax — Central Sales Tax Act (1956), Ss. 7 (4) (a), 8 (4) — Central Sales Tax (Registration and Turnover) Rules (1957), Rule 5 (1) — Application for amendment of registration certificate — Date of effectiveness of amendment — Date of application and not when amendment is allowed, should be taken — Responsibility for delay in allowing amendment is on Sales Tax authority.

The Act or the Central Sales Tax (Registration and Turnover) Rules, 1957, do not contain any provision indicating the date from which any amendment in the certificate would be effective. It would, however, be equitable and reasonable to hold that where the purchasing dealer applies for amendment of a registration certificate, it is the date on which he makes the application for amendment that should be taken as the date of effectiveness of the amendment, if it is allowed. Considerable time may elapse between the making of an application for amendment of the registration certificate and the passing of the final order allowing the amendment. The responsibility for the delay in allowing the amendment lies on the shoulders of the sales-tax authority for which clearly the dealer cannot be made to suffer. The requirement in the form of certificate of registration, of mentioning the date of commencement of its validity, would not have been necessary, if the effectiveness of the certificate were to commence from the date of its issue or the date of its amendment. If the amendment of the registration certificate is made effective from the date of the application for amendment, then the goods in question would become specified in the registration certificate as from that date and then there would be no difficulty in giving a declaration under section 8 (4) of the Act.

(Paras 4, 5)

Y. S. Dharmadhikari, for Petitioner;
K. K. Dube, Govt. Advocate, for Respondents.

DIXIT, C. J.: The petitioner has been registered as a dealer under section 7 of the Central Sales Tax Act, 1956

(hereinafter referred to as the Act). In the certificate of registration issued to it, certain goods were specified under Sections 8 (1) (b) and 8 (3) of the Act. On 10th September 1965 the petitioner-firm applied for amendment of the registration certificate so as to add thereto the following goods for purposes of sections 8 (1) (b) and 8 (3):

"Diesel locomotives, Motor vehicles, Cranes, Fork Lifts, Trolleys and other equipments and vehicles, electrical bulbs and lighting fixtures".

This prayer for amendment was allowed in part by the Sales Tax Officer, Shahdol, in regard to "electrical bulbs and lighting fixtures for factory". The amendment was, however, allowed in regard to other goods by the Commissioner of Sales Tax, Madhya Pradesh by his order dated 18th May 1967. While allowing the amendment the Commissioner of Sales Tax, however, put a restriction on the number of goods the petitioner could purchase after paying the concessional rate of sales-tax under section 8 (1) (b) and directed the amendment of the registration certificate by insertion of the following entries:

"Diesel Locomotives	..	2
Cranes	..	3
Fork Lifts	..	6
Rly. line trollies	..	14
Hand Trollies	..	25
Trucks	..	10
Coal-loaders	..	2
Trailors	..	7
Tractors	..	3"

The Commissioner of Sales Tax rejected the prayer of the petitioner that the amendment in the registration certificate should be made effective from the date, that is 10th September 1965, on which it submitted to the Sales Tax Officer, Shahdol, its application for amendment.

2. The petitioner now seeks a writ of certiorari for quashing the order dated 18th May 1967 of the Commissioner in so far as it restricted the number of goods that the applicant could purchase and made the amendment in the registration certificate effective from the date of the order of the Commissioner, namely, 18th May 1967. The petitioner further prays that a direction be issued to the respondents to delete the restriction put on the number of goods the petitioner could purchase and make the amendment effective from 10th September 1965.

3. Having heard learned counsel for the parties we have reached the conclusion that this application must be granted. There is no provision in the Central Sales Tax Act or the Rules made thereunder giving to the authority issuing a certificate of registration power to restrict the number of goods that a dealer could purchase for the purposes

of section 8 (1) of the Act. On the other hand, sections 7 (3) and 8 (3) speak of the "goods" to be specified in the certificate of registration as "goods of the class or classes" for the purposes of section 8 (1). The expression "goods of the class or classes" clearly does not carry the implication of specification of the goods in the certificate of registration by the number of goods. The Commissioner of Sales Tax imposed a restriction on the number of goods the petitioner could purchase for the purposes of section 8 (1) mainly persuaded by the reason that the certificate might be misused "if the quantum of goods were not to be specified in the certificate of registration". The possible misuse of the certificate can hardly afford any justification for putting a restriction on the number of goods the petitioner could purchase when there is no statutory provision empowering the authority granting the certificate to specify the goods in the certificate with reference to the number of goods that could be purchased. If a registered dealer misuses the certificate of registration granted to him, then the authority granting it has the power under section 7 (4) of the Act to cancel it. In our judgment, the restriction put by the Commissioner of Sales Tax on the number of Diesel Locomotives, Cranes, Fork Lifts, Railway Line Trolleys, Hand Trolleys, Trucks, Coal-loaders, Trailors and Tractors that the petitioner could purchase after paying concessional rate of tax cannot be sustained.

4. In regard to the date of effectiveness of the amendment in the registration certificate, the Act or the Central Sales Tax (Registration and Turnover) Rules, 1957, do not contain any provision indicating the date from which any amendment in the certificate would be effective. The amendment can be effective either from the date on which it is made or from the date on which the purchasing dealer applies for amendment of the registration certificate. In our opinion, it would, however, be equitable and reasonable to hold that where the purchasing dealer applies for amendment of a registration certificate, it is the date on which he makes the application for amendment that should be taken as the date of effectiveness of the amendment if it is allowed. It is easy to see that considerable time may elapse between the making of an application for amendment of the registration certificate and the passing of the final order allowing the amendment. The responsibility for the delay in allowing the amendment lies on the shoulders of the sales-tax authority for which clearly the dealer cannot be made to suffer. Actually, in the present case, the petitioner

made the application for amendment of the registration certificate on 10th September 1965, but it was not until 30th March 1966 that the Sales Tax Officer made an order allowing the amendment in part only in regard to electrical bulbs and lighting fixtures for factory. The order of the Commissioner was passed thereafter on 18th May 1967. Thus, there was an interval of nearly 20 months between the making of an application for amendment and the passing of the final order by the Commissioner allowing the amendment in respect of Diesel Locomotives, Cranes etc.

Some guidance on this point is available from the fact that Form B in which a certificate of registration is issued under Rule 5 (1) of the Central Sales Tax (Registration and Turnover) Rules, 1957, requires that the date from which the certificate is valid must be stated in the certificate. In the certificate the date of commencement of its validity has to be stated thus:

"This certificate is valid from until cancelled"
Such a requirement would not have been necessary if the effectiveness of the certificate were to commence from the date of its issue or the date of its amendment.

5. Learned Government Advocate submitted that the amendment in the registration certificate could not be as from a past date inasmuch as on the date of the purchase of the goods inserted by the amendment, the petitioner would not have been in a position to give a declaration under section 8 (4) of the Act as the goods had not been specified in the registration certificate on the date of the purchase. This is an argument in a circle. If the amendment of the registration certificate is made effective from the date of the application for amendment, then the goods in question would become specified in the registration certificate as from that date and then there would be no difficulty in giving a declaration under section 8 (4) of the Act.

6. For these reasons, this petition is allowed. The order dated 18th May 1967 of the Commissioner of Sales Tax is quashed in so far as it restricts the number of Diesel Locomotives, Cranes, Fork Lifts, Railway Line Trolleys, Hand Trolleys, Trucks, Coal-loaders, Trailors and Tractors which the petitioner can purchase after paying the concessional rate of tax and in so far as it makes the insertion of the above goods in the registration certificate effective from 18th May 1967. The Commissioner of Sales Tax is directed to delete from the registration certificate the restriction put on the number of aforesaid goods which the petitioner can purchase and to make the amendment allowed in the certificate

effective from the date of the petitioner's application for amendment, namely, 10th September 1965. The petitioner shall have costs of this application. Counsel's fee is fixed at Rs. 150/-. The outstanding amount of the security deposit shall be refunded to the petitioner.

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Petition allowed.

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INDORE BENCH:

P. V. DIXIT, C. J. AND S. B. SEN, J.

Jagannath Bheraji, Applicant v. Harisingh Kishanji and others, Opposite Party.

Civil Revn. No. 462 of 1967, D/- 3-4-1968, from order of V. R. Newaskar, J. D/- 21-2-1968.

(A) Provincial Small Cause Courts Act (1887), Ss. 16 and 23 — Civil P. C. (1908), Ss. 24 (4), 107 and 115 — Regular court, when can try small cause suit— Decision of court in suit, which it is not competent to try, is nullity — Objection to jurisdiction can be taken even in appeal or revision: C. R. No. 377 of 1966 D/- 29-3-67 (MP) and C. R. No. 208 of 1966, D/- 10-4-67 (MP), Overruled.

Section 16 of Provincial Small Cause Courts Act is imperative in its terms. Its language is plain enough. That provision means that if a suit is cognizable by a Court of Small Causes, and if at the time of the institution of the suit there is a Small Cause Court having jurisdiction to try it, then the suit shall not be tried by any other court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court. It is only when there is at the time of the institution of the suit no Court of Small Causes having jurisdiction to try the suit that a suit can be tried by any other court having jurisdiction as an ordinary suit. (Para 3)

The expression "save as expressly provided by this Act or by any other enactment for the time being in force", with which section 16 of the Act begins, only emphasizes the fact that if a regular court by error tries a suit which is of small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of such court are without jurisdiction and a nullity. Such an express provision however is to be found in Section 23 of the Act which gives jurisdiction to ordinary courts to try a small cause suit as an ordinary suit removing the bar contained in section 16 for the trial of a small cause suit by a court of ordinary jurisdiction.

It is noteworthy that when a Small Cause Court returns a plaint under subsection (1) of section 23 it has to comply with the provisions of O. 7 R. 10 C. P. C. (corresponding to section 57 of the Civil Procedure Code, 1882). Subsection (2) also says that when the Small Cause Court returns the plaint, that Court shall be deemed to have been unable to entertain the suit by reason of a cause of nature like to that of defect of jurisdiction. If section 16 had the effect of making an ordinary court competent to try a suit of a small cause nature as an ordinary suit, then it would not have been necessary to incorporate section 23 in the Act. Again, under section 24 (4), Civil P. C. a suit can be transferred from a Court of Small Causes to a regular Court. But then, as provided by section 24 (4), C. P. C., the court to which the suit is transferred is deemed to be a court of small causes for purposes of the suit transferred. Section 24 (4), C. P. C. thus removes the bar imposed by section 16 of the Act against the trial of a suit of Small Cause nature by an ordinary court when there is a Small Cause Court exercising jurisdiction within the same local limits and the suit is cognizable by that court, and at the same time gives jurisdiction to the ordinary court to which the suit is transferred to try the suit as a small cause suit. Both section 23 of the Act and section 24 (4) C. P. C., only reinforce the conclusion that in the absence of an express statutory provision a regular court has no jurisdiction to try, whether as an ordinary suit or as a small cause suit, a suit which is of small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits. C. R. No. 178 of 1965 D/- 29-9-65 (MP) and MCC No. 27 of 1967 D/- 1-9-1967 (MP) Approved; AIR 1957 Andh Pra 133, Rel. on.

(Para 7)

Section 16 does not deprive the regular courts altogether of jurisdiction in all circumstances in suits cognizable by a Court of Small Causes. The deprivation of jurisdiction of the regular Court is only when at the time of the institution of a suit of small cause nature there is a Court of Small Causes having jurisdiction to try it. But from the mere fact that a regular court is not altogether deprived of jurisdiction by S. 16, it does not at all follow that even if it is deprived of jurisdiction in the circumstances mentioned in section 16 its decision in a suit, which it was incompetent to try, is not a nullity. Further if a suit is tried by a regular court in contravention of section 16 of the Act, then even if no objection to the jurisdiction of the court is taken during the trial that objection can be raised in an appeal

from the final decision of the regular court as also in a revision petition to this Court against the decision of the appellate Court. C. R. No. 377 of 1966 D/- 29-3-1967 (MP) and C. R. No. 208 of 1966 D/- 10-4-67 (MP), Overruled; AIR 1930 Bom 80 held obiter. Case law discussed. (Paras 4 and 5)

(B) Provincial Small Cause Courts Act (1887), Ss. 15 and 16 — S. 15 has no bearing on question of jurisdiction of regular courts to try suit cognizable by court of small causes as ordinary suit when there is already a court of small causes having jurisdiction to try suit.

(Para 8)

Cases Referred: Chronological Paras
(1967) MCC No. 27 of 1967 D/-

1-9-1967 = 1968 MP LJ 147,
State v. Saudan Singh 3

(1967) CR No 377 of 1966 D/- 29-
3-1967 (MP), Manakchand v. Rajmal 1, 2, 8

(1967) CR No. 208 of 1966 D/- 10-
4-1967 (MP), Govardhan v.
Nathu 8

(1965) CR No 178 of 1965 D/- 29-9-
1965 (MP), Mukund v. Firm
Kashilal 1, 3

(1957) AIR 1957 Andh Pra 133
(V 44) = ILR (1957) Andh Pra
270, Venkata Subbaramiah v.
K. Hari Rao 3

(1956) AIR 1956 Mad 610 (V 43),
Chockiah Thevar v. Shanmuga
Sundaram 4

(1930) AIR 1930 Bom 80 (V 17) =
31 Bom LR 1307, Jodha v. Maganlal 6

(1928) AIR 1928 All 38 (V 15) =
ILR 49 All 686, Municipal Board
Benares v. Shambhu Nath 4

(1927) AIR 1927 Bom 663 (2)
(V 14) = 29 Bom LR 273, Abdur
Rahman v. Bharna Budhya 4

(1920) AIR 1920 Nag 39 (V 7) =
55 Ind Cas 328, Nandlal v.
Narayan 4

(1902) ILR 26 Mad 176 = 12 Mad
LJ 264, Ramasamy Chettiar v.
R. G. Orr 4

Y. I. Mehta, for Applicant; R. G.
Waghmare, for Opposite Party.

P. V. DIXIT, C. J.: This revision petition has come up before us on a reference made by Newaskar J., before whom it first came up for hearing. The question, which has been referred to us for decision, is—

"Where a Civil Judge Second Class having only limited power to try Small Cause suits tries a suit of Small Cause nature on the regular side without objection as to his jurisdiction by the defendant, is the decision a nullity when the suit could have been tried as a Small Cause suit by another Court namely the Court of Additional District Judge?"

The learned Single Judge thought it necessary to make this reference because of a conflict in the decisions of this Court in Mukund v. Firm Kashilal, CR No. 178 of 1965 D/- 29-9-1965 (MP) and Manakchand v. Rajmal, CR No. 377 of 1966 D/- 29-3-1967 (MP). In Mukund's case, CR No. 178 of 1965 D/- 29-9-1965 (MP) (Supra) one of us (Sen J.) expressed the view that

"If there exists a Court who has power to hear the suit under Small Cause Courts Act and if the suit is instituted in a Civil Court that Court will have no jurisdiction to hear the suit of a small cause nature".

In the case of Manakchand, CR No. 377 of 1966 D/- 29-3-1967 (MP) (Supra) Krishnan J. has held that there is no inherent lack of jurisdiction if a court, which is otherwise competent, tries a suit in breach of S. 16 of the Provincial Small Cause Courts Act, 1887; and that if the point of jurisdiction is not raised by the defendant in the court below, he cannot be permitted to raise the objection for the first time in revision.

2. The material facts are that the non-applicants filed a suit in the Court of the Civil Judge, Second Class, Hatod, for recovery of Rs. 764.80 from the petitioner. The value of the suit exceeded the pecuniary limit of suits which were cognizable by the Civil Judge as Court of Small Causes. The learned Civil Judge tried the suit as an ordinary suit in his ordinary jurisdiction and gave to the plaintiffs a decree for Rs. 607.80 besides costs. The defendant-applicant then filed an appeal in the Court of the Additional District Judge, Indore, contending that the Civil Judge, Second Class, had no jurisdiction to try the suit as an ordinary suit as the suit was cognizable by a court of Small Causes and when it was filed there already existed a Court of Small Causes having jurisdiction to try the suit as a small cause suit, namely, the Court of the Additional District Judge, Indore, empowered under Section 9 of the M. P. Civil Courts Act, 1958. The learned appellate Judge dismissed the appeal relying on the decision of this Court in CR No. 377 of 1966 D/- 29-3-1967 (MP) (supra). He also reached the conclusion that the decision of the Civil Judge, Second Class, Hatod, was right on merits. The defendant appellant then filed this revision petition.

3. The answer to the question placed before us for decision turns solely on the construction of section 16 of the Provincial Small Cause Courts Act. That provision lays down that—

"Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be

tried by any other court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

Section 16 is imperative in its terms. Its language is plain enough. That provision means that if a suit is cognizable by a Court of Small Causes, and if at the time of the institution of the suit there is a Small Cause Court having jurisdiction to try it, then the suit shall not be tried by any other court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court. It is only when there is at the time of the institution of the suit no Court of Small Causes having jurisdiction to try the suit that a suit can be tried by any other court having jurisdiction as an ordinary suit. Thus section 16 takes away jurisdiction of the regular court to try a suit of small cause nature as an ordinary suit if there is at the time of the institution a Court of Small Causes having jurisdiction to try the suit as a small cause suit. The words "shall not be tried by any other court having jurisdiction within the local limits..." mean that a regular court is incompetent to try a suit cognizable by a Court of Small Causes if at the time of the institution of the suit there is a Court of Small Causes having jurisdiction to try it. This is the view, which has been taken by both of us in two cases, namely, by Sen J. in CR No. 178 of 1965 D/- 29-9-1965 (MP) (Supra) and by the Chief Justice in State v. Saudansingh, MCC No 27 of 1967 D/- 1-9-1967 (MP). This view is also supported by the decision of the Andhra Pradesh High Court in Venkata Subbaramiah v. K. Hari Rao, AIR 1957 Andh Pra 133 and by other cases to which a reference will be made presently.

4. Now, it is elementary that, if a court has no authority to decide a matter, then its decision thereon is a nullity. Further, it is now firmly settled by numerous authorities that an objection as to the court's jurisdiction or authority to try a suit can be raised at any time if the defect of jurisdiction is admitted or proved or manifest. Where a court has no jurisdiction to try a suit of a particular nature, neither the consent of the parties nor their failure to raise objection as to jurisdiction can give jurisdiction to that Court. In this connection, it would be sufficient to refer to *Abdur Rahman v. Bharna Budhya*, AIR 1927 Bom 663 (2); *Municipal Board Benares v. Shambhu Nath*, AIR 1928 All 38; *Ramasamy Chittiar v. R. G. Orr*, (1902) ILR 26 Mad 176; *Nandlal v. Narayan*, AIR 1920 Nag 39; *Chockiah Thevar v. Shanmugasundaram*, AIR 1956 Mad 610 at p 612. If, therefore, a suit is tried by a regular court in contravention

of Section 16 of the Act, then even if no objection to the jurisdiction of the court is taken during the trial that objection can be raised in an appeal from the final decision of the regular court as also in a revision petition to this Court against the decision of the appellate Court.

5. Shri Waghmare, learned counsel appearing for the plaintiff-opponents, however, urged that Section 16 did not deprive the regular courts altogether of jurisdiction in a suit cognizable by a Court of Small Causes; and that if there was a Court of Small Causes having jurisdiction to try the suit, then S. 16 merely prevented the regular Court from trying the suit as a small cause suit but did not prohibit the trial of the suit as an ordinary suit by the regular court. It was said that if a suit cognizable by a Court of Small Causes was tried by a regular court as an ordinary suit then the decision of the regular court was not a nullity. This construction of section 16 cannot be accepted. The argument put forward by the learned counsel involves reading into S. 16 words and expression which are not to be found therein. There is no justification whatsoever for reading the words "shall not be tried by any other court having jurisdiction" as meaning "shall not be tried by any other court having jurisdiction as a small cause suit but can be tried by any other court having jurisdiction as an ordinary suit". No doubt, section 16 has not the effect of making suits cognizable by a Court of Small Causes triable only by a Court of Small Causes and no other courts so that if there is no Court of Small Causes having jurisdiction, then the suit cannot be tried at all. It does not deprive the regular courts altogether of jurisdiction in all circumstances in suits cognizable by a Court of Small Causes. The deprivation of jurisdiction of the regular Court is only when at the time of the institution of a suit of small cause nature there is a Court of Small Causes having jurisdiction to try it. But from the mere fact that a regular court is not altogether deprived of jurisdiction by section 16, it does not at all follow that even if it is deprived of jurisdiction in the circumstances mentioned in section 16 its decision in a suit, which it was incompetent to try, is not a nullity.

6. Learned counsel for the opponents referred us to a decision of the Bombay High Court in *Jodha v. Maganlal*, AIR 1930 Bom 80, where it has been held that failure to comply with section 16 is merely a defect in procedure in proceeding in a court other than the Small Cause Court having jurisdiction to try the suit; but this does not mean that the Court has no jurisdiction to try the suit. That was a case in which a suit

for recovery of rent was filed in the court of Subordinate Judge who was invested with Small Cause Court's powers. He heard the suit as an ordinary suit and transferred it to the Joint Subordinate Judge who had no small cause powers. The learned Judge passed a decree in the tenant's favour. In revision, the Bombay High Court held that the suit should be retried in a proper court as the trial of the suit as an ordinary suit had prejudiced the parties. It was after having reached the conclusion that the suit should be retried by a Small Cause Court having jurisdiction that the learned Judges of the Bombay High Court made the observation that failure to comply with section 16 was merely a defect in procedure. It is thus plain that what has been said in the Bombay decision with regard to S. 16 is obiter.

7. The expression "Save as expressly provided by this Act or by any other enactment for the time being in force", with which section 16 of the Provincial Small Cause Courts Act begins, only emphasizes the fact that if a regular court by error tries a suit which is of small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits, then the proceedings of such court are without jurisdiction and a nullity. That expression means that in the absence of an express provision in the Provincial Small Cause Courts Act or any other enactment for the time being in force, a regular court has no jurisdiction to try a small cause suit, whether as an ordinary suit or as a small cause suit. Such an express provision is to be found in section 23 of the Provincial Small Cause Courts Act which gives jurisdiction to ordinary courts to try a small cause suit as an ordinary suit removing the bar contained in section 16 for the trial of a small cause suit by a court of ordinary jurisdiction. It is noteworthy that when a small Cause Court returns a plaint under sub-section (1) of section 23 it has to comply with the provisions of O. 7 R. 10 C. P. C. (corresponding to section 57 of the Civil Procedure Code, 1882) Sub-section (2) also says that when the Small Cause Court returns the plaint, that Court shall be deemed to have been unable to entertain the suit by reason of a cause of nature like to that of defect of jurisdiction. If section 16 had the effect of making an ordinary court competent to try a suit of a small cause nature as an ordinary suit, then it would not have been necessary to incorporate section 23 in the Provincial Small Cause Courts Act. Again, section 24 (4) C. P. C. is also a provision contemplated by the expression "Save as expressly provided by any other enactment for the time

being in force" occurring in section 16 of the Act. Under that provision, a suit can be transferred from a Court of Small Causes to a regular Court. But then, as provided by section 24 (4), the court to which the suit is transferred is deemed to be a court of small causes for purposes of the suit transferred. Section 24 (4) thus removes the bar imposed by section 16 of the Provincial Small Cause Courts Act against the trial of a suit of Small Cause nature by an ordinary court when there is a Small Cause Court exercising jurisdiction within the same local limits and the suit is cognizable by that court, and at the same time gives jurisdiction to the ordinary court to which the suit is transferred to try the suit as a small cause suit. If section 16 had the effect as contended for by the learned counsel for the opponents, then section 24 (4) C. P. C. need not have been enacted at all. Thus both section 23 of the Provincial Small Cause Courts Act and section 24 (4) C. P. C. only reinforce the conclusion that in the absence of an express statutory provision a regular court has no jurisdiction to try, whether as an ordinary suit or as a small cause suit, a suit which is of small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits.

8. The aforesaid discussion is sufficient to show that the view taken by Krishnan J in CR No 377 of 1966 D/- 29-3-1967 (MP) (Supra) as also in CR No 208 of 1966 D/- 10-4-1967 (MP), that the trial of a suit of small cause nature by a regular court as an ordinary court in contravention of section 16 is merely an error of procedure and, therefore, the decision of a regular court in such a suit is not a nullity, is not correct. The learned Single Judge has also observed in those cases that in the trial of such a suit by an ordinary court the defendant gets an elaborate hearing and does not suffer any prejudice and cannot be allowed to raise any objection as to jurisdiction for the first time in his appeal before the appellate court or in revision before the High Court. With all respect to the learned Judge, the question of jurisdiction of court is not one which can be determined with reference to the form or manner of hearing or prejudice to the parties. As has been pointed out earlier, if a regular court has no jurisdiction to try a small cause suit in the circumstances mentioned in S. 16 then its decision is clearly a nullity and objection as to the jurisdiction of the court can be raised any time. In the cases decided by Krishnan J. there is also a reference to section 21 C. P. C. and section 15 of the Provincial Small Cause Courts Act. Section 21 C. P. C. has no applicability whatsoever. An

objection that on account of existence of a Small Cause Court having jurisdiction to try a suit of the small cause nature the regular court has no jurisdiction to try the suit as an ordinary suit in view of section 16 is plainly not an objection as to the place of suing with which section 21 C. P. C. deals. Again, section 15 of the Provincial Small Cause Courts Act only specifies the suits which are excepted from the cognizance of a Court of Small Causes and limits the jurisdiction of Small Cause Court with reference to the pecuniary valuation of the suit. It has no bearing whatsoever on the question of jurisdiction of the regular courts to try a suit cognizable by a Court of Small Causes as an ordinary suit when there is already a Court of Small Causes having jurisdiction to try the suit.

9. For these reasons, the answer to the question referred is that if the Court of Additional District Judge is empowered and has jurisdiction to try a small cause suit, then that suit cannot be tried by the Court of the Civil Judge, Second Class, as an ordinary suit. That suit cannot be tried by the Court of Civil Judge, Second Class, as a small cause suit if the value of the suit exceeds the pecuniary value of the suits which the Civil Judge, Second Class, is empowered to try as small cause suits. Even if no objection as regards jurisdiction is raised by the defendant in the Court of the Civil Judge, Second Class, the defendant is entitled to raise the objection before the appellate court or in this Court in revision. In such circumstances, the decision of the civil Judge, Second Class, in the suit being one without jurisdiction is a nullity.

10. S. B. SEN, J.: I agree.

AKJ/D.V.C. Question answered accordingly.

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(V 56 C 20)

P. K. TARE
AND K. L. PANDEY, JJ.

B. S. Birthare, Petitioner v. State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 97 of 1963 D/- 7-8-1968.

(A) Constitution of India, Art. 311 (2) — Temporary or officiating appointment — Such appointment is liable to be terminated without notice — Order of termination or reversion is not punishment — Order is not assailable as offending Art. 311 (2). AIR 1962 SC 794 and AIR 1966 SC 1529 and AIR 1957 SC 886, Relied on. (Para 3)

(B) Fundamental Rules, Rr. 9 (13), 14 and 14A — Lien — Government servant confirmed on permanent post of lower division clerk in Forest Department — Afterwards his services transferred to Jail Department but not substantively — At the time of transfer the servant himself giving voluntary declaration that he would not claim any lien on his permanent post of Forest Department — Later on, his services in Jail Department terminated "as no longer required" and replaced at disposal of Forest Department — Forest Department taking view that because the servant had voluntarily undertaken not to claim lien on his post in Forest Department, he had no right of reappointment on his former post — Held that refusal to replace him on his permanent post contravened Rr. 14 and 14A of the Fundamental Rules which continued to be operative and effective as laws in force by virtue of Art. 313 of the Constitution and are statutory provisions — (Constitution of India, Arts. 311 and 313) — AIR 1956 SC 285, Relied on. (Paras 4 and 5)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1529 (V 53) =
(1966) 2 SCJ 535, Divisional Personnel Officer Southern Rly. Mysore v. Raghavendrchar 3
(1962) AIR 1962 SC 794 (V 49) =
1962 Supp (1) SCR 92, State of Bombay v. F. A. Abraham 3
(1957) AIR 1957 SC 886 (V 44) =
1958 SCR 509, Hartwell Prescott Singh v. U. P. Govt. 3
(1956) AIR 1956 SC 285 (V 43) =
1955-2 SCR 1331, Pradyat Kumar v. C. J. of Calcutta 4

C. P. Sen, for Petitioner; K. K. Dube, Govt. Advocate, for Respondents.

PANDEY, J.: This petition under Article 226 of the Constitution is directed against two orders, one dated 31st October 1964 whereby the Inspector General of Prisons terminated the petitioner's services as an assistant jailor and another dated 10th November 1964 by which the Divisional Forest Officer declined to take him back as a lower division clerk on the ground that he had no lien on that post.

2. The material facts giving rise to this petition may be shortly stated By an order dated 30 August 1954, the petitioner was appointed a lower division clerk in the office of the Chief Conservator of Forests, Indore. By another order dated 26 July 1956, he was confirmed on that post with effect from the same day. In course of time, he was transferred to the office of the Divisional Forest Officer, Indore, where he was working as Camp Clerk. While he was so employed, he was allowed to apply for the post of an assistant jailor. After

the usual interview, he was selected for the post and appointed temporarily until further orders as officiating assistant jailor in the Central Jail, Raipur. In pursuance of this order dated 5 December 1962, he joined his duties on 18 December 1962. It transpired that, at Raipur, he developed pulmonary tuberculosis and had to proceed on long leave. Although he recovered in the sense that his lungs were clear and he had resumed his duties also, he was still weak. Therefore, when he was subsequently transferred to the Training Centre, Central Jail, Jabalpur, and he took charge of that post on 22 October 1964, he had to make a request that he should be given only table work. He was then put on the sick list and, by the impugned order dated 31 October 1964, his services were terminated "as no longer required". A copy of that order was sent to the Chief Conservator of Forests as well as to the Divisional Forest Officer, Indore, with the intimation that the petitioner's services were replaced at the disposal of the Forest Department where he had a lien on the post formerly held by him. However, he was not taken back by that department because, by the impugned order dated 10 November 1964, the Divisional Forest Officer, Indore, took the view that the petitioner, who had voluntarily undertaken not to claim lien on any post in the Forest Department, had no right of reappointment on the post formerly held by him. Thereafter, the petitioner made several representations to various authorities, but he did not get any redress of his grievances. As a last resort, he has moved this Court for relief.

3. Having heard the counsel, we have reached the conclusion that this petition must be allowed. So far as the challenge to the order of the Inspector General of Prisons, is concerned, it must fail. The petitioner was appointed "temporarily until further orders as officiating assistant jailor" on the condition that "the appointment is liable to be terminated without notice". There is nothing in the order or elsewhere to show that the petitioner's services were terminated as a measure of punishment. A person holding a post temporarily or officiating in it, until further orders has no right to hold that post and if his services are terminated or he is reverted to the post formerly held by him, there is, without more, no punishment because this could be done under the very condition of his appointment: *State of Bombay v. F. A. Abraham*, AIR 1962 SC 794; *Divisional Personnel Officer, Southern Railway, Mysore v. S. Raghavendrchar*, AIR 1965 SC 1529 and *Hartwell Prescott Singh v. U. P. Government*, AIR 1957 SC 886. In our opinion, the order of termination of

the petitioner's services as officiating assistant jailor is not assailable as offending Article 311 (2) of the Constitution.

4. The other order refusing to employ the petitioner in the Forest Department is unsustainable. The rules made by the Secretary of State for India in Council under section 96-B of the Government of India Act, 1915, are laws in force which have been kept alive under Article 313 of the Constitution: *Pradyat Kumar v. C. J. of Calcutta*, AIR 1956 SC 285. Since Fundamental Rules are such rules, they continue to be operative and effective as laws in force. Lien, as defined in F.R. 9 (13) means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he had been appointed substantively. There is no question, and it is not disputed either, that the petitioner, who had been confirmed on a permanent post of a lower division clerk, had a lien on that post. It is, however, argued that since he had himself given a declaration that he would not claim any lien on that post after his services were transferred to the Jail Department, it must be held that, upon such transfer, he ceased to hold that lien. This contention, grounded as it is upon the petitioner's declaration in disregard of the provisions of the relevant Fundamental Rules, is, as we would show immediately, not well founded and must be rejected.

5. The relevant Fundamental Rules are 14 and 14A which read:

"F. R. 14 (a) A local Government shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity—

- (1) to a tenure post, or
- (2) to a permanent post outside the cadre on which he is borne; or
- (3) provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under this rule.

(b) A local Government may, at its option, suspend the lien of a Government servant on a permanent post which he holds substantively if he is deputed out of India or transferred to foreign service or, in circumstances not covered by clause (a) of this rule, is transferred, whether in a substantive or officiating capacity, to a post in another cadre, and if in any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

(c) Notwithstanding anything contained in clause (a) or (b) of this rule, a Government servant's lien on the tenure

post may in no circumstances be suspended. If he is appointed substantively to another post, his lien on the tenure post must be terminated.

(d) If a Government servant's lien on a post is suspended under clause (a) or (b) of this rule, the post may be filled substantively, and the Government servant appointed to hold it substantively shall acquire a lien on it, provided that the arrangements shall be reversed as soon as the suspended lien revives.

(e) Except as provided in sub-rule (3) of rule 97, a Government servant's lien which has been suspended under clause (a) of this rule shall revive as soon as he ceases to hold a lien on post of the nature specified in sub-clause (1) or (3) of that clause.

(f) A Government servant's lien which has been suspended under clause (b) of this rule shall revive as soon as he ceases to be on deputation out of India or on foreign service or to hold a post in another cadre, provided that a suspended lien shall not revive because the Government servant takes leave if there is reason to believe that he will, on return from leave, continue to be on deputation out of India on foreign service or to hold a post in another cadre and the total period of absence on duty will not fall short of three years or that he will hold substantively a post of the nature specified in sub-clause (1) or (3) of clause (a). F. R. 14-A (a) Except as provided in clause (c) of this rule and rule 97, a Government servant's lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(b) In a case covered by sub-clause (2) of clause (a) of rule 14, the suspended lien may not, except on the written request of the Government servant concerned, be terminated while the Government servant remains in Government service.

(c) Notwithstanding the provisions of rule 14 (a), the lien of a Government servant holding substantively a permanent post shall be terminated on his appointment substantively to any of the offices referred to in sub-rule (1) of rule 97 or to the post of Chief Engineer of the Public Works Department or on his appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman, or any other member, of a State Public Service Commission."

It is not disputed that the case before us is not covered by F. R. 97. That being so, the petitioner's lien on the post of lower division clerk which he held substantively as a permanent incumbent could be terminated as provided by

F. R. 14 (c), if he was appointed substantively to a permanent post of assistant jailor. That he had not been so appointed is obvious and is not now disputed. That being so, as required by F. R. 14A (a), the petitioner's lien on the post of a lower division clerk could in no circumstances be terminated even with his consent, because the result would be to leave him without a lien or a suspended lien on another permanent post. It is manifest that the action taken in regard to the petitioner by the authorities of the Forest Department contravenes the statutory provisions contained in the Fundamental Rules and must, therefore, be struck down.

6. The petition succeeds and is allowed. The order of the Divisional Forest Officer, Indore, dated 10 November 1964 is quashed and the respondents 3 and 4 are directed to give effect to the lien which the petitioner continues to hold on the post of a lower division clerk formerly held by him and so to re-employ him on that post. In the circumstances of the case, the petitioner shall have his costs from the respondents 1, 3 and 4. The security amount shall be refunded. Hearing fee Rs. 100/-.

HGP/D V.C.

Petition allowed.

AIR 1969 MADHYA PRADESH 62 (V 56 C 21)

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

Rameshwar, Petitioner v. Industrial Court, Madhya Pradesh, Indore and others, Respondents.

Misc. Petn. No. 596 of 1966, D/- 6-9-1968

(A) Madhya Pradesh Industrial Relations Act (27 of 1960), Ss. 65 (1) (a), 83, 85 and 86 — Appeal under S. 65 (1) (a) — Finding therein by Industrial Court that dismissal of employee is proper and not in contravention of S. 83 — Setting aside penalty imposed on employer under S. 86 — It must also set aside order of reinstatement passed under S. 85.

On a finding in appeal by the Industrial Court that dismissal of employee is proper and not in contravention of section 83, it has jurisdiction not only to set aside the penalty imposed on the employer under section 86 but also to set aside the consequential order of reinstatement made under section 85. The origin and existence of an order under section 85 is solely dependent upon the existence of an order imposing penalty under section 86 and when the latter is set aside in appeal the former falls along with it. It was, therefore, not necessary for the Legislature to make in-

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dependent provision for appeal against an order made under section 85.

(Para 4)
(B) Madhya Pradesh Industrial Relations Act (27 of 1960), S. 83 (c) — Transfer of employee from one post to another — Labour Court ordering reinstatement to original post — Meanwhile, agreement between employer and Union increasing work-load of that post accompanied by increase in wages—Refusal by employee on first day of his reinstatement to complete increased work-load — His dismissal is not in contravention of S. 83 (c).

(Para 6)

Y. S. Dharmadhikari, for Petitioner;
G. M. Chaphekar with P. D. Pathak, for Respondents.

SINGH, J.: The petitioner Rameshwar was working as a Stripper in the Motilal Agrawal Mills (Private) Limited Gwalior (hereinafter referred to as the employer). An agreement was arrived at between the employer and the Mazdoor Congress Gwalior, which was the representative union of the employees, on 25th May, 1964. By this agreement, the strength of the Strippers was reduced from four to two. The reduction of strength resulted in the increase of work-load on the remaining two Strippers, but their basic wages were also increased from Rs. 31.50 P. M. to Rs. 48/- P. M. The petitioner after this agreement was transferred to the post of cane-boy. He was, however, not satisfied and challenged his transfer in Labour Case No. 57 of 1964. This case was decided by the Labour Court, Gwalior on 27th April 1965 and the employer was directed to post the petitioner as a Stripper. The petitioner was taken on duty as a Stripper on 29th April, 1966, but was suspended on the same date. After completion of a domestic enquiry, he was dismissed.

The petitioner filed a criminal complaint alleging that the employer with a view to victimise and punish the petitioner started harassing him and gave him two warnings at 10-15 A. M. and 12-30 P. M. on the very first day he joined his duty as Stripper; that the petitioner was punished by reason of the fact that he obtained an award against the employer; that his dismissal was in contravention of section 83 of the Madhya Pradesh Industrial Relations Act; and that the employer was liable to punishment under section 86 of the Act. This complaint was decided by the Labour Court Gwalior on 3rd August, 1966 in favour of the petitioner and the Managing Director of the Mills was fined a sum of Rs. 500/- under section 86 for contravention of section 83 (1) (c). It was also ordered under section 85 that the petitioner be reinstated. The employer then went up in appeal before the Industrial Court, Indore which was

allowed on 2nd November, 1966 and the order of the Labour Court punishing the employer and reinstating the petitioner was set aside. Aggrieved by this order in appeal the petitioner has now come up under Articles 226 and 227 of the Constitution. The petitioner prays that the order of the Industrial Court be quashed and that of the Labour Court be restored.

2. It is first contended by the learned counsel for the petitioner that the Industrial Court had no jurisdiction to set aside the order of reinstatement passed under section 85 of the Act. The learned counsel points out that although an order of punishment under section 86 is made appealable under section 65, an order under section 85 reinstating the employee is not appealable and hence even if the Industrial Court had jurisdiction to set aside the order of the Labour Court as regards the order punishing the employer, it had no jurisdiction to set aside the petitioner's reinstatement under S. 85 of the Act.

3. The point raised by the learned counsel for the petitioner relates to the construction of sections 65, 83, 85 and 86 of the Industrial Relations Act. The sections so far as relevant read as follows:

"65. Appeal. — (1) An appeal shall lie to the Industrial Court—

(a) against a conviction by a Labour Court, by the persons convicted;

(b) against an acquittal by a Labour Court, by the State Government;

(c) for enhancement of sentence awarded by a Labour Court, by the State Government."

"83. Employer not to dismiss, reduce or punish an employee.—

(1) No employer shall dismiss, discharge or reduce any employee or punish him in any other manner by reason of the circumstances that the employee—

(a)

(b) is entitled to the benefit of a registered agreement or a settlement, submission or award; or

(c) has appeared or intends to appear as a witness in, or has given evidence or intends to give evidence in, proceeding under this Act or any other law for the time being in force or takes part in any capacity or in connection with a proceeding under this Act."

... ..

"85. Power of Court to order reinstatement, etc. —

If the Court trying an offence under Section 83, finds that the employee has been dismissed, discharged or reduced in contravention of the provisions of Section 83, it may direct that the employee shall be reinstated forthwith or by such date as may be specified in the order."

"86. Penalty for wrongful dismissal etc., of an employee —

(1) Whoever contravenes the provisions of sub-section (1) or (2) of Section 83, shall, on conviction, be punishable with fine which may extend to five thousand rupees"

4. It will be seen that when an employee is dismissed, discharged, reduced or otherwise punished in contravention of Section 83, the employer commits an offence which is punishable under section 86. While trying an offence relating to the contravention of Section 83 if it is found by the Court that any employee has been dismissed, discharged or reduced in contravention of Section 83 i.e. an offence under Section 86 is made out, it may direct the reinstatement of the employee under Section 85. It would be seen from the language used in Sections 83, 85 and 86 that Section 85 is not independent of Section 86 but confers jurisdiction on the Court to pass a consequential order of reinstatement after the contravention complained of under Section 86 is established. It is only when an offence is proved under Section 86 that an order under Section 85 would be made. The learned counsel for the petitioner was not able to point out any case under Section 85 where reinstatement would be ordered when no offence under Section 86 was made out.

Order under Section 86 is made appealable under Section 65. Under Section 65 (1) (a) the appellate court in deciding the appeal against the conviction under Section 86 can reverse the finding of the trial court and can hold that there was no contravention of Section 83 and no offence was made out. The appellate court will on such a finding acquit the accused. The finding in appeal that there has been no contravention of Section 83 and that no offence has been made out under Section 86 will demolish the foundation of the order of reinstatement under Section 85, and that order being of a consequential nature, the appellate court will have power to set it aside. The origin and existence of an order under Section 85 is solely dependent upon the existence of an order of conviction under section 86 and when the latter is set aside in appeal the former falls along with it. It was therefore, not necessary for the Legislature to make independent provision for appeal against an order made under section 85.

If the argument of the learned counsel for the petitioner were to be accepted, most illogical result will follow. The position would then be that although the Industrial Court would be able to set aside the order of conviction under section 86 on the finding that there was no contravention of section 83, the consequential order of reinstatement under

section 85 which on this finding will be exposed to be wholly invalid will be allowed to perpetuate. In our opinion, such an illogical and anomalous result was never intended by the Legislature. The true construction of the provisions is that on a finding that the employee was not dismissed, discharged or reduced in contravention of S. 83, the appellate court has jurisdiction not only to set aside the conviction under section 86 but also the consequential order of reinstatement made under section 85.

5. It is next argued that the finding that there was no contravention of section 83 is not correct. It is pointed out that when the petitioner was reinstated by order of the Labour Court in the earlier case, he was not liable to do the extra work resulting from the reduction of the strength of Strippers and was obliged to do only that much of work which a Stripper was doing before the reduction of strength.

6. The question to be determined before the Labour Court and the Industrial Court was whether the petitioner was dismissed by reason of the circumstances mentioned in clauses (b) and (c) of section 83, that is to say, by reason of the circumstance that he obtained an award against the employer or that he instituted the earlier proceedings against the employer. The finding of the Industrial Court is that the dismissal of the petitioner was not by reason of any such thing. The employer in accordance with the agreement with the representative union of Labour reduced the strength of the Strippers. Previously there were four Strippers and after the agreement, they were reduced to two. This naturally increased the work-load but the wages also increased. The employer wanted that the petitioner should do the work in accordance with this agreement. Before this agreement every Stripper was required to clean 35 machines, but after it each Stripper was required to clean 70 machines. The employer honestly believed that the petitioner on reinstatement was liable to do the work of cleaning 70 machines. The petitioner, however, refused to clean more than 35 machines. On complaint being made, he was given a simple warning at 10-15 A. M. and when he refused to do any further work, he was again warned at 12-30 P. M. Thereafter, he was suspended and a domestic enquiry was held.

The reason why the employee was dismissed was not the circumstance that he had obtained an award against the employer or that he had taken any proceeding against the employer under the Act, but because he refused to do the work of a Stripper of cleaning 70 machines. It is here not necessary to decide

quest bringing in its wake, Sec. 106 of the Succession Act. It followed that since Muthammal had died before the testator, the half share of Muthammal in the properties bequeathed lapsed and had to be treated as undisposed of. S. A. No. 15 of 1962 (Mad), Reversed. (Para 10)

(B) Succession Act (1925), S. 106 — "Two persons jointly" — Interpretation.

The reference to "two persons jointly" in S 106 obviously means a bequest to a plurality of persons and not just to two persons in the arithmetical sense. (Para 5)

(C) Succession Act (1925), S. 106 — Section is not a rule of construction of a will, but a provision for devolution. AIR 1960 Andh Pra 368, Dissent. from; Case law Ref. (Para 7)

(D) Limitation Act (1908), Art. 144 — Possession of co-owner when adverse to other co-owner — Burden of proof.

While mere possession of a person without any title may be adverse to the true owner, possession being an indicia of title, mere exclusive possession would not do, to constitute adverse possession against a tenant-in-common. No doubt, the Article of Limitation Act applicable even among tenants-in-common is the residuary Art 144 of the Limitation Act of 1908. But where the parties are co-owners, there is unity of possession, possession of the co-owner is possession of all the co-owners and for possession to become adverse, there must be something more than exclusive occupation, there must be, as it is termed, ouster. The Law as to what amounts to ouster or adverse possession between co-owners is well settled. A tenant-in-common will not be permitted to claim the protection of the statute of limitation and plead acquisition of title by prescription, against his co-tenant, unless it clearly appears that he has repudiated the title of his co-tenant and has been holding adversely to him for the statutory period. Exclusive possession by one co-tenant being consistent with the subsistence of the tenancy-in-common, to be adverse there must be outward acts of exclusive ownership or possession hostile to the tenant-in-common. While the ultimate finding, whether there is ouster or not is a matter for inference from facts and there can be no comprehensive formula to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenant, when the plea is of adverse possession against a tenant-in-common, the approach to the determination of the question is different. The Court cannot be satisfied with mere exclusive possession of one tenant-in-common. A tenant-in-common pleading ouster must establish that there was denial of the other co-owner's right in the properties, that the

denial was sufficiently notorious and open, that the tenant-in-common out of possession should have got knowledge of it; and that the tenant-in-common in possession continued to enjoy the properties in repudiation of the rights of the other co-tenant in the properties for the statutory period. Case law Ref. (Para 12)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mad 83 (V 55)=
1967-1 Mad LJ 461, Ameer Bibi v. Chinnammal 12
- (1968) A. S. No. 84 of 1957, D/- 23-9-1960=ILR (1968) Mad 138, Sanjeevi Reddi v. Ahilandathammal 6
- (1962) AIR 1962 SC 287 (V 49)=
(1962) 3 SCR 440, Bhagwan v. Mt. Rectidevi 5
- (1960) AIR 1960 Andh Pra 368 (V 47)=
=1960-1 Andh WR 102, Surareddi v. Venkata Subbareddi 7, 10
- (1958) AIR 1958 Andh Pra 48 (V 45)=
ILR (1957) Andh Pra 686, Peeran Sahib v. Jamaluddin Sahib 12
- (1957) AIR 1957 SC 314 (V 44)=
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- (1954) AIR 1954 SC 337 (V 41)=
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- (1953) 1953-2 Mad LJ 241=1953
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- (1950) 63 Mad LW 378, Muthammal v. Chandrakasa Udayar 7
- (1942) AIR 1942 Mad 622 (V 29)=
=ILR (1943) Mad 15 (FB), Palania Pillai v. Ibrahim Rowther 12
- (1935) AIR 1935 Mad 852 (V 22)=
=42 Mad LW 422, Seshureddi v. Mallareddi 7
- (1933) AIR 1933 PC 72 (V 20)=
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- (1933) AIR 1933 Mad 204 (V 20)=
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28 Mad LW 869, Venkatakrishnayya v. Madamma 7
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- (1926) AIR 1926 Mad 273 (V 13)=
50 Mad LJ 413, Janakiram Chetti v. Nagamani Mudaliar 7
- (1921) AIR 1921 Cal 647 (V 8)=
26 Cal WN 65, Jagannath Marwari v. Smt. Chandi Bivi 12
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App 51 (PC), Venkata Narasimha v. Parthasarathi 6, 7
- (1911) ILR 33 All 41=7 All LJ 941,
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- (1908) ILR 35 Cal 961=6 Cal LJ 735, Jogendra Nath Roy v. Baldeo Das 12
- (1904) ILR 27 Mad 300 (FB), Karup-pai Nachiar v. Sankaranarayana Chetti 7
- (1896) ILR 23 Cal 670=23 Ind App 37 (PC), Jogeswar Narain Deo v. Ramchandra Dutt 5
- (1889) ILR 16 Cal 677=16 Ind App 44 (PC), Nandi Singh v. Sitaram 5
- (1888) ILR 11 Mad 258, Vydinada v. Nagammal 7
- (1871) 6 Ch A 696=40 LJ Ch 776, Robertson v. Fraser 10
- (1752) Ambler 136=27 ER 89, Humphrey v. Tayleur 5
- T. P. Gopalakrishnan, for Appellants;
U. Somasundaram and R. Bhoominathan, for Respondents.

JUDGMENT:— This is a Letters Patent Appeal from the decision of our learned brother Srinivasan, J. and is preferred by the defendants in a suit relating to certain landed properties praying for permanent injunction or in the alternative for possession with future profits. The claim of the plaintiffs is rested on two wills, one dated 7-4-1934, and the other dated 5-3-1940, the latter by the person claiming the entirety of the properties under the earlier will. The decree of the trial Court accepting the plaintiffs' claim and giving them possession, was confirmed on appeal by the learned Subordinate Judge, Dindigul, and has been affirmed in second appeal in this Court. The plaintiffs have been awarded future mesne profits to be determined under Order 20, Rule 12, C. P. C.

2. The principal questions that arise for consideration are the interpretation of the will dated 7-4-1934, and the true scope and effect, if any, of Sections 106 and 107 of the Indian Succession Act, Act 39 of 1925, in relation to that will. The suit properties, a tope, originally belonged to one Chinnathambiah Pillai and he left the Will dated 7-4-1934, a registered instrument, bequeathing certain properties including the suit properties to his second wife Meenakshiammal and her only daughter Muthammal. The daughter Muthammal predeceased the testator — she died on 28-3-1936. The testator died on 4-11-1936. The first plaintiff in the suit is a subsequently born daughter of the testator by the second wife Meenakshiammal and the second plaintiff in the suit is her lessee. Defendants 1 to 4 in the suit are sons of one Arunachalam, deceased son of the testator by his first wife. Prior to his will, the testator had divided himself away from his son Arunachalam and they were living separately, the properties comprised in the will being the separate properties of the testator. It is the case of the plaintiffs that

on the death of the testator, Meenakshiammal, the second wife, entered into possession of all the properties, the subject matter of the will, and continued in exclusive possession of the same till her death on 3-5-1959. It is claimed that she got patta for the properties transferred to her name. Meenakshiammal left a will bequeathing the properties to her only surviving daughter Ramayee, the first plaintiff. The plaintiffs came to Court on the averment that after the first plaintiff entered into possession of the properties on the death of her mother and leased the suit properties to the second plaintiff, defendants 1 to 4 with the help of the other defendants attempted to trespass on the properties and prevented the enjoyment of the suit tope by the plaintiffs.

3. The defence as it ultimately emerged is simple. It is urged for the defendants that as Muthammal predeceased the testator, the half share of the estate in the legacy intended for her, fell into the residue of the testator's properties and Arunachalam, father of defendants 1 to 4, succeeded to the same as his father's heir in Hindu Law. They plead that Meenakshiammal and Arunachalam were in joint possession of the properties as tenants-in-common and the tenancy-in-common was continued after the death of Arunachalam between defendants 1 to 4 and Meenakshiammal, till her death on 3-5-1959. For the plaintiffs, it is contended that the original bequest of Chinnathambiah Pillai was a joint bequest in favour of his second wife Meenakshiammal and his daughter Muthammal and that on the death of Muthammal, the second wife Meenakshiammal took the entire estate in terms of Section 106 of the Indian Succession Act. If the plea of joint bequest is upheld and Section 106 applied, there is no defence to the action. The defendants have not pleaded any adverse possession and they conceded possession of Meenakshiammal till her death in 1959. The Courts below, and our learned brother, Srinivasan, J., in second appeal, have upheld the plaintiffs' contention that under the will Ex. A-1 of Chinnathambiah Pillai, the mother and the daughter took a joint estate resulting in the mother Meenakshiammal becoming the sole legatee of the entirety of the properties on the death of her daughter Muthammal. It is this interpretation of the will that is the subject of challenge before us by Sri T. P. Gopalakrishnan, learned Counsel for the appellants.

4. It will be convenient to set out first the material portions of the Will. Broadly translated they are to this effect: "With a view to avoid all disputes relating to these properties after my lifetime and claims by others to the same, under the terms of this Will I give these

properties to my wife for her maintenance and for my minor daughter Muthammal for her sridhana, seer and other expenses. After my lifetime these two persons shall take Items 1 and 2 hereunder absolutely and enjoy the same with powers of gift, sale etc., they themselves discharging the debts specified hereunder. Neither of them shall have power to alienate the third item. Whoever performs the obsequies of Meenakshiammal, shall take the same".

In our view, on the plain language of the will, it is difficult to hold that the legatees thereunder take as joint tenants with rights of survivorship between them. We are dealing with the testamentary disposition of a Hindu and we cannot readily import in the construction of his will that a gift under a will to two persons *ex facie* constitutes joint tenancy between them. A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner and the distinguishing feature of joint tenancy is the right of survivorship. On the death of one joint tenant, his interest in the property passes to the other joint tenants by survivorship and this process may continue until there is, but one survivor, who would then hold as sole tenant.

5. Section 106 of the Indian Succession Act which is relied upon for the plaintiffs is one of a fasciculus of sections dealing with the doctrine of lapse of legacies. We are concerned here, particularly with Sections 105 to 108 and it is better they are set out:

"Section 105. (1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

106 If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

107. If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

108. Where a share which lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of".

As the illustration to Section 106 is broadly relied upon, we are giving the same hereunder.

"The legacy is simply to A and B. A dies before the testator. B takes the legacy".

These provisions have been made applicable to Hindus under the 1925 Indian Succession Act. The corresponding provision for Section 106, in the old Act is Section 93. The illustration gives the presumption of English law that a gift to two persons with words of limitation *prima facie* constitutes a joint tenancy between them. But there is no such presumption in the case of persons governed by Hindu Law and the question for consideration is, whether Section 106 is a statutory provision making every gift or bequest to two persons a joint estate, that is, a statutory and obligatory rule of construction or a provision against lapse of a legacy to the residue in the event of the estate granted on the interpretation of the testament in question being a joint estate, that is, does the section with its illustration necessarily import the English idea of joint estate in the case of bequest to two persons irrespective of the interpretation, which the Court would ordinarily give to the will in question. The reference to "two persons jointly" in Section 106 of the Act obviously means a bequest to a plurality of persons and not just to two persons in the arithmetical sense. In our view, the illustration deals with a legacy simpliciter to A and B without anything more and so may not be helpful in construing the section. The section speaks of a legacy given to two persons jointly and our reading is that if the testament when construed makes out that the legacy is given to two persons jointly, then on the death of one of the legatees before the testator his share therein does not fall or lapse into the residue, but the other legatee takes the entirety of the estate. This section must be read along with Section 107 and interpreted accordingly. Section 107 deals with a case of legacy where the intention as brought out by the language of the will is to give the several legatees distinct shares therein. Section 106 provides for cases, where the testator intends the legatees to take the gift jointly. The Court must, before it applies Section 106, infer from the terms of the will as an intention that the legatees should take the estate jointly with its incidents of survivorship. Section 106 does not rule out the application of established rules in the matter of construction of wills. The Court of construction will have to put itself so to say in the testator's armchair and consider the will as a whole in the light of the circumstances attendant at the execution of the will. Then it asks itself, what could he have intended circumstanced as he was? The meaning of the words used, what the words convey

would depend upon their setting, the class to which the testator belonged, the religious and social influences, and the known practices, notions and wishes likely to be held by the testator with reference to his estate in the situation in which he was. The words of a will are not used in vacuo. Now it is well established that the principle of joint tenancy is unknown to Hindu Law, except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law, which, under that law, passes by survivorship. See *Mt. Bahurani v. Rajendra Baksh Singh*, AIR 1933 PC 72, at p 75. In that case, there were grants made to two brothers and their heirs absolutely and the question was whether the grants were to the two brothers generally or as members of joint family. Their Lordships of the Judicial Committee observed as follows—

"In their Lordships' opinion this is a clear ruling that the principle of joint tenancy is unknown to Hindu law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara Law which under that law passes by survivorship. There could, therefore, be no question of these grants creating a joint tenancy as opposed to a tenancy-in-common, even if according to the English Law, the terms of these instruments admitted of such a construction."

In *Jogeswar Narain Deo v. Ramchandra Dutt*, (1896) ILR 23 Cal 670 (PC) the construction of a will of a Hindu testator whereby he bequeathed 4 annas share of a Zamindari to his youngest widow and her son with power to them to alienate or sell the property bequeathed came up for consideration before the Judicial Committee. The Zamindar had executed the will in the apprehension that the legatees, his youngest wife and her son, would be unable to live peaceably with his elder son and other members of the family after his death. The question as to the interest which the two legatees took in the estate arose when the son after becoming a major, questioned the alienation made by his mother of the two annas share therein which she claimed as her own. The contention that the mother and son became, in the sense of English law joint tenants of the four annas share and not tenants-in-common was overruled by the Judicial Committee, observing that the court would not be justified in importing into the construction of a Hindu will an extremely technical Rule of English conveyancing. They observed that the principle of joint tenancy appeared to be unknown to Hindu law except in the case of coparcenary between the members of an undivided family. This principle was affirmed by the Supreme Court recently in *Bhagwan v. Reo-*

tidevi, AIR 1962 SC 287. But that does not mean that because the principle of joint tenancy is unknown to Hindu law outside the coparcenary, there can never be a bequest to be taken by two persons jointly. That there can be a gift of property even among Hindus to two persons to be held jointly outside the coparcenary, is clear from the pronouncement of the Privy Council in *Nandi Singh v. Sitaram*, (1889) ILR 16 Cal 677 (PC). In that case, the last holder executed a deed of gift of the property in dispute in favour of her daughter and her husband, that is, his son-in-law jointly. It was an absolute gift and under the *wazib-ul-arz* which governed the succession in the case the gift in favour of his son-in-law was invalid. A contention was raised that for that reason, the whole gift failed. Repelling the contention, the Judicial Committee observed—

"The gift is to the two donees jointly, and in *Humphrey v. Tayleur*, (1752) Ambler 136 (138) Lord Chancellor Hardwicke said 'if an estate is limited to' two jointly, the one capable of taking, the other not, he who 'is capable shall take the whole'. This principle does not depend upon any peculiarity in English law and is applicable to this deed of gift".

It follows that there can be a joint gift in favour of two persons even when the parties are Hindus. To such cases Section 106 will certainly be attracted. It all depends upon the intention of the testator as could be gathered from the language of the instrument and the surrounding circumstances.

6. The true scope of Section 106 of the Indian Succession Act has been the subject of careful consideration by one of us in *Sanjeevi Reddi v. Ahilandathammal*, A. S. No. 84 of 1957 (Mad) (unreported — by Anantanarayanan, J., as he then was). In that case there was extensive citation of the available authorities upon the problem of interpretation of the section and in the light of the decisions, it was observed therein as follows:

"They (Sections 106 and 107) are not really statutory rules of construction of Hindu Wills, or of testamentary disposition in general. They are rules which provide for a further devolution of an estate in one contingency, namely, where one of several legatees dies before the testator. Section 106 provides for the devolution where the legacy is a joint legacy; in precisely the same manner, Section 107 provides for the devolution where the legacy is a gift in severalty. But it would lead to absurd results, and it would be logically fantastic if we apply Section 106 or Section 107 as the case may be, in such a manner as to involve the construction of a will in dif-

ferent terms from those upon which the will would be normally otherwise construed. There are many decisions laying down the principle upon which wills should be construed by Courts and perhaps the most compendious statement of the criteria will be found in Venkata Narasimha v. Parthasarathi, (1913) ILR 37 Mad 199 (PC) where the famous metaphor of "the armchair of the testator" has been used by the Judicial Committee. But a will which is construed as a joint legacy or as a legacy in severalty, as the circumstances may warrant, cannot be something else because one of the legatees happens to die before the testator. I do not think that this line of reasoning can really be disputed. It appears to me, per contra, rather that we should first construe the terms of any will upon the general principles, and then proceed to apply Section 106 or Section 107 as the case may be, to the specific contingency of the death of one of the legatees before the testator, which these sections seek to provide for."

7. The following cases *inter alia* had been cited then: *Vyadinada v. Nagammal*, (1888) ILR 11 Mad 258, *Seshureddi v. Mallareddi*, AIR 1935 Mad 852, *Krishnaswami v. Avayambal Ammal*, AIR 1933 Mad 204, *Venkatakrishnayya v. Madamma*, AIR 1928 Mad 926, *Janakiram Chetti v. Nagamani Mudaliar*, 50 Mad LJ 413=(AIR 1926 Mad 273), *Karuppai Nachiar v. Sankaranarayana Chetti*, (1904) ILR 27 Mad 300 (FB), *Muthammal v. Chandrakasa Udayar*, 63 Mad LW 378, *Mt. Jio v. Mt. Rukman*, AIR 1927 Lah 126, *Deokali v. Ram Jag*, AIR 1931 Oudh 421, *Gopi v. Mt. Jaldhara*, (1911) ILR 33 All 41, (1913) ILR 37 Mad 199 (PC), *Surareddi v. Venkatasubba Reddi*, 1960-1 Andh WR 102=(AIR 1960 Andh Pra 368). The decision points out that the observation in 1960-1 Andh WR 102=(AIR 1960 Andh Pra 368) referring to Section 106 as a rule to enable Courts in construing wills, does not convey the precise import of the section. We may state that though this section occurs under the chapter headed "Of construction of wills" in its effect it is not a rule of construction of a will, but a provision for devolution.

8. The further question about the requirement specified in Section 107 for application of the section, that the "legacy is given to legatees in words which show that the testator intended to give them distinct shares of it" has also been discussed in the above unreported decision. While Counsel in that case were agreed that Sections 106 and 107 between themselves exhausted cases of the death of a legatee before the testator in cases of joint gifts or gifts in severalty, an argument was raised that for Section 107 there should be actual expressions in the will providing for the legatees taking in

distinct shares and that the section did not warrant an inference that the legatees should take the shares in severalty by mere implication or interpretation. Learned Counsel had contended that if specific expressions providing for the legatees taking distinct shares were not found in the will, there was no alternative, but to interpret the will as amounting to a joint gift and apply Section 106. Dealing with this contention, it was observed that the language of Section 107 amounts to nothing more than this:

"Where, from the language employed in the will, or gift, the inference is justified that it was a gift in severalty, thereby amounting to a tenancy-in-common and to distinct shares, then the principle applies, where one of the legatees dies before the testator. That is the only permissible interpretation, for, otherwise, we would be driven to conclude that there is a third case, a medium quid not provided for by these two sections, which is not the contention of either learned Counsel. I do not think it can be seriously disputed that, in interpreting the terms or words of a will, or even of a statute, the entire text or body of the words has to be taken into consideration, along with every essential implication arising from the particular language employed. I am of the view that Section 107 merely employs language amounting to this, namely, that where, having regard to the dispositions and the surrounding circumstances, the inference is justified that the legacy was in severalty (which would necessarily be in distinct equal shares, unless unequal shares were specified), the principle of the section would apply, in the case of death of a legatee before the testator".

9. We have heard no arguments to differ from the views then expressed.

10. We shall now examine the will before us in the light of the above principles. We bear in mind that a Hindu testator is perfectly at liberty like any other testator to make a joint bequest in favour of two or more legatees and such a bequest can be inferred from the explicit language used, or from the language interpreted in the light of the surrounding circumstances, which justify a joint bequest as the only reasonable inference. In 1960-1 Andh WR 102=(AIR 1960 Andh Pra 368) above referred to, it was *inter alia* observed—

"It cannot be postulated that whenever a gift is made to two or more persons jointly, they take it only as tenants-in-common irrespective of the intention of the donor. It all depends on the intention of the testator as could be gathered from the language of the instrument and the surrounding circumstances. Such a construction does not in any way violate the principles of Hindu Law".

But we have to bear in mind that as pointed out in *Robertson v. Fraser*, (1871) 6 Ch A 696,

"equity favours the construction that legatees were to take separate shares as tenants-in-common and hence the Court would utilise even a very slight indication of such an intention, to draw that inference".

In the present case, the testator is apprehensive that dispute may arise after his death between his son by his first wife, who had got himself divided and the junior wife and her minor daughter. He wants to provide for them and he wants to provide seer and sridhana for his minor daughter. The legatees have been given absolute rights in the properties bequeathed with full powers of alienation by way of gift, sale etc. There were debts to be discharged and the legatees have been enjoined to discharge them. With reference to one of the items bequeathed, the third item, it is provided that neither of the legatees shall have the power to alienate that item and that the item should be taken by the person, who performed the funeral of the junior wife. Here the testator expects both his junior wife and daughter to outlive him and take the bequest. He expects his daughter to be married away and provided with seer and sridhana. It is manifest that the intention of the testator as disclosed in the above provisions may be defeated, if the principle of joint tenancy with its incident of *jus accrescendi* should be applied to the bequest. Such an estate is unsuitable when we are concerned with beneficial owners like a Hindu widow and her unmarried minor daughter, who has to be married and provided with sridhana and seer etc. A joint bequest introduces an element of chance. Certainly the testator would not intend that after his death, should his daughter die joint but leaving her own son, the estate must survive to the widow. In *Megarry*, the Law of Real Property, 2nd Edn. at page 243, the position even in English law is stated as follows—

"Even if there were no clear words of severance, the gift taken as a whole might show that a tenancy-in-common was intended. Thus provisions for the use of capital or income, or both, for the maintenance and advancement of those concerned created a tenancy-in-common. For example, if under a settlement on children containing such provisions an advance was made to one child, it would have to be debited against the child's share and this could not be done unless the child was a tenant-in-common and so had a distinct share".

In our view, the language of the will, interpreted in the light of the above prin-

ciples, does not permit treating the bequest in favour of Meenakshiammal and Muthammal as a joint bequest bringing in its wake, Section 106 of the Indian Succession Act. It follows that the half share of Muthammal in the properties bequeathed lapsed and has to be treated as undisposed of. The result is that on the testator's death, Arunachalam as the then heir of the properties of the testator succeeded to the half share. Arunachalam and Meenakshiammal became co-heirs in respect of the suit properties, Meenakshiammal as the legatee and Arunachalam as the heir-at-law.

11. But this finding of ours, differing from *Srinivasan, J.*, and the Courts below, does not necessarily entail the dismissal of the suit, or the acceptance of the defence. The plaintiffs have further pleaded that on the death of Chinnathambiah Pillai, Meenakshiammal considered herself to be entitled to the properties bequeathed to her and Muthammal, entered on the possession of the properties and perfected her title by adverse possession. This plea of adverse possession was met by the defendants with the specific case that Arunachalam as the heir of Chinnathambiah Pillai took possession of the properties jointly with Meenakshiammal and was in joint possession and enjoyment with her. It was pleaded that the plaintiffs' mother and defendants 1 to 4 and their father Arunachalam had enjoyed the properties as tenants-in-common. On these pleas the trial Court raised the three following issues, (issues 1, 3 and 5):—

"Issue 1: Whether the plaintiffs succeeded to the properties covered by the will as contended by the plaintiffs and whether the plaintiffs' mother was in exclusive possession?

Issue 3: Whether the plaintiffs' mother and defendants 1 to 4 and their father enjoyed suit property as tenants-in-common? If so, whether the suit either for injunction or for possession is not maintainable?

Issue 5: Whether the plaintiffs' mother had prescribed title by adverse possession?"

Having held that the plaintiffs' mother had succeeded to the entirety of the properties covered by the will and the properties did not vest on Arunachalam and the plaintiffs' mother as tenants-in-common, the trial Court, examining the evidence regarding possession at some considerable length, concluded—

"I find that the first plaintiff has proved that her mother was in exclusive possession for more than 12 years and the defendants 1 to 4 have not proved their joint possession."

The learned District Munsif points out that the defendants had not pleaded any

adverse possession and only the plaintiffs had pleaded that they perfected their title by adverse possession. He points out that he had already found that Arunachalam and defendants 1 to 4's father did not get any interest in the suit properties under the will Ex. A-1 and, as such, the question of joint possession by the defendants did not strictly arise in the case. He was also not satisfied with the evidence of joint possession let in by the defendants. On this he found the issues regarding adverse possession and prescription in favour of the plaintiffs. The lower appellate Court even as the trial Court, rejected the case of the defendants that Arunachalam and Meenakshiammal, and subsequently, Meenakshiammal and the first defendant jointly enjoyed the suit properties. The appellate Court would hold that the evidence for the defendants on this aspect of the matter was thoroughly artificial and falsified by documentary evidence. The lower appellate Court would hold in favour of the exclusive possession and enjoyment of the suit properties by Meenakshiammal and after her, by her daughter and it is observed that this possession was adverse to Arunachalam and his heirs, namely, defendants 1 to 4, for over the statutory period. It is found that defendants 1 to 4 never enjoyed the suit properties separately or jointly with Meenakshiammal. In second appeal, the question of adverse possession and acquisition of title by prescription pleaded for the plaintiffs was not examined and there is just a passing observation, that even in the view that the bequest was several, admittedly the mother was in possession of what might be deemed to be the daughter's share of the property from the date of the testator's death till the date of suit and that any person claiming under Muthammal will obviously be affected by adverse possession. But where is the question of any one claiming under Muthammal, the daughter? Muthammal having predeceased her father, her interest as legatee never vested in her for her to be fresh stock of descent. The lower appellate court has fallen into the same error, when it observed that the fact that Meenakshiammal and Muthammal succeeded to the properties as tenants-in-common did not affect the case because in its view on the death of Muthammal, her mother Meenakshiammal succeeded to the rights of Muthammal in the properties as the heir of Muthammal under Hindu Law.

12. Learned Counsel for the appellants points out that the finding as to adverse possession found in the three judgments, no doubt, each concurring with the others, as it stands, cannot avail the plaintiffs. Learned Counsel urges that in their approach to the question of ad-

verse possession all the Courts have overlooked that the adverse possession or acquisition of title by prescription pleaded by the plaintiffs would not, once it is held that legatees took as tenants-in-common, be against a stranger, but against a tenant-in-common. Now, while mere possession of a person without any title may be adverse to the true owner, possession being an indicia of title, mere exclusive possession would not do, to constitute adverse possession against a tenant-in-common. No doubt, the Article of Limitation Act applicable even among tenants-in-common is the residuary Article 144 of the Limitation Act of 1908. But where the parties are co-owners, there is unity of possession, possession of the co-owner is possession of all the co-owners and for possession to become adverse, there must be something more than exclusive occupation, there must be, as it is termed, ouster. The Law as to what amounts to ouster or adverse possession between co-owners is well settled. A tenant-in-common will not be permitted to claim the protection of the statute of limitation and plead acquisition of title by prescription, against his co-tenant, unless it clearly appears that he has repudiated the title of his co-tenant and has been holding adversely to him for the statutory period. Exclusive possession by one co-tenant being consistent with the subsistence of the tenancy-in-common, to be adverse there must be outward acts of exclusive ownership or possession hostile to the tenant-in-common. While the ultimate finding, whether there is ouster or not is a matter for inference from facts and there can be no comprehensive formula to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenant, when the plea is of adverse possession against a tenant-in-common, the approach to the determination of the question is different. The Court cannot be satisfied with mere exclusive possession of one tenant-in-common. A tenant-in-common pleading ouster must establish that there was denial of the other co-owner's right in the properties, that the denial was sufficiently notorious and open, that the tenant-in-common out of possession should have got knowledge of it, and that the tenant-in-common in possession continued to enjoy the properties in repudiation of the rights of the other co-tenant in the properties for the statutory period. (See Jogendra Nath Roy v. Baldeo Das, (1908) ILR 35 Cal 961; Krishnayya v. Udayalakshammamma, 1953-2 Mad LJ 241; Jagannath Marwari v. Smt. Chandni Bivi, 26 Cal WN 65=(AIR 1921 Cal 647); Lakshmi Reddi v. Lakshmi Reddi, AIR 1957 SC 314; Peeran Sahib v. Jamaluddin Sahib, AIR 1958 Andh Pra 48; Palania Pillai v. Ibrahim Rowther, ILR (1943) Mad 15=

(AIR 1942 Mad 622) (FB); *Chenabasavana Gowd v. Mahabaleswarappa*, AIR 1954 SC 337; *Ameer Bibi v. Chinnammal*, 1967-1 Mad LJ 461=(AIR 1968 Mad 83).

13. It may be that the evidence recorded in this case when examined, would satisfy the test of ouster necessary to bar a co-tenant out of possession. If the original entry on the properties by Meenakshiammal on the death of her husband was to the knowledge of Arunachalam, as a person entitled to the entirety of the properties and Arunachalam had been kept out of possession and enjoyment, that may go a long way to establish ouster. In that case the very entry on the properties is hostile. It would become hostile and adverse even subsequently. But in none of the judgments of the Courts below, do we see that the Court was conscious of the fact that it had to find ouster before it could hold that the co-tenants out of possession had lost their title by prescription. The finding of the trial Court ultimately arrived at, is that the first plaintiff and her mother had been in exclusive possession for more than 12 years and that defendants 1 to 4 had not proved their joint possession. This by itself on the principles stated above will not do; the evidence has not been scanned to find, if there was ouster. Exclusive possession of one co-owner is not the same thing as hostile exclusion of the other co-tenant. It is the latter that constitutes ouster, makes possession adverse. The judgments on appeal have not gone further and discussed the problem from the stand point of the parties being tenants-in-common.

14. But it is clear, that the parties knew what they were about, when the plaintiffs pleaded acquisition of title by prescription as an alternative to the plea that the bequest was a joint one and the defendants sought to counter this by pleading joint enjoyment of the suit properties. Only the Courts' attention was not drawn to the fact, that the plea of adverse possession came in the alternative, and was on the basis of a tenancy-in-common and they must look for ouster, not just exclusive occupation. We think that in the interest of justice, the parties must be given an opportunity to agitate this question over again, letting in further evidence, if they consider necessary. We would repeat that we are not finding against the plaintiffs' plea of adverse possession against the defendants. The evidence even as it is may be sufficient to sustain the first plaintiff's acquisition of title by prescription, or it may be the other way. We do not go into the evidence, we say nothing on the merits, as it is a matter for the Court of fact to decide. In fairness to the defendant, they could not be concluded on a finding of

loss of title by prescription, when the decision is given on a manifestly erroneous approach. Having regard to the fact that the suit is of the year 1959, it is sufficient, if the Subordinate Judge of Dindigul is asked to submit a fresh finding on the question—

"Whether Meenakshiammal had by the time of her death in 1959 perfected her title to the half share of Arunachalam in the suit properties by ouster and adverse possession?"

The parties may, if they have, let in further evidence on the question, and the Subordinate Judge will submit his finding on the evidence already on record and the additional evidence, if any tendered, in the light of the principles above set out, within ten weeks from the receipt of the records. Time for objections to the findings, if any, ten days.

JHS/D.V.C.

Order accordingly.

AIR 1969 MADRAS 104 (V 56 C 24)

KAILASAM, J.

Sellappa Gounder and another, Petitioners v. State of Madras represented by Secretary Home Dept. Madras and another, Respondents.

Writ Petn. No. 4318 of 1965, D/- 1-8-1967.

(A) Land Acquisition Act (1894), Ss. 4 (1) and 6 — Notification under S. 4 (1) and declaration under S. 6 can be simultaneous — Directions given in the Madras Land Acquisition Manual recommended for being followed. AIR 1963 SC 151 (171), Foll. (Para 6)

(B) Land Acquisition Act (1894), S. 17 (4) — Opinion of State Government about emergency is challengeable only when the Government acts mala fide or does not apply its mind to the matter. AIR 1965 Mad 328 & W.P. No. 1555/64 & W. P. No. 795 of 1962 (Mad) & W. P. No. 505 of 1961 (Mad), Dissented, and held impliedly overruled by AIR 1967 SC 1081 — (Constitution of India, Art. 226 — Judicial review of administrative order).

The decision of the Government regarding the existence of urgency is not subject to judicial review except in cases where the order itself suffers from a lacuna or in cases where the Government never applied its mind to the matter or acted mala fide. The Court will not be entitled to go into the question whether the decision was taken on proper material and in an objective manner. AIR 1967 Mad 118 & AIR 1954 Mad 481 & ILR (1965) 1 Mad 741 & AIR 1967 SC 483 & AIR 1967 SC 1081, Followed. W. P. No. 1555 of 1964 (Mad) & W. P. No. 795 of 1962 (Mad) & W. P. No. 505 of 1961

GL/HL/D53/68

(Mad) & AIR 1965 Mad 328, Dissented, and held impliedly overruled by AIR 1967 SC 1081. (Para 10)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 483 (V 54)=Cri Appeal No. 110 of 1966, D/- 27-7-1966, Jaichand Lala Sethia v. State of West Bengal 7, 8, 10
- (1967) AIR 1967 SC 1081 (V 54)=(1967) 1 SCR 373, Raja Anand v. State of U. P. 7, 10
- (1967) AIR 1967 Mad 118 (V 54)=ILR (1967) 2 Mad 590, Mohd. Habibullah v. Special Deputy Collector for Land Acquisition, Madras 9, 10
- (1965) AIR 1965 Mad 328 (V 52)=ILR (1965) 2 Mad 416, Periathambi Mudaliar v. Spl. Tahsildar (L. A.) Planning Scheme, Coimbatore 10
- (1965) ILR 1965-1 Mad 741, Nagamalai Colony Formation Association v. State of Madras 9, 10
- (1964) W. P. No. 1555 of 1964 (Mad) 10
- (1963) AIR 1963 SC 151 (V 50)=(1963) 2 SCR 774, Smt. Somawanti v. State of Punjab 6
- (1962) W. P. No. 795 of 1962 (Mad) 10
- (1961) W. P. Nos. 505 etc. of 1961 (Mad) 10
- (1954) AIR 1954 Mad 481 (V 41)=1953-2 Mad LJ 684=66 Mad LW 999, Natesa Asari v. State of Madras 9, 10
- (1945) AIR 1945 PC 156 (V 32)=72 Ind App 241, Emperor v. Sibnath Banerjee 7, 8, 10

V. P. Raman for N. R. Chandran, for Petitioners; T. Selvaraj for Govt. Pleader, for Respondents.

ORDER:— This petition is filed for the issue of a Writ of Certiorari calling for the records of the State of Madras relating to G. O. No. 4256, Home, dated 14-9-1965 published in Fort St. George Gazette, dated 29-9-1965 and for quashing the same.

2. The Petitioners are the owners of Survey No. 250/28 and S. No. 2491/A in Ariyur Village, Namakkal Taluk, Salem District. Regarding this land, the Government issued a notification under Section 4 (1) of the Land Acquisition Act on 14-9-1965. In the same notification, under sub-section (4) to Section 17, the Governor directed that in view of the urgency of the case, the provisions of Section 5-A shall not apply. On the same date 14-9-1965, the Governor also made a declaration under Section 6 of the Land Acquisition Act declaring that the lands were needed for public purpose, namely for making provision for house sites for Harijans of Nadupatti. These two notifications are challenged in this writ petition.

3. Mr. V. P. Raman, the learned Counsel for the Petitioners raised three contentions. Firstly, he submitted that the notification under Section 4 (1), the dispensing of the provisions under Section 5-A and the issuing of declaration under Section 6 of the Land Acquisition Act on the same date are illegal and contrary to Section 17 (4) of the Land Acquisition Act. Secondly, he submitted that the State was not justified in invoking the provisions under Section 17 (4) as there was no urgency as contemplated under the section. Thirdly, he contended that the acquisition of the house under Section 17 (2) (b) (ii) (c) can only be justified for making provision for houses for the poor and not for Harijans as a class as there may be Harijans who are rich.

4. So far as the objection of the learned Counsel that the notification under Section 4 (1) and under Section 17 (4) that the provisions of Section 5-A shall not apply and the declaration under Section 6 cannot be made simultaneously is concerned, the learned Counsel strenuously relied on the wordings of Section 17 (4) which reads:—

"In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable the appropriate Government may direct that the provisions of Section 5-A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Section 4, sub-section (1)".

5. The procedure under the Land Acquisition Act is to make a preliminary notification under Section 4 (1) by the appropriate Government stating that the land in a particular locality is needed for any public purpose. The powers under Section 17 (4) can be invoked in the case of urgency. It may be that at the time of the notification under Section 4 (1), the Government was satisfied that the land is required urgently and, therefore, may pass an order simultaneously that the Government is satisfied that the provisions of Section 17 (1) or 17 (2) are applicable and declare that the provisions of Section 5-A shall not apply. So far, there can be no difficulty. Strong reliance is made on the words "a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Section 4, sub-section (1)". It was contended that the words "a declaration under Section 6 may be made after the publication of the notification under Section 4, sub-section (1)" would contemplate an earlier publication of the notification under Section 4, sub-section (1) to be followed by a declaration under Section

6, and, therefore, the two notifications cannot be made simultaneously.

6. The Supreme Court in *Smt. Somawanti v. State of Punjab*, AIR 1963 SC 151 at p. 171, in answering the contention that notifications under Section 4(1) and Section 6 cannot be made simultaneously observed as follows:—

"But it seems to us that where there is an emergency by reason of which the State Government directs under sub-section (4) of Section 17 of the Act that the provisions of Section 5-A need not be complied with, the whole matter, that is, the actual requirement of the land for a public purpose must necessarily have been considered at the earliest stage itself that is when it was decided that the compliance with the provisions of Section 5-A be dispensed with. It is, therefore, difficult to see why the two notifications cannot, in such a case be made simultaneously. A notification under sub-section (1) of Section 4 is a condition precedent to the making of notification under sub-section (1) of Section 6. If the Government, therefore, takes a decision to make such a notification and, thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of Section 5-A, and also to declare that the land comprised in the notification is in fact needed for public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day."

The Court proceeded to observe that the law does not make the prior publication of notification under sub-section (1) of Section 4 a condition precedent to the publication of notification under sub-section (1) of Section 6. The decision negatives the contention of the learned Counsel. Following the decision, I hold that the objection that the notification under Section 4 (1) and the declaration under Section 6 cannot be made simultaneously has to be rejected. In this connection it will be useful to refer to the directions given in the Land Acquisition Manual compiled by the Madras Government at page 89. They are as follows:

"In cases in which exemption from the operation of Section 5-A of the Act is recommended and the Collector submits both the notification under Section 4 (1) and the declaration under Section 6 they may be sent together to the press, but they should not both be published in one issue of the Gazette. The latter should be published a week after the former. The schedule of lands should be published with the notification under Section 4 (1) and the declaration under Section 6." These directions are by way of abundant caution and if followed would avoid the objections that are raised in the present petition.

7. The next contention of the learned Counsel is that the decision whether there was an urgency or not is justiciable and the Court would be entitled to look into the facts of each case. The Supreme Court in *Raja Anand v. State of U. P.*, AIR 1967 SC 1081 at p. 1085 observed:—

"It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17 (4) of the Act, is subjective and a Court cannot normally enquire whether there were sufficient grounds or justification of the opinion formed by the State Government under Section 17 (4)". After citing with approval the decision of *Emperor v. Sibnath Banerjee*, 72 Ind App 241=(AIR 1945 PC 156) and referring to the decision of the Supreme Court in *Jaichand Lala Sethia v. State of West Bengal*, Cri. Appeal No. 110 of 1966, D/-27-7-1966=(AIR 1967 SC 483), the Court observed:

"But even though the power of the State Government has been formulated under Section 17 (4) of the Act in subjective terms the experience of opinion of the State Government can be challenged as ultra vires in a Court of law if it could be shown that the State Government never applied its mind to the matter or that the action of the State Government is mala fide."

The exceptions mentioned in the decision which would enable a party to challenge the opinion of the State Government are that the State Government never applied its mind to the matter or that the action of the State Government is mala fide.

8. Dealing with the satisfaction of the Government required under Rule 30 of the Defence of India Rules, 1962 the Supreme Court in AIR 1967 SC 483 has held that the satisfaction is a subjective satisfaction and that a Court cannot normally enquire whether grounds existed which would have created the satisfaction on which alone the order could have been made in the mind of a reasonable person, if, therefore, an authenticated order of detention is on its face regular and in conformity with the language of Rule 30 it is not ordinarily open to a Court to enter into an investigation about the sufficiency of the materials on which the order of detention is based. The Supreme Court quoted with approval the law stated in 72 Ind App 241 at p. 261=(AIR 1945 PC 156 at p 161). There the Privy Council stated:—

"In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled."

The Supreme Court in summing up the position held as follows at page 486:

"The accuracy (of a recital) can be challenged in two ways either by proving that the State Government never applied its mind to the matter or that the authorities of the State Government acted mala fide. In a normal case the existence of such a recital in a duly authenticated order will in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing that the necessary condition was fulfilled. In other words, in a normal case the existence of such a recital in a duly authenticated order that the State Government was satisfied will, in the absence of any evidence to the contrary, be accepted by the Court as establishing that the State Government was so satisfied. If the order of detention itself suffers from any lacuna, it is open to a Court in a proper case to call for an affidavit from the Chief Minister or other Minister concerned or to call for the relevant file from the State Government in order to satisfy itself as to the accuracy of the recital made in the order of detention."

Thus it will be seen that normally an affidavit or the records will not be called for if the order prima facie discloses that the Government was satisfied. If the order suffers from any lacuna, an affidavit can be called for. The case where the State Government never applied its mind to the matter or where the State Government acted mala fide is different.

9. In *Natesa Asari v. State of Madras*, 1953-2 Mad LJ 684=66 Mad LW 999=(AIR 1954 Mad 481) a Division Bench of this Court in considering the scope of the challenge to the satisfaction of the Government as to the state of urgency under Section 17 (4) held that what was required under Section 17 (4) is that the Government must be satisfied that there was such urgency as is contemplated under Section 17 (1) and if it was so satisfied it was entitled to pass an order under S 17(4) dispensing with the application of S. 5-A. The submission that there was no urgency in the case as would justify invoking the provisions under Section 17 (1) and that there was no enquiry about such urgency was rejected on the ground whether an urgency existed or not was a matter solely for the determination of the Government and was not a matter for judicial review. A recent decision of a Bench of this Court in *Mohd. Habibullah v. Special Deputy Collector for Land Acquisition, Madras*, AIR 1967 Mad 118 followed the decision in 1953-2 Mad LJ 684=(AIR 1954 Mad 481) and held whether urgency existed or not is a matter solely for the determination of the Government and it is not a matter for judicial review. In *Nagamalai Colony Formation Association v. State of Madras*, ILR 1965-1 Mad 741, at page 751 in considering the scope of

the Government's satisfaction regarding the urgency, a Bench of this Court has found that no objective criterion is laid down to guide the Government and that the sub-section does not even use the words like, that the Government should be reasonably satisfied as to the existence of the condition. Taking this into consideration that steps will have to be taken under Section 17 (4) in cases of urgency, the Court expressed its view that it would be hampering the freedom of swift action if an objective investigation were to be prescribed. The Bench also followed the view expressed in 1953-2 Mad LJ 684=(AIR 1954 Mad 481).

10. Thus it will be seen that three Division Benches of this Court have taken the view that the question whether urgency exists or not is a matter solely for the determination of the Government and it is not a matter of judicial review. Reading these decisions along with the decisions in AIR 1967 SC 483 and AIR 1967 SC 1081, the position of law is clear that the decision of the Government regarding the urgency is not subject to judicial review except in cases where the order itself suffers from a lacuna or in cases where the Government never applied its mind to the matter or acted mala fide.

A view somewhat different is expressed by a Bench of this Court in *W. P. No. 1555 of 1964 (Mad)*. The Court held:

"The question in each case for the Government to consider when it desires to invoke Section 17 (4) would be whether facts and conditions exist or require that would not brook the delay which would be caused by applying Section 5-A. A decision on that question will have to be taken on proper material and in an objective manner, neither capriciously nor whimsically. But when the Court is called upon to see whether the power in invoking urgency provisions has been properly exercised, it has necessarily to examine whether the decision to invoke the provisions was based on material and was neither arbitrary nor capricious nor mala fide."

The scope of the judicial review according to this decision is wider than that as envisaged by the two decisions of the Supreme Court in AIR 1967 SC 483 and AIR 1967 SC 1081. Neither the decisions of the Supreme Court nor that of the Privy Council in AIR 1945 PC 156=72 Ind App 241 nor the three Division Bench decisions of this Court in 1953-2 Mad LJ 684=(AIR 1954 Mad 481), ILR (1965) 1 Mad 741 and AIR 1967 Mad 118 were brought to the notice of the learned Judges. With respect I feel bound by the two decisions of the Supreme Court and the three Division Bench judgments referred to above and hold that the deci-

sion of the Government regarding the existence of the urgency is not justiciable except grounds specified in the decisions. The Court will not be entitled to go into the question whether the decision was taken on proper material and in an objective manner. In this view I am unable to agree with the decision of a Single Judge of this Court in AIR 1965 Mad 328, W. P. No. 795 of 1962 and in W. P. Nos. 505, etc. of 1961.

11. The next point urged by the learned Counsel is that the notification requiring the lands for the purpose of providing the Harijans with house-sites is not one contemplated under Section 17 (4) of the Land Acquisition Act and the notification under Section 4 (1) and the declaration under Section 6 which states that the land is required as house-sites for Harijans are illegal. This argument is based on the wording of Section 17 (2) (b) (ii) (c) which makes the procedure under Section 17 (2) applicable in cases of acquisition for construction of houses for the Harijans need not necessarily be acquisition for providing dwelling houses for the poor for some of the Harijans may be rich. The answer to this contention is twofold by the State. Firstly it is submitted that the notification is one under Section 17 (1) and as such may be upheld. It provides that when the Government is satisfied about the existence of urgency, it can invoke the provision under Section 17 (4) if the land sought to be acquired is waste or arable land. Section 17 (1) is not applicable to lands which are not waste or arable. It is only with regard to the lands which do not fall under the category of arable lands, the question whether the land is intended for dwelling houses for the poor would have to be gone into. It is unnecessary to consider this question at any length in this case for it is clear from the counter affidavit that the notification in this case is under Section 17 (1) and on the merits it is seen that the land is required for 24 families who are Harijans badly in need of the house-sites. Thus on the materials on record it is clear that the land is required for providing dwelling houses for Harijans who are without houses and are poor. The requirement under Clause (c) of sub-section (2) (b) (ii) of Section 17 that the land can be acquired under Section 17 (2) for providing house-sites for the poor is satisfied. In this connection it is useful to refer to the directions given in the Land Acquisition Manual compiled by the State Government. At page 85 of the Manual it is directed.

"When land is required for providing house-sites for members of the Scheduled Castes or other labouring classes or of a cooperative society, the names of the members to whom it is intended to assign

the land when acquired should be given in the notice issued under Sections 4 (1) and 5-A together with the extents proposed to be given to each."

This instruction if followed would avoid the legal contentions that have been put forward in this case. It may not be necessary that in the notifications under Sections 4 (1) and 5-A these particulars should be given but it is desirable to follow such a course.

12. In the result all the contentions raised by learned Counsel for the Petitioners are rejected. The Writ Petition is dismissed. There will be no order as to costs.

BDB/D,V.C.

Petition dismissed.

AIR 1969 MADRAS 108 (V 56 C 25)

M. ANANTANARAYANAN, C. J.
AND NATESAN, J.

Tirumalaisami Naicker, Appellant v. Villagers of Kadambur, Athur Taluk, Represented by their Nattamaikara Nella-thambi Moopanan and another, Respondents.

Letters Patent Appeal No. 69 of 1964, D/- 1-8-1967 against judgment of Kailasam, J., in S. A. No. 761 of 1961, D/- 17-4-1964.

(A) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 93 — Bar on maintainability of suits in Civil Courts is not absolute — Matters not contemplated by the Act can be dealt with in Civil Courts.

Section 93 bars suits or other legal proceedings in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act, except under and in conformity with the provisions of the Act. A reading of S. 93 will further show that it does not impose an absolute bar on the maintainability of a suit in a Civil Court. It provides, that a suit of the nature contemplated therein, can be instituted only in conformity with the provisions of the Act. Clearly a suit or other legal proceedings in respect of matters not contemplated in the section can be instituted in the ordinary way. It cannot mean that suits of the category for instituting which, no provision is made in the Act are barred. (Para 5)

(B) Civil P. C. (1908), S. 9 — Jurisdiction — Dispute of a civil nature can be dealt with in Civil Courts unless its jurisdiction is barred — Presumption is in favour of Civil Court's jurisdiction — Person claiming ousting of jurisdiction must establish it.

HL/HL/D:55/68

Under S. 9, C. P. C. a litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in a Civil Court under the provisions of the Civil Procedure Code, unless cognizance of the suit is either expressly or impliedly barred. If a suit is otherwise within the jurisdiction of the Civil Court the person who seeks to oust the jurisdiction of that Court must affirmatively establish the bar, every presumption being in favour of the jurisdiction of the Court. Exclusion of the jurisdiction of a Civil Court in a case where a person asserts a right and seeks remedy cannot be readily inferred. (Para 5)

(C) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Ss. 57, 62, 87, 93 — Orders under S. 57(c) not binding on persons who were not parties to proceedings — Neither S. 93 or 87 bar a civil suit for declaration and injunction by third party who was not a party to proceedings.

An order under S. 57 (c) has not been made a decision in rem to bind persons not parties to the proceedings. So long as the plaintiff's rights are not affected, his title placed in jeopardy and his possession and enjoyment of the property not interfered with, he may ignore orders and proceedings to which he is not a party and which in law are not binding on him.

The summary procedure under S. 87 cannot be availed of against a person claiming in good faith to be in possession on his own account or on account of third parties, that is, not on account of trustees, office bearers and servants of the temple dismissed or suspended or otherwise not entitled to be in possession.

Section 87 further expressly provides that nothing in the section shall bar the institution of a suit by any person aggrieved from an order under the section for establishing his title to the suit property, that is the existence of right of suit even to persons against whom proceedings under S. 87 are specifically contemplated and have been taken if they are aggrieved, is recognised. A fortiori suit by a third party to establish his right in any property that may be the subject of an order under Sec. 87 would require no saving even. It is not a suit which is provided under the Act; it is not barred under the Act and therefore cannot be subject to the restrictions found in Sec. 62 of the Act. Where the suit instituted is one for a declaration of title with consequential relief of injunction by a stranger to the proceedings under the Act, this is not therefore a suit which is contemplated under S. 62 of the Act, and clearly S. 87 does not bar the suit in question. Section 93 in the circumstances cannot stand in the way of its institution. (Paras 6, 7)

(D) Civil P. C. (1908), O. 1, R. 9 — Plaintiff filing suit against 'A' and 'B' — 'A' is one of the trustees of a temple — B is tenant of property which A claims as temple property and which plaintiff claims it in his own right — 'A' is sued in his personal capacity — No necessity to join other trustees as parties.

(Para 8)

P. C. Parthasarathy Iyengar, for Appellant; S. Palanisami and C. Desappan, for Respondent.

NATESAN, J.:— Two questions are raised in this Letters Patent Appeal from the decision of our learned brother, Kailasam, J. First it is contended that the suit not having been instituted in conformity with and as provided for under the Madras Hindu Religious and Charitable Endowments Act, Madras Act XIX of 1951, hereinafter referred to as the Act, it is barred under Section 93 of the Act. Next it is submitted that the suit is bad for non-joinder of the other trustees of the religious institution in question.

2. The appellant before us is the first defendant in a suit filed by the villagers of Kadambur, Athur Taluk, Salem District, represented by their Nattamaikarar Nallathambi Moopanar, as the plaintiff, for a declaration that the suit building belonged to the villagers and the second defendant in the suit, the District Board, Salem, was their tenant. An injunction was prayed for restraining the first defendant in the suit, the present appellant, from interfering with suit property. The first defendant is one of the trustees of certain temples in the village, and it is the case of the plaintiff that the first defendant fraudulently obtained an order from the Hindu Religious and Charitable Endowments Board to the effect that the suit property is a property of the temples. It is seen that on proceedings taken by the first defendant under Section 87 of the Act (Miscellaneous Petition No. 73 of 1957) for possession of the suit property, the second defendant who was in occupation of the property as a tenant of the plaintiff attorned to the first defendant on 20-5-1957. The second defendant subsequently on 20-12-1957 sent to the plaintiff a memo to the effect that the suit property had been included as temple property, and that the first defendant claimed to be entitled to receive the rents. This, according to the plaintiff, necessitated his filing the suit for a declaration of the title of the villagers to the suit property and for an injunction against the first defendant. The plaintiff would state that the order obtained by the first defendant from the H. R. and C. E. Board was not binding on the plaintiff and it could be ignored by the villagers.

3. In its written statement the second defendant Board expressed its willingness to pay the rent to such person as the Court might declare to be entitled to receive the rent. Besides setting up a plea that though the suit building was built by the villagers it had been dedicated to the temples in the village and therefore it is a public religious institution, the first defendant strenuously contended that the suit should have been in conformity with Section 62 of the Act, filed in the Sub-Court, which alone had jurisdiction. A plea of non-joinder of the other trustees of the temple was raised and the written statement specifically set up the order under Section 87 of the Act as a bar to the suit as instituted.

4. The learned District Judge, on an elaborate consideration of the evidence, oral and documentary, upheld the plaintiff's claim that the second defendant Board had entered on the possession of the suit property as tenant under the person who was then in management of the property as Nattamaikarar of the villagers and was continuing in possession of the property. He found that there was no proof that at any point of time the temples enjoyed the suit property or appropriated the income from the suit property which was constructed from subscriptions collected from the villagers. For the first time in 1956 the H. R. and C. E. Board had passed orders treating the suit property as belonging to the village temples and appointing the first defendant and two other persons as trustees issued a certificate under Section 87 of the Act. It is seen from the record that for sometime previously the first defendant had been seeking to convince the second defendant not to pay the rent to the plaintiff in his capacity as Nattamaikarar of the village. The learned District Judge observes that the first defendant chagrined at his failure in convincing the second defendant Board not to pay the rent to the plaintiff in his capacity as Nattamaikarar of the village must have induced the H. R. and C. E. Board authorities to include the suit property as part of temple property and appoint trustees for the temples with a direction to take possession of the suit property, and that evidently the first defendant thought "that unless he adopted such sharp practice" he could not prevent the plaintiff in his capacity as Nattamaikarar of the village from collecting the rent from the second defendant board". We may add here that the plaintiff, either in his individual capacity or as Nattamaikarar of the village, was not made a party to the proceedings before the H. R. and C. E. Board, and as pointed out by the plaintiff, the orders of the Board had been obtained behind his back without any reference to him and obvi-

ously without bringing to the notice of the Board the dispute relating to title to the suit property.

5. We fail to see how on the facts as pleaded and as have now emerged it would be said that the suit is barred by any law. Manifestly it is just a common law suit by the person duly representing the owners of the property for a declaration of title of the villagers against their tenant who sets up a third party's title and pleads attornment to the third party. The plaintiff has chosen to implead in the suit, besides the tenant, the person who according to him induces the tenant not to pay the rents to the plaintiff, and who eo nomine obtained an order for possession under Section 87 of the Act. The argument for the appellant is that Section 93 of the Act read with Sections 57, 62 and 87 bars the suit as instituted. In our view, this plea was rightly overruled by the learned District Judge. Our learned brother, Kailasam, J., has examined the plea at length and affirmed its untenability. Section 93 bars suits or other legal proceedings in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act, except under and in conformity with the provisions of the Act. It is nobody's contention that the present suit relates to the administration or management of a religious institution. The next question is whether the suit relates to any other matter or dispute for determining or deciding which provision is made in the Act. Clearly there is no provision in the Act for determination of the dispute as raised in the suit. This is a simple suit by the landlord against his tenant who sets up title in a third party. Relief is no doubt claimed also against the person who happens to be one of the trustees of the institution on the averment that he is interfering with the lawful and due realisation of the rent by the plaintiff from the second defendant Board. Under Section 9, C. P. C. a litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in a Civil Court under the provisions of the Civil Procedure Code, unless cognisance of the suit is either expressly or impliedly barred. If a suit is otherwise within the jurisdiction of the Civil Court the person who seeks to oust the jurisdiction of that Court must affirmatively establish the bar, every presumption being in favour of the jurisdiction of the Court. Exclusion of the jurisdiction of a Civil Court in a case where a person asserts a right and seeks remedy cannot be readily inferred. Exclusion of the suit in question from the cognisance of the Court must be either expressly expressed or clearly and necessarily im-

plied. A reading of Section 93 shows that it does not impose an absolute bar on the maintainability of a suit in a Civil Court. It provides, that a suit of the nature contemplated therein, can be instituted only in conformity with the provisions of the Act. Clearly a suit or other legal proceedings in respect of matters not contemplated in the section can be instituted in the ordinary way. Section 93 imposes certain statutory restrictions in respect of suits mentioned therein, suits relating to the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in the Act. The suits under the two categories mentioned in the section must be instituted under and in conformity with the provisions of the Act. This last limb of the section brings out that the restriction on suits or other legal proceedings, is in respect of matters for which provision is made in the Act. It cannot mean that suits of the category for instituting which, no provision is made in the Act are barred. There can be suits not covered by the Act and aggrieved parties will be deprived of all remedies where no provision is made under the Act for securing the relief they desire and at the same time it should be held that remedies outside the Act are barred. Section 93 clearly bars only those suits for which provision has been made in the Act and it does not prohibit the institution of suits under the general law which do not fall under the scope of any of the sections of the Act.

6. Our attention is drawn by learned Counsel to Sections 57 and 62 of the Act. Section 57 provides for the Deputy Commissioner to decide certain disputes and matters, and Section 57 (c) enables the Deputy Commissioner to enquire into and decide whether any property or money is 'a religious endowment'. Section 61 (1) provides for an appeal to the Commissioner by any person aggrieved from any order passed by the Deputy Commissioner under the prior provisions within one month from the date of the publication of the order. In the case of a party concerned the appeal must be within one month of the receipt of the order. Under Section 62 (1) any party aggrieved by an order passed by the Commissioner, under Section 61 sub-section (1) or sub-section (2) and relating to any of the matters specified in Section 57, Section 58 or Section 60 may, within 90 days from the date of the receipt of such order by him, institute a suit in the Court against such order. But the Court is given no power to stay the Commissioner's order pending the disposal of the suit. Court is defined under Section 6 (6) of the Act as the Subordinate Judge's Court having jurisdiction over the area in which a temple is

situated and the District Court having jurisdiction where there is no Subordinate Judge's Court. Learned Counsel would contend that here is an order under Section 57 of the Act recognising the property in question as that of certain temples, and that therefore the suit must be instituted in the Subordinate Judge's Court, and not in the District Munsif's Court as has been done. The power of the Deputy Commissioner to find whether a particular property belongs to a temple, it is said, is found in Section 57. Therefore it is argued that when a certificate is issued under Section 87, it involves a decision under Section 57 (c). But the first thing to be noticed is that the Deputy Commissioner in this case was not called upon to decide any dispute between the plaintiff and the institution. As stated earlier the plaintiff was not a party to the proceedings and orders have been obtained without reference to the dispute, behind his back. Section 62 provides for suits by any party that may be aggrieved by the order of the Commissioner passed on appeal made to him. An order under Section 57 (c) of the Act has not been made a decision in rem to bind persons not parties to the proceedings. So long as the plaintiff's rights are not affected, his title placed in jeopardy and his possession and enjoyment of the property not interfered with, he may ignore orders and proceedings to which he is not a party and which in law are not binding on him. A mere declaration behind the back of the plaintiff without reference to him, that the property is that of the temple will not affect the plaintiff. What affected the plaintiff was the much later attornment by the second defendant-Board against whom the certificate under Section 57 was obtained and the Board's refusal to pay rents to the plaintiff.

7. Section 87 of the Act enables a person who has been appointed as trustee or Executive Officer of a religious institution or to discharge the functions of a trustee of a religious institution, when resisted in or prevented from obtaining possession of the property of a religious institution by a trustee, office-bearer or servant of the religious institution who has been dismissed or suspended from his office or is otherwise not entitled to be in possession or by any person claiming or deriving title from such trustee, office-bearer or servant, to secure possession by summary proceedings before specified alias of Magistrates. But the summary procedure cannot be availed of against a person claiming in good faith to be in possession on his own account or on account of third parties, that is, not on account of trustees, office-bearers and servants of the temple dismissed or suspended or otherwise not

entitled to be in possession. To get an order for delivery under the Section the person who could claim possession under Section 87 has to produce a certificate by the Commissioner in the prescribed form setting forth the property in question. Under the proviso to S 87 before issuing a certificate in respect of any property, the Commissioner has to give notice to the trustee, office-holder or servant of the religious institution, as the case may be and consider the objections, if any, made. The certificate is conclusive for the purpose of the proceedings under the section. Dispossession of persons bona fide in possession on their own account is not contemplated in these proceedings. Section 87 further expressly provides that nothing in the section shall bar the institution of a suit by any person aggrieved from an order under the section for establishing his title to the suit property, that is the existence of right of suit even to persons against whom proceedings under Section 87 are specifically contemplated and have been taken if they are aggrieved, is recognised. A fortiori suit by a third party to establish his right in any property that may be the subject of an order under Section 87 would require no saving even. It is not a suit which is provided under the Act; it is not barred under the Act and therefore cannot be subject to the restrictions found in Section 62 of the Act. The suit instituted in the present case is one for a declaration of title with consequential relief of injunction by a stranger to the proceedings under the Act. This is not therefore a suit which is contemplated under Section 62 of the Act, and clearly Section 87 does not bar the suit in question. Section 93 in the circumstances cannot stand in the way of institution of the present suit. The first contention fails.

8. As regards the plea of non-joinder of other trustees, no doubt where a religious institution has plurality of trustees the institution cannot be represented unless all the trustees are made parties. If the temples are to be bound by this judgment, all the trustees are necessary parties. But the present suit is framed as against the first defendant restraining him from in any way objecting to the payment of rent by the second defendant Board to the plaintiff. As our learned brother Kailasam, J., points out, the suit is not against the first defendant in his capacity as trustee appointed by the Religious Endowments Board. It follows that this plea of non-joinder of other trustees also fails.

In the result the Letters Patent Appeal fails and is dismissed with costs.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 112 (V 56 C 26)

RAMAKRISHNAN AND
SADASIVAM, JJ.

Sivasankara Mehta, Appellant v. M/s. Bagwandas Arjunlal Bankers and others, Respondents.

Original Side App. No. 43 of 1966 and C. M. P. Nos. 12111 of 1967 and 13495 of 1967, D/- 28-11-1967 against judgment of Ramamurti, J., in Appln. No. 238 of 1965, D/- 26-4-1966.

Presidency-Towns Insolvency Act (1909), Ss. 9 (e) and 12 (b), (c) — Civil P. C. (1908), O. 38, R. 11 — Attachment before judgment of moveable property — Suit decreed and attachment made absolute on 20-11-1964 — Petition on 19-3-1965 to execute decree by sale of attached property — Petition ordered on 31-3-1965 — Insolvency petition on 7-7-1965 — Held, petition was within time — Period of three months had to be counted from date of completion of 21 days after filing execution petition (i. e., 19-3-1965): AIR 1931 Cal 246, Rel. on; Appln. No. 238 of 1965, D/- 26-4-1966 (Mad), Affirmed — O. 38, R. 11 could be relied upon for purpose of realising amount by sale of property without fresh attachment — That order could not be viewed as a deeming provision having the effect of dating execution petition retrospectively to date of decree itself when attachment is made absolute: Case law discussed.

(Paras 3 to 7)

Cases Referred: Chronological & Paras
(1963) AIR 1963 Mad 217 (V 50)=

ILR (1963) Mad 194 (FB), Subramaniam v. Sundaram 8

(1942) AIR 1942 Mad 512 (V 29)=
1942-1 Mad LJ 428, Chidambaram

Mudaliar v. Ranganatham 9

(1937) AIR 1937 Mad 84 (V 24)=
Ramanandhan v. Veerappa 8

(1936) AIR 1936 Mad 91 (V 23)=
ILR 59 Mad 303, Dalayya v.

Sundara Narayana 8, 9

(1931) AIR 1931 Cal 246 (V 18)=
ILR 57 Cal 1274, Mt. Anupama

Debi v. Gurudas Chatterji 8

(1924) AIR 1924 Mad 494 (V 11)=
ILR 47 Mad 483 (FB), Meyyappa

Chettiar v. Chidambaram Chettiar 9

(1921) AIR 1921 Mad 163 (V 8)=
ILR 44 Mad 902 (FB), Arunachala

Chetti v. Periasami Servai 8, 9

(1899) 1899-1 QB 626=68 LJQB 3

344 In re, Beeston

Sivaramakrishniah, for Appellant.

RAMAKRISHNAN, J.:— This appeal

filed under the Letters Patent is directed against the order of Ramamurti, J., in I. P. No. 42 of 1965, a petition filed by a creditor to adjudge one Sivasankara Mehta, the appellant, an insolvent. The ground relied on by the petitioning credi-

tor is a brief one. He alleged that the debtor's properties were attached in execution of a decree passed by the City Civil Court, Madras for payment of money, that the attachment remained subsisting for a period of more than 21 days, and that consequently this amounted to an act of insolvency, as defined in Section 9 (e) of the Presidency-Towns Insolvency Act. That section is in the following terms—

"A debtor commits an act of insolvency in each of the following cases:— (e) if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money."

Under Section 12 (c) such a petition has to be filed by the creditor within three months from the act of insolvency relied upon. It was alleged by the appellant in answer to the petition that the act of insolvency had occurred long prior to the period of three months before the presentation of the petition and that, therefore, the petition was barred by time. The learned Judge held that the petition was not so barred, bearing in mind the relevant dates in the case, and adjudged the appellant insolvent as prayed for by the order dated 26-4-1966. The debtor appeals.

2. Certain dates are important for the purpose of a appreciating the points in controversy. The petitioning creditor attached before judgment the moveable properties of the appellant in a suit filed by him in O. S. No 2783 of 1964 on the file of the City Civil Court, Madras. The suit was decreed for a sum of Rs. 4550/- on 20-11-1964 and the attachment before judgment was made absolute on the same date. On 19-3-1965, the petitioning creditor, the decree-holder in the above suit, filed an execution petition in the City Civil Court, Madras, praying for the sale of the moveables of the appellant, which were the subject-matter of the attachment mentioned earlier. The execution petition was ordered on 31-3-1965 and thereafter it was adjourned for filing sale papers. The present insolvency petition was filed in 7-7-1965. The learned Judge was of the opinion that the act of insolvency within the meaning of Section 9 (e) of the Act was completed when 21 days elapsed from 19-3-1965, the date of the filing of the execution petition and that, therefore, the insolvency petition filed on 7-7-1965 was within three months thereafter and therefore was in time. Alternatively it was contended by the learned Counsel for the petitioning-creditor before the learned Judge, that time should be reckoned for the purpose of limitation from 31-3-1965 when notice of the execution petition for the purpose of proceeding with the sale of moveables was served

on the Registrar of the City Civil Court, Madras and from that point of view the petition was in time. But the learned Judge did not consider this alternative aspect, and gave the opinion that even if the date of the filing of the execution petition on 19-3-1965 is taken into account, calculating 21 days thereafter, the insolvency petition must be considered to be well within time.

3. In this appeal, learned Counsel for the appellant, Mr. Sivaramakrishniah, contended that on the principle laid down by several decisions of Courts in India, the act of insolvency enunciated in Section 9 (e) of the Act is not a continuing one and that the moment 21 days elapse from the date of the attachment of the property of an insolvent in execution of a decree for money, the act of insolvency becomes complete. Thereafter the three months period of time has to be counted for the purpose of limitation under Section 12 (b). The authorities relied on in this connection are in *Re, Beeston*, 1899-1 QB 626, which was followed in *Mt. Anupama Devi v. Gurudas Chatterji*, ILR 57 Cal 1274=(AIR 1931 Cal 246) and several other decisions. Of these decisions Mulla in his *Law of Insolvency in India*, 2nd Edn. at page 124 observed—

"The fact that the attachment continues for more than 21 days is not a continuing act of insolvency. Nor is there a repetition of the act of insolvency at the expiration of every 21 days thereafter. Once these days have elapsed, the act of insolvency is complete. A petition therefore must be presented within three months of the completion of the first 21 days, though the attachment may continue for more than 21 days". This principle has become well established in this country and has to be adopted in this case also.

4. The next and in fact the principal argument relied upon by the learned Counsel for the appellant is this. Order XXXVIII Rule 11, Civil Procedure Code reads thus:

"Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of the such decree to apply for a re-attachment of the property".

The effect of this order is to lay down that when there is an attachment before judgment, and subsequently a decree is passed making the attachment absolute and if thereafter an execution petition is filed for executing the decree, the anterior attachment can be relied upon for the purpose of realising the amount of the decree by sale of the property without a fresh attachment. According to the learned Counsel for the appellant,

in such cases where the fact of attachment of a debtor's property in execution of a decree is relied upon as an act of insolvency under Section 9 (e) of the Presidency-Towns Insolvency Act, the terminus a quo for the purpose of calculating the three months period of limitation must be counted from the expiry of 21 days from the date of the decree which makes the attachment absolute. According to the learned Counsel, even though in fact an execution petition is filed long subsequent to the decree, Order XXXVIII Rule 11 Civil Procedure Code must be viewed as a deeming provision having the effect of dating the execution petition retrospectively to the date of the decree itself when the attachment is made absolute. We are unable to agree with this contention. The purpose of a deeming provision in a statute is to create by a legal fiction something which was not there before. But in cases where Order XXXVIII Rule 11 Civil Procedure Code applies and an attachment had already existed before the execution petition is filed, that order merely declares a right in the decree-holder to proceed with the execution on the basis of the pre-existing attachment without the need to obtain a fresh attachment. No question of deeming provision arises in such cases.

5. Further, if we are to concede the proposition put forward by the learned Counsel for the appellant, it will amount in many cases to casting an oppressive burden on debtors. The proposition amounts to saying that the moment the property is attached before judgment and the attachment before judgment is made absolute on the passing of the decree in the judgment, the attachment for the purpose of Section 9 (e) of the Presidency Towns Insolvency Act will commence from the date of the decree irrespective of whether the decree-holder elects to execute the decree by filing an execution petition or whether he is prepared to give some accommodation to the judgment-debtor to satisfy the decree. In other words, on the expiry of 21 days from the date of decree, an act of insolvency becomes complete and the judgment-debtor will have to face the consequence of an insolvency petition which it may be open to any creditor to file within three months and 21 days after the passing of the decree. Such an intention cannot be inferred either from the language of Order XXXVIII Rule 11, C. P. C. or Section 9 (e) of the Presidency Towns Insolvency Act.

6. In the present case, it appears to us, that it is by reliance on the fact that such an extreme proposition will enable the appellant to urge a plea of limitation that this argument appears to have been put forward. But on the other hand, if we are to concede the above proposition

the hardship that will be caused to debtors will in many cases be oppressive and unconscionable. It could not be the intention of the statute to impose such an onerous consequence, on the mere passing of a decree along with an attachment of the judgment-debtor's property made before judgment which becomes absolute on the passing of the decree.

7. Several decisions cited in this connection do not support the above extreme view taken by the learned Counsel for the appellant. In fact, the learned Counsel was fair enough to concede that the proposition which he has put forward above is without authority of any decision, and he wants us to lay down the law in the manner suggested by him for the first time in this case. On the other hand, if we read carefully the decisions cited at the Bar, there is practically a consensus of view to hold that the terminus a quo for computing the three months period of limitation under Section 12 (b) of the Act is the actual date of the filing of the execution petition followed by 21 days thereafter, and that this will be the case when the filing of an execution petition follows an attachment before judgment and Order XXXVIII Rule 11 is applied thereafter.

8. In *Dalayya v. Sundaram Narayana*, ILR 59 Mad 303 at p. 309=(AIR 1936 Mad 91 at p. 93) Varadachariar, J., speaking for the Bench observed:

"As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court. The more reasonable view seems to us to be to hold that, from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment available for purposes of execution".

In *Ramanandhan v. Veerappa*, AIR 1937 Mad 84 at p. 89, a Bench of this Court held that before the attachment before judgment can become an attachment in execution of the decree, there must be some unmistakable declaration of the decree-holder's intention to execute the decree, that in ordinary cases such an election or declaration of intention would be made by presenting an execution application, but it does not seem that in every case without exception it should be done in this manner and in no other and that if the intention to execute can be inferred from other circumstances, it is sufficient. The decision in ILR 59 Mad 303=(AIR 1936 Mad 91) was followed by a recent Full Bench of this Court in *Subramaniam v. Sundaram*, ILR (1953) Mad 194 at p. 202=(AIR 1953

Mad 217 at p. 219) (FB) where the Full Bench observed:

"..... an attachment before judgment automatically becomes an attachment in execution of the decree, when the decree-holder applies for an order of the Court directing the sale of the property attached and that the subsistence of such an attachment for more than 21 days after the application for sale has been made by the decree-holder can be relied upon as an act of insolvency under Section 9 (e) of the Presidency-Towns Insolvency Act".

Referring to the effect of O. XXXVIII Rule 11 C. P. C., in a Full Bench decision of this Court reported in *Arunachala Chetti v. Periasami Servai*, ILR 44 Mad 902 at p. 910=(AIR 1921 Mad 163 at p. 167) (FB) Wallis, C J., who delivered the opinion of the Full Bench, at page 910 of the report (ILR Mad)=(at p. 167 of AIR) observed—

"Order XXXVIII Rule 11 does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Article 11 of the Limitation Act or of Order XXI Rule 57 as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment." Though that decision dealt with Article 11 of the Limitation Act, as well as Order XXI Rule 57 C. P. C., in the context of Order XXXVIII Rule 11 C. P. C. the above observations will be equally valid when we have to construe what is meant by the terms "attachment in execution of a decree" for the purpose of Section 9 (e) of the Presidency Towns Insolvency Act.

9. There is an observation of one of the learned Judges who constituted the above Full Bench, Spencer, J., at page 911 of the report (ILR Mad)=(at p. 167 of AIR)—

"If, on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree, because Order XXXVIII Rule 11 declares that no re-attachment is necessary. As attachment is the first step in the execution of all decrees against property, just as sale or delivery of property is the last step, the effect of this provision is that execution is made to date back to the first attachment which was before judgment." We cannot construe this observation of Spencer, J., which appears to have been nothing more than a passing observation, to imply that for the purpose of Section 9 (e) of the Presidency Towns Insolvency

Act, on the filing of an application for execution of a decree where there has been an attachment before judgment, a retrospective effect is given for the purpose of antedating the terminus a quo for the purpose of computing limitation under Section 12 (b) of the Act to the date of the judgment when the attachment was made absolute. In fact, in a later Full Bench decision in *Meyyappa Chettiar v. Chidambaram Chettiar*, ILR 47 Mad 483=(AIR 1924 Mad 494) (FB) which followed the decision in ILR 44 Mad 902=(AIR 1921 Mad 163), Ramesam, J., at page 508 of the report (ILR Mad)=(at pp 502-503 of AIR) made the comment that in the earlier Full Bench decision Spencer, J., "may be regarded as going further than the others", when he agreed with the other Judges to the extent that at least after the order for sale, the attachment before judgment becomes one in execution. In a decision of a Bench of this Court reported in *Chidambaram Mudaliar v. Ranganatham*, 1942-1 Mad LJ 428=(AIR 1942 Mad 512) the question arose under Section 9 (e) of the Presidency Towns Insolvency Act. In that case, the petitioning creditor filed a suit against the appellants and obtained an attachment before judgment, which was confirmed when he obtained a decree on 27-7-1941. On 11-9-1941, the decree-holder applied for the sale of the property which was already under attachment. The insolvency petition was filed for adjudicating the appellants on 17-10-1941, relying on Section 9 (e) of the Presidency Towns Insolvency Act. The learned Judges observed that when an execution application is made, the attachment automatically becomes an attachment in execution of the decree and no other construction is open. They followed the earlier decision cited above including the judgment of *Varadachariar, J.*, in ILR 59 Mad 303=(AIR 1936 Mad 91) No doubt, the occasion did not arise in that case for examining fully when the terminus a quo for purpose of Section 12 (b) commenced: nor was a contention like the one urged by the learned Counsel for the appellant herein placed before the Court; the only dispute was whether an attachment effected before judgment can be deemed to be an attachment in execution of the decree on the filing of a subsequent execution petition. But the observation of the learned Judges that on the making of an execution petition the attachment before judgment automatically becomes an attachment in execution of the decree shows that the Bench was having in mind the principle that the act of insolvency for the purpose of Section 9 (e) of the Act would be committed only if the execution petition is filed and 21 days run thereafter. In fact, Mullah in his law of

Insolvency, in India, 2nd Edn. to which we have made reference already, has referred to this judgment at page 124 of his book for holding

"That an attachment before judgment can be relied upon as an act of insolvency where the decree-holder elects to avail himself of the attachment and applies for execution inasmuch as from the moment of such application the attachment becomes available for the purpose of execution there being no necessity for a fresh order of attachment by the Court".

10. In view of the above considerations, we are of the opinion that there is no merit in the appeal, which is dismissed with costs of the petitioning creditor.

AKJ/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 116 (V 56 C 27)

VENKATADRI, J.

K. T. Kosalram, Petitioner v. Dr. Santhosham and others, Respondents.

Election Petn. No. 10 of 1967, Appln. No. 1333 of 1967, D/- 11-7-1967.

Representation of the People Act (1951), Ss. 82, 90 — Returning Officer — Whether proper or necessary party to election petition — Civil P. C. (1908), O. 1, Rr. 1, 3 and 10.

Section 82 of the Act is not final and conclusive in the matter of array of parties to an election petition. Provisions of Civil P. C. can be used and utilised. The Act does not say, whether the Returning Officer is either a necessary party or proper party in an appropriate case. Whenever there are allegations of bad faith, misconduct and impropriety and not merely illegality made against the Returning Officer in an election petition, the Returning Officer is a proper party though S. 82 does not make him a necessary party. Section 90 of the Act enables the Tribunal to implead the Returning Officer as a party under the provisions of the Civil Procedure Code which are expressly made applicable to the trial of election petitions, subject to the provisions contained in the Representation of the People Act and the Rules made thereunder: Case law discussed.

(Paras 8, 13)

Cases Referred: Chronological Paras

(1963) 3 Doabia's Ele Cases 206, Dwijendralal Sengupta v. Harekrishna Kunar 12

(1959) 22 Ele LR 45 (Ele Tri Nellore), Returning Officer, Atmakur v. Kondiah 11

(1958) 15 Ele LR 219 (MP), Inayatullahkhan v. Diwanchand Mahajan 11

(1954) AIR 1954 SC 210 (V 41)= 1954 SCR 892, Jagannath v. Jaswant Singh 11

(1952) 1 Ele LR 194 (Ele Tri Bom), G. C. Partabrai v. A. T. Chaharmal 10, 12

(1952) 2 Ele LR 121 (Ele Tri Cal), Nrisimha Kumar Sinha v. S. C. Ghosh 11

Govt. Pleader, for Applicant; K. V. Sankaran for K. V. Sankaran and R. Nadasabapathi and U. N. R. Rao and N. Sivasankaran, for Respondents.

ORDER:— This is an application by the Returning Officer, Tiruchendur Parliamentary Constituency, to strike off his name from the array of parties in Election Petition No. 10 of 1967. The applicant figures as the fifth respondent in the election petition. In this application, he states that he is neither a necessary party nor a proper party to the petition, that no relief has been asked for against him, that it cannot be said that the presence of the applicant will in any way enable the Court to adjudicate more effectively and completely the questions raised in the election petition, that he has acted only in the course of his duty as Returning Officer and has not done anything contrary to the statute, that the election petition has not disclosed any cause of action against him and that, therefore, his name may be struck off from the array of parties in the election petition.

2. The election petitioner has stated in his counter that he has impleaded the applicant as a party since he is of opinion that the applicant is a proper party, though not a necessary party.

3. The elected candidate (Dr. M. Santhosham) states in his counter that, since the petitioner in the election petition has made several allegations of improper conduct on the part of the Returning Officer and his staff in the matter of counting of votes and in not exercising adequate vigilance, it is just and necessary to retain him in the array of parties in order to enable the Court to determine the truth of the allegations.

4. In the election petition, there are several allegations of irregularities committed by the applicant in the matter of counting and rejection of votes, in the way of maintaining the secrecy of votes and in the unlawful manner in which he and his subordinates discharged their duties during the election.

5. The Returning Officer plays an important part in an election and the office of the Returning Officer is an honourable and distinguished one. The Returning Officer should be free from partiality, should not be prone to misconduct and should not give arbitrary decisions. He

is expected to maintain the secrecy of voting and he must satisfy himself whether a candidate is eligible and if he is not satisfied, then he can disqualify him. He should follow the instructions given to him strictly, before and after the election.

6. Learned Government Pleader appearing for the applicant-Returning Officer contends that the applicant cannot be impleaded under the provisions of the Representation of the People Act 1951; for, under that Act, only the contesting candidates and the returned candidate can be made parties to the petition. If there is any allegation in the petition as to breach of official duties in connection with the election, the Act provides that the official shall be punishable with fine. Even assuming that the serious allegations against the Returning Officer are true, he can be summoned to give evidence in the course of trial of the election petition.

7. Under the circumstances, an interesting question of election law and procedure arises, viz., whether the Returning Officer, when allegations of illegality, irregularity and impropriety are made against him, is a necessary or a proper party to an election petition, or whether he should be impleaded as a party or whether he should be deleted if he is already made a party to an election petition.

8. This question must be determined with reference to the particular statute, viz., the Representation of the People Act 1951 and the Rules made thereunder. It is true Section 82 of the Act provides for array of parties to an election petition. But it is not final and conclusive. The provisions of the Civil Procedure Code can be used and utilised either for impleading or for adding of parties to a petition. Further, the Act does not say that the Returning Officer is either a necessary party or a proper party in an appropriate case.

9. In Halsbury's Laws of England, Simonds Ed. 3rd Edn. Vol. 14 in para 446, the law on this aspect of the matter is summed up in the following words:—

"Where, however, a parliamentary election petition complains of the conduct of a Returning Officer, he will, for all the purposes of the Act, except as regards the admission of respondents in his place, be deemed to be a respondent. The allegation against the Returning Officer need not necessarily be one of wilful misconduct, and he may be joined as a respondent — where the acts or omissions or negligences complained of are not personal but are those of his subordinates".

From the cases reported in Election Petitions by O'Molloy and Hardcastle, it can

be gathered, that, if it is proposed to give evidence at the hearing of an election petition to implicate the Returning Officer, he should be made a respondent and that a mere proposal to offer evidence implicating the Returning Officer will not enable one to take out summons as no charge has been made against him in the petition. In another case, the presiding Judge refused to allow the respondent in an election petition to serve a copy of the petition on the Returning Officer on the ground that it was unnecessary, as, by the fact of the conduct of the Returning Officer being complained of, he was already deemed to be a respondent. But on a summons being subsequently taken out by the returning officer for particulars of the charges against him, another Judge held that he was not a party as wilful misconduct was not alleged against him. The trend of opinion from these English cases seems to be that, whenever there is any allegation of misconduct, he must be deemed to be a proper party.

10. The earliest case that can be traced, for the purpose of answering the question whether a Returning Officer is a necessary or a proper party, is *G. C. Partabrai v. A. T. Chaharmal*, (1952) 1 Ele LR 194 at p. 200 (Ele. Tri. Bom) where it is observed—

"Section 82 of the Representation of the People Act 1951 provides that the petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election. It is not stated anywhere in the said Act that the Returning Officer should not be made a party. Under the Civil Procedure Code, a person may be made a party to an action either because he is a necessary party or a proper party".

11. In that case, the Tribunal was not prepared to say that the respondent No. 8 (Returning Officer) was a necessary party to the petition, but in view of the allegations of irregularity and illegality made against him and his subordinates by the petitioner therein, the Tribunal thought that the Returning Officer was a proper party. In *Nrisinha Kumar Sinha v. S. C. Ghosh*, (1952) 2 Ele LR 121 (Ele Tri Cal), though the question arose whether the Returning Officer was a necessary or proper party in an election petition, it was conceded that the final decision did not depend on that issue and neither party proposed to examine the Returning Officer as his witness but wanted to have him as a Court witness. The Tribunal, however, did not deem it necessary to examine him as a Court witness in the circumstances of that case. In *Jagannath v. Jaswant Singh*, AIR 1954 SC 210, their Lordships of the Supreme Court have observed that non-compliance with the provisions of the law re-

lating to the impleading of parties is not necessarily fatal and can be cured, that it is for the Tribunal to determine the matter as and when it arises in accordance with the provisions of the Code of Civil Procedure which have been made expressly applicable and that further the array of parties as provided by Section 82 is not final and conclusive. In *Inayatullah Khan v. Diwanchand Mahajan*, (1958) 15 Ele LR 219 (MP) there was an allegation of corrupt practice against the Returning Officer that he wrongfully refused to allow recount of the votes but he was not impleaded as a party — neither party cared to summon him as a witness. During the course of the hearing of the appeal, the Court, however, gave a telegram to the Returning Officer informing him of the date of hearing and leaving it to him to take the next step. The Officer, however, did not choose to appear. But his non-appearance was not mistaken by the Court, as it was of opinion, on the materials placed before it, that there was no corrupt practice on the part of the Returning Officer but only an improper exercise of judgment on his part. The question whether the Returning Officer was a necessary or a proper party was, therefore, left open. But in *Returning Officer, Atmakur v. Kondiah*, (1959) 22 Ele LR 45 (Ele. Tri. Nellore), the Election Tribunal held that the Returning Officer was not a necessary or a proper party to an election petition, even though allegations were made against him in the petition. According to the Tribunal, if the allegations against the Returning Officer are proved, it can take action under Section 90 of the Representation of the People Act.

12. In *Dwijendralal Sen Gupta v. Harekrishna Kumar*, (1953) 3 Doabia's Ele Cases 206, the Calcutta High Court had an occasion to consider in extenso whether the Returning Officer was a necessary or proper party to an election petition. In that case, there were allegations of bad faith, misconduct and impropriety in the election petition against a Returning Officer. He was not impleaded as a party but the election petitioner undertook to summon him as a witness at the time of the trial. It was explained by the Court that the witness at one stage would have to be declared hostile by the petitioner and the petitioner may have to cross-examine his own witness. Equally if the other side called him as a witness and his evidence would come as a surprise. It was also observed by the Court that, if the Returning Officer was joined as a party to the election petition, then he had got to make out his case in his written statement or in answer to the allegations in the petition so that every one would know what his answers were and the party might come

ready with his evidence to meet the evidence of the Returning Officer. On the facts of that case, the Calcutta High Court held that the Returning Officer was a proper party. On a review of the case law, the Calcutta High Court followed the decision in (1952) 1 Ele LR 194 (Ele. Tri. Bom.).

13. Even under the provisions of the Representation of the People Act, whenever there are allegations of bad faith, misconduct and impropriety and not merely illegality made against the Returning Officer in an election petition, the Returning Officer is a proper party, though not a necessary party. In proper cases, the Returning Officer may be a proper party to the election petition, even though Section 82 of the Act does not make him a necessary party. Section 90 of the Act enables the Tribunal to implead the Returning Officer as a party under the provisions of the Civil Procedure Code which are expressly made applicable to the trial of election petitions, subject to the provisions contained in the Representation of the People Act and the rules made thereunder.

14. For the foregoing reasons and in view of the fact that serious allegations of irregularity, illegality and impropriety are made against the Returning Officer in the election petition, I feel that he is a proper party to the election petition.

15. In the result, the application is dismissed but without costs.

VGW/D.V.C.

Application dismissed.

AIR 1969 MADRAS 118 (V 56 C 28)

KAILASAM, J.

C. S. Devasahayam, Petitioner v. Government of Madras by its Chief Secy. (P. S.) Madras, Respondent.

Writ Petn. No. 171 of 1957, D/- 1-2-1958.

Constitution of India, Arts. 14, 15 and 16 — Employment — Equality of Treatment — Person discriminated against has right to challenge discriminatory order — Discrimination when permissible — Two tests laid down — Civil Services in Madras State — Age of superannuation in some services only, raised to fifty eight — Dearth of experienced officers and need of technically qualified officers were criteria, where retirement age was raised — Age not raised for service in Commercial Tax Department for the same reasons — Held there was no discrimination.

Construing the provisions of Articles 14, 15 and 16 of the Constitution of India, it is clear that a Government servant is entitled to equality of treatment in res-

GL/HL/D42/63

pect of matters relating to employment under Article 16 (1) and that would include the provision as to salary, periodical increments, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. The person adversely affected is entitled to challenge any order on the ground of discrimination. But its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group. The age of retirement in Madras State Government servants is fixed as fifty five. But as regards certain services in the State Service, the age of superannuation was increased to fifty eight. Dearth of officers in the service is an intelligible differentiation and has to be accepted as valid classification. Need of the Government to utilise the services of the technically qualified and experienced persons is another valid reason. These are adequate and valid grounds for classification. The second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The object sought to be achieved is efficient public service, and this could be achieved only by retaining persons in service when there is a dearth of persons applying for those posts. Therefore when the superannuation age of officers in Commercial Tax Department was not raised, as there was no dearth of officers, there was no case of bad classification or of discrimination. AIR 1958 SC 538 (547, 548) & AIR 1962 SC 36 (40-41), Rel. on; AIR 1963 SC 268 & AIR 1965 SC 280 & AIR 1965 SC 1567, Disting. (Paras 4 and 5)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 280 (V 52)=

1967-2 Lab LJ 246, Shivacharana
v. State of Mysore 5

(1965) AIR 1965 SC 1567 (V 52)=
1965-1 SCR 693, Bishun Narain
v. State of U. P. 5

(1963) AIR 1963 SC 268 (V 50)=
(1963) 1 SCR 707, Panduranga
Rao v. Andhra Pradesh P. S.
Commission 5

(1962) AIR 1962 SC 36 (V 49)=
1962-2 SCR 586, General Manager,
Southern Railway v. Rangachari 4

(1958) AIR 1958 SC 538 (V 45)=
1959 SCR 279, Ram Krishna Dal-
mia v. Justice S. R. Tendolkar 4

M. V. Krishnan, for Petitioner; Advo-
cate-General for Govt. Pleader and T.
Salvaraj, for Respondent.

ORDER:— This Writ Petition is filed
by a retired Deputy Commissioner of
Commercial Taxes for the issue of a
Writ of Mandamus directing the Gov-

ernment of Madras to continue the ser-
vice of the petitioner in the Commercial
Department until he reaches 58 years of
age.

2. The Petitioner joined the service
of the Government of Madras in the
Revenue Department on 16-2-1931. In
1948, he opted to the Commercial Taxes
Department where he served for about
18 years. On attaining the age of 55, he
was retired from service on 25-4-1966.
The order retiring the petitioner is chal-
lenged on the ground that it is discrimi-
natory, in that, while the servants of the
Central Government are retired only at
the age of 58, the State Government
Servants are forced to retire on attaining
55 years, and that even regarding the
State Government Service, while in the
case of certain departments, the age of
retirement is 58, the members of the ser-
vice belonging to the petitioner's depart-
ment are obliged to retire at 55 years. It
is contended that this amounts to unfair
discrimination and not valid in law.

3. Rule 56 of the Fundamental Rules
of the Madras Government provides that
the date of compulsory retirement of Gov-
ernment servant is the date on which he
attains the age of fifty five years. The
State of Madras examined the question
of increasing the age of retirement of its
employees to fifty eight as had been done
by the Central Government and decided
that the age of superannuation of the
State Government servants should re-
main at 55. But in respect of certain
categories, in modification of the policy of
retiring the Government Servants at
fifty five, raised the age of superannua-
tion from fifty five to fifty eight by issu-
ing suitable amendments to govern such
services. The list of services for which
the age of retirement was raised to fifty
eight is given in para (4) of the supple-
mental counter affidavit filed on behalf of
the respondent. Nine categories of ser-
vices are listed of which regarding the
posts covered by categories (1), (3), (4),
(5), (6), (8) and (9) the main reason given
for the extension of the age of superan-
nuation is that there was dearth of quali-
fied persons. Regarding category (2), the
reason given is that the members of the
State Higher Judicial Service are treated
on a par with the officers of the I. A. S.
cadre in the matter of pay, pension and
retirement benefits, and since the Gov-
ernment of India have raised the age of
I. A. S. and I. P. S. Officers to fifty eight,
the Madras Government have also rais-
ed the age of superannuation in respect
of District Judges. In respect of cate-
gory (7), the reason is that in order to
enable the Government to utilise the ser-
vices of the technically qualified and ex-
perienced persons, such extension was
given.

4. The principle to be borne in mind by a Court in determining the validity of a statute on grounds of violation of Article 14 of the Constitution is laid down in *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538. The Supreme Court held that (at pages 547 and 548)

"While Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question."

Among other principles stated, the Court laid down:—

"That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest; that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

In *General Manager, Southern Railway v. Rangachari*, (1962) 2 SCR 586 at p 596=(AIR 1962 SC 36 at pp 40-41) the Supreme Court while construing the extent of protection under Article 16 of the Constitution of India, held thus:—

"Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16 (1) to the initial employment and nothing else; but that clearly is only one of the matters relating to employment. The other matters relating to employment would inevitably

be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. In this connection, it may be relevant to remember that Article 16 (1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15 (1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment."

Construing the provisions of Articles 14, 15 and 16 of the Constitution of India, it is clear that a Government servant is entitled to equality of treatment in respect of matters relating to employment under Article 16 (1) and that would include as pointed out by the Supreme Court in the *Rangachari's* case, the provision as to salary, periodical increments, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. The person adversely affected is entitled to challenge any order on the ground of discrimination. But its validity can be sustained if two tests are satisfied. The first test is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The age of retirement of State Government servants is fixed as fifty five. But as regards certain services in the State service, the age of superannuation was increased to fifty eight. The object of such increase is to secure efficient public service. The question is whether the classification which distinguished persons grouped together from others was based on an intelligible differentia. The differentiation relied on by the Government in the case of services, except categories 2 and 7 mentioned in the supplemental counter affidavit, is dearth of qualified persons in the services. It cannot be said that there is any dearth of officers in the service to which the petitioner belongs. This is an intelligible differentiation and has to be accepted as valid classification. Regarding category No. 7, the reason given is that the extension was given to enable the Government to utilise the services of the technically qualified and experienced persons. The service to which the petitioner belonged

cannot be said to be a technical service. In the case of category No. 2, the extension was granted as the members of the State Higher Judicial Services are treated on a par with the officers of the I. A. S. cadre in the matter of pay, pension and retirement benefits, and as the Government of India have raised the age of I. A. S. and I. P. S. to fifty eight, the Madras Government have also raised the age of superannuation in respect of District Judges. This is an adequate and valid ground for classification. The second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision in question. The object sought to be achieved is efficient public service, and this could be achieved only by retaining persons in service when there is a dearth of persons applying for those posts. On these grounds, I am unable to accept the contention of the learned Counsel for the petitioner that the order of retirement of the petitioner is unsustainable.

5. The learned Counsel relied on the decision in Panduranga Rao v. Andhra Pradesh P. S. Commission, AIR 1963 SC 268 wherein it was held by the Supreme Court that:—

"as this rule has introduced a classification between one class of advocates and the rest, and the said classification must be said to be irrational in as much as there is no nexus between the basis of the said classification and the object intended to be achieved by the relevant scheme of rules. Rule 12 (h) and the corresponding portion of paragraph 4A (1) of the notification based on it are unconstitutional and ultra vires."

The decision is not applicable to the facts of the case as it has been held in this case that the classification is justified. Learned Counsel relied on the decisions of the Supreme Court in Shivacharana v. State of Mysore, AIR 1965 SC 280 and Bishun Narain v. State of U. P., AIR 1965 SC 1567. In the former decision, it was held that No. 1, to R. 285 applied to all Government Servants and as such was not open to challenge under Article 14 or Article 16 (1) of the Constitution. In the latter case it was held that the impugned notification was not discriminatory, for, it had treated all public servants alike and fixed 31-12-1961 as the date of retirement for those who had completed fifty five years, but not fifty eight years upto 31-12-1961. In the two cases referred to above, there was no discrimination, as the order was made applicable to all Government Servants. But when it is not made applicable to certain classes of public services, it will have to be considered whether the classification is reasonable and answers the tests laid down by the Supreme Court as

stated above. It has been found in this case that the tests were satisfied. The two decisions of the Supreme Court cited by the petitioner will not be of any help to him.

6. In the result, all the contentions of the petitioner will have to be rejected. This petition is accordingly dismissed. No order as to costs.

BDB/D.V.C.

Petition dismissed.

AIR 1969 MADRAS 121 (V 56 C 29)

M. ANANTANARAYANAN, C. J.

AND NATESAN, J.

Management of Presidency Talkies by Proprietor, Paragon Talkies, Appellant v. N. S. Natarajan and another, Respondents.

Writ Appeal No. 175 of 1967, D/- 28-11-1967 against order of Venkatadri, J., in W. P. No. 695 of 1964, D/- 23-3-1967.

(A) Constitution of India, Art. 226 — Writ to quash order under S. 33 (2) (b) Industrial Disputes Act by Labour Court refused — Appeal against refusal — Scope of appeal — Subsequent events are not relevant to scope of appeal.

An appeal against an order refusing issue of a writ, to quash the order of the Labour Court declining to grant permission under S. 33 (2) (b) of the Act is limited in scope to the refusal to issue a writ of certiorari. The scope of the appeal is thus restricted and the subsequent events which might affect the employment or non-employment of the worker by the employer organisation are not relevant to the scope, nor do they affect it. (Para 1)

(B) Industrial Disputes Act (1947), Ss. 33 (2) (b), 15, Sch. II, Item 6 — Tribunal, powers of — Alleged misconduct by employee — Tribunal does not sit in appeal over judgment of management — Yet "baseless findings" and "basic errors" will enable Tribunal to decline permission under S. 33 (2) (b).

Although an Industrial Tribunal, in the case of an alleged dismissal of workman for misconduct, does not act as a court of appeal, and substitute its own judgment for that of the management, yet there are certain grounds on which the Tribunal will have jurisdiction to decline to grant the statutory permission under S. 33 (2) (b). Those grounds, include "any basic error" or where, on the materials, "the finding is completely baseless". AIR 1958 SC 130 (138), Rel. on. (Para 3)

(C) Industrial Disputes Act (1947), S. 33 (2) (b), Sch. III, Item 8 — Misconduct, what constitutes explained — Charge of misconduct is a serious charge and must

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be supported by material evidence — Powers of High Court to interfere.

'Misconduct' is a specific word, with a specific connotation. It cannot be mere inefficiency or slackness. It is something far more positive, and certainly, deliberate disobedience of any order of a superior authority will be one species of misconduct. Where the Management takes the responsibility to level a charge of "misconduct" which is the charge of some positive act, or of conduct which would be quite incompatible with the express and implied norms, of the relationship of the employee to the employer in such an organisation, there must be material in support of such a serious charge. Where, there is no material whatever of that kind, High Court must necessarily interfere, on both the grounds, namely, of 'basic error' and that 'the finding is completely baseless or perverse.' (Paras 6, 7)

(D) Industrial Disputes Act (1947), S. 33 (2) (b) — Misconduct — Request for permission of Tribunal to dismiss an employee — Grounds for dismissal very flimsy as to be open to plausible charge of victimisation — Management should take action only on very strong ground — Good relations between employer and employee are desirable. (Dictum).

Dictum—Held that where the management asked for permission under S 33(2) (b) to dismiss an employee on a charge of misconduct on very flimsy grounds the material in support of the charge being so flimsy as to be almost non-existent. It could even be argued with considerable plausibility that there has been victimisation of the employee. In the interests of good employer and employee relations, it would appear to be highly desirable, that action of such rigour, upon materials which may amount, at the highest to proof of mere temporary inefficiency be avoided in future. (Para 8)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 130 (V 45)=
1958 SCR 667, M/s Iron and Steel
Co. v. Their Workmen 3

N. C. Raghavachari, for Appellant; V. Krishnan, for Respondents.

ANANTANARAYANAN, C. J.:— In our view, the learned Judge (Venkatadri, J.), was perfectly justified in declining to issue a writ of certiorari quashing the order of the Labour Court, which itself embodies the decision of the Labour Court not to permit the Management to dismiss the employee for alleged misconduct under Section 33 (2) (b), proviso, of the Industrial Disputes Act, 1947. At the outset a certain complicating feature might be referred to. It appears that subsequent to the decision in this writ petition by Venkatadri, J., or, at any rate, subsequent to the order of the

Labour Court declining to grant the statutory permission under Section 33 (2)(b) proviso, another dispute was raised on behalf of the employee, in the same situation or context, because the employee had not been further employed by the Management. It would seem that this eventuated in a different reference to the Labour Court, which again went into the merits, and held that the non-employment of the employee was opposed to industrial law. A second writ petition was sought to be instituted by the Management with regard to this decision of the Labour Court, but, admittedly, it was not pressed home, and it failed. Learned Counsel for the respondent (employee) raised an argument, more or less of a preliminary character, that since the Labour Court had subsequently held that the threatened dismissal was improper, the writ appeal, itself would not lie. The argument is not tenable, for the simple reason that the writ appeal is limited in scope to the refusal of Venkatadri, J., to issue a writ of certiorari quashing the order of the Labour Court declining to grant permission under Section 33 (2) (b) of the Act. The scope of the appeal is thus restricted, and the subsequent events which might affect the employment or non-employment of the worker by the employer organisation are not relevant to the scope, nor do they affect it.

2. The short and simple point before us is whether the employer organisation, in exercise of disciplinary jurisdiction and on the findings of a domestic tribunal, had any jurisdiction to proceed to dismiss this worker or employee "for misconduct not connected with the dispute" under Section 33 (2) (b) of the Act.

3. This question must be answered very decidedly in the negative. It is true that as the learned Counsel for the appellant has pointed out, M/s. Iron and Steel Co. v. Their Workmen, AIR 1958 SC 130, 138 is authority for the view that an Industrial Tribunal, in the case of an alleged dismissal for misconduct, does not act as a Court of appeal, and substitute its own judgment for that of the management. But that very decision is authority for the view, equally, that there are certain grounds on which the Tribunal will have jurisdiction to decline to grant the statutory permission. For our purpose, it is sufficient to state that those grounds, include "any basic error" or where, on the materials, "the finding is completely baseless".

4. In the present case, we have been taken in great detail through the record. The actual charge is a very simple one, namely, that on 14-7-1963, while the respondent was on duty as the Chief Booking Clerk in the theatre, he did not issue

tickets at the Ladies counter for the Matinee show. It appears that three representatives of the picture owners, namely, Messrs M. G. R. Pictures were then inside the booking counter, and, certainly one of them asked the respondent to proceed inside the counter and to issue the tickets. The respondent declined to do this, and, in his view, he had good reasons for the refusal to engage himself in that duty at that juncture. There were already two clerks, who generally functioned under the respondent who were issuing tickets at the ladies counter, and the respondent claims that he was standing outside, looking to the regulation of the crowd. He states that the booking office was already crowded by the presence of the two clerks and the representatives, and that there was some confusion. He feared that, if duties were hurriedly performed in that confusion, shortages of cash might occur, as they very often tended to occur, when tickets were sold hastily, and in the context of even slight disorder. Further, he claims that he was then having loose bowel movements and in indifferent health, and so for the time being he preferred not to engage himself in selling tickets at the Ladies Counter, and he so informed one of the representatives of the picture owners. This person seems to have made some complaint later to the manager, on which action in disciplinary proceedings followed.

5. This, as far as we are able to gather, is the sum and substance of the record. The very words in Tamil which are ascribed to the employee, show that he made a decision on the spot not to follow the suggestion of the representative that he should sell tickets at the Ladies counter, because he feared that the office was crowded, and that shortages of cash might occur. There is an explicit reference to this apprehension on the part of the employee. These are the facts, and the only facts that have been established. On these facts, can we conceivably sustain the finding that there has been 'misconduct' on the part of the employee, in the sense that there is some material, however slight, in support of that charge?

6. Now 'misconduct' is a specific word, with a specific connotation. The learned Counsel for the employer organisation himself concedes that it cannot be mere inefficiency or slackness. It is something far more positive, and certainly, deliberate disobedience of any order of a superior authority will be one species of misconduct. But the point here, as stressed by Venkatadri, J., is that there was no misconduct of any kind on the part of the employee, even if the management took the view that he was not as diligent in the performance of his

duties at that time, as he might have been. The Representative of the picture owners was not a person in authority over this employee in any sense. He was merely a third party who, no doubt, had an interest in seeing that the tickets were not sold in the black market, or issued freely without collection of the fee. It may be that the representative made this suggestion, in good faith, because he was interested in seeing that there was the maximum sale of tickets at the Ladies counter. But equally, this employee might have made his own judgment of the situation, and felt that if he engaged himself in that duty in those circumstances, shortages of cash might occur, which will lead to future embarrassment and loss to the management. Even if the judgment was not a correct one, this is not misconduct in any specific sense, or by any stretch of imagination.

7. We have perused certain Standing Orders, which appear to have been prescribed by Managements generally, though it does not appear that this particular Management has adopted this form of Standing Orders. The several species of misconduct are enumerated in these Standing Orders, and all of them amount to positive acts of wilful disobedience or positive acts of malfeasance, injury to property, insubordination etc. It is true that the Management, in this case, probably felt that the representative of the Picture owners had to be humoured, for the simple reason that the Management had to depend upon the good opinion or favour of the Picture owners, for supply of further pictures. Had the Management taken some action against the employee, short of an averment of misconduct, within the meaning of the Act, and warned him or censured him, conceivably there would be no room for interference. But, where the Management takes the responsibility to level a charge of "misconduct" which is the charge of some positive act, or of conduct which would be quite incompatible with the express and implied norms, of the relationship of the employee to the employer in such an organisation, there must be material in support of such a serious charge. Where, there is no material whatever of that kind, this Court must necessarily interfere, on both the grounds which have been recognised in the Supreme Court decision earlier referred to, namely, 'basic error' and the fact that 'the finding is completely baseless or perverse.'

8. Accordingly, the writ appeal has necessarily to fail and is dismissed. We may add that this is a case in which with considerable plausibility, it could even be argued that there has been victimisation of the employee, the material in support of the charge being so flimsy

as to be almost non-existent. In the interests of good employer and employee relations, it would appear to be highly desirable, that action of such rigour, upon materials which may amount, at the highest to proof of mere temporary inefficiency be avoided in future. The parties will bear their own costs.

BDB/D.V.C.

Writ dismissed.

AIR 1969 MADRAS 124 (V 56 C 30)

ALAGIRISWAMI, J.

Paramasami Pillai, Appellant v. Sornathammal and others, Respondents.

Second Appeal No. 1385 of 1963 and Memo of Objections, D/- 18-7-1967 against decree of Dist. Court, Madurai, in A. S. No. 288 of 1961.

Hindu Law — Marriage — Marriage of man with impotent woman is invalid — Such marriage is not nullity unless a declaration is secured from Court — Death of husband — No declaration from Court that marriage was nullity — Woman gets status of widow of deceased — Third person cannot question her status.

Marriage of a man with a person who is not a woman and as such unfit for sexual intercourse, is invalid. (Para 5)

The question as to impotency cannot be raised by a third person, because, it is solely a personal matter for the spouses, nor can it be raised after the death of any one of them. The distinction between void contract and voidable contract is not applicable to a case of marriage and even in a case where the marriage is a nullity it would be necessary for the party complaining nullity of the marriage to get a declaration of nullity from court. Hence though marriage with impotent woman is invalid, on the death of the husband who did not ask for a declaration from court that the marriage is nullity the woman must be held to be his widow and the person claiming as reversioner of the deceased cannot raise the question whether that woman was the widow of the deceased. (Para 6)

Cases Referred: Chronological Paras

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| (1963) AIR 1963 All 564 (V 50)=
1963 All LJ 658, Smt. Ramdevi
v. Rajaram | 3 |
| (1956) AIR 1956 Andh 237 (V 43)=
1956 Andh LT 815, Mallareddy
v. Subbamma | 3, 6 |
| (1952) AIR 1952 Bom 486 (V 39)=
ILR (1953) Bom 486, A. v. B | 3, 5 |
| (1952) AIR 1952 Sau 44 (V 39),
Kantilal v. Vimla | 3 |
| (1949) AIR 1949 Cal 44 (V 36)=
ILR (1945) 1 Cal 407, Ratanmoni
Debi v. Nagendra Narain Singh | 3, 5 |

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(1942) AIR 1942 All 267 (2) (V 29)=
ILR (1942) All 518, Bhagwati
Saran Singh v. Parameswari Nan-
dan

3

(1942) AIR 1942 Mad 693 (V 29)=
ILR (1942) Mad 807 (FB), Amir-
thammal v. Vallimayil Ammal

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R. Gopalaswami Iyengar and K. N.
Debasubramanian, for Appellant; N. K.
Ramaswami, for Respondents.

JUDGMENT:— This second appeal arises out of a suit filed by the appellant claiming to be the reversioner to the estate of one Deiva Pandian who died issueless on 6-7-1957 for setting aside a sale deed executed by Deiva Pandian in favour of the first defendant in the suit and for recovery of the suit properties. On an objection taken by the first defendant, the third defendant was added as a party to the suit on the ground that she was widow of Deiva Pandian's father and as such entitled to his estate. The plaintiff contended that the third defendant was not a woman at all, that therefore there could be no valid marriage between her and Deiva Pandian's father and that consequently she was not Deiva Pandian's father's widow. The trial Court held that the marriage between the third defendant and Deiva Pandian's father was valid. It also held that the plaintiff was not the reversioner to Deiva Pandian's estate, that the sale deed executed by Deiva Pandian in favour of the first defendant was executed for consideration, and that it was not executed because of fraud and undue influence, and dismissed the suit. The Lower Appellate Court came to the conclusion that the sale deed executed by Deiva Pandian in favour of the first defendant was not supported by consideration, and that therefore it would not be valid. On the question of the validity of the marriage between the third defendant and Deiva Pandian's father, it held that the third defendant was a sexless person and though it was disposed to hold that the marriage between her and Deiva Pandian's father could not be valid it felt bound by the authority to hold that there was a valid marriage, and that in any case the question of the validity of the marriage between the third defendant and Deiva Pandian's father was one which could have been raised only by Deiva Pandian's father and not by third parties like the plaintiff. In the result it dismissed the plaintiff's appeal.

2. I think the finding of the lower appellate Court that the third defendant was a sexless person is correct. In effect it means that the third defendant was not a woman. The third defendant refused to submit herself to a medical examination and it is in evidence that Deiva Pandian's father married Deiva Pandian's mother after he had married

the third defendant, apparently because the third defendant was unfit for sexual intercourse. The third defendant had described herself as Ali and it was also in evidence that she had no breasts. She did not menstruate either, the admission by P. W. 1 that the third defendant had a hole cannot be held to mean that she had a vagina. What could be seen is a cleft rather than a hole. On the whole I am satisfied that the conclusion of the Lower Appellate Court that the third defendant was not a woman is correct.

3. The next question that arises is whether the marriage between her and Deiva Pandian's father was valid. The argument on behalf of the plaintiff is that a marriage can be only between persons of opposite sex, that one of them must be a male and another a female, and that unless the third defendant were female there could be no valid marriage between her and Deiva Pandian's father and the marriage would be a total nullity. For this proposition the plaintiff (appellant herein) relied upon the decision in *A v. B*, AIR 1952 Bom 486 where, Tendolkar, J., after an elaborate discussion of all the Sanskrit texts bearing on the subject held that such a marriage would be absolutely null and void under the Hindu Law. The learned Judge criticised the opinion of Mayne in Mayne's Hindu Law, 10th Edn. on the ground that Mayne did not have all the Sanskrit texts presented to him. He also criticised the decision in *Bhagwati Saran Singh v. Parameswari Nandan*, ILR (1942) All 518=(AIR 1942 All 267) and that of a Full Bench of this Court in *Amrithammal v. Vallimayil Ammal*, ILR (1942) Mad 807=(AIR 1942 Mad 693) (FB). Both the decisions were criticised on the ground that they placed great reliance upon the opinion of Mayne. The decision of the Calcutta High Court in *Ratan Moni Debi v. Nagendranarain Singh*, ILR (1945) 1 Cal 407=(AIR 1949 Cal 44) was accepted as correct by the learned Judge and he stated that the decision would be reinforced by the various texts that he himself had cited in his judgment. In the Calcutta case it was held that a wife whose husband was impotent at the time of marriage and had never been able to consummate the marriage was entitled to a decree for nullity of marriage. As against this, reliance was placed by the respondents on the decisions in *Smt. Ramdevi v. Rajaram*, 1963 All LJ 658=(AIR 1963 All 564), *Kantilal v. Vimala*, AIR 1952 Sau 44 and *Mallareddy v. Subbamma*, AIR 1956 Andh 237. In *Kantilal v. Vimala*, AIR 1952 Sau 44, where the Court held valid a marriage with a person whom it described as an impotent and sexless woman and whose genital organs were said to be not at all developed and who was said to have no

ability to perform the sexual act and be an active party to coitus. In that case the woman had very rudimentary development of the internal organs and the secondary sex characteristics were not all developed. She had not been menstruating at all. This decision followed the Full Bench decision of this Court in ILR (1942) Mad 807=(AIR 1942 Mad 693) (FB). The decision in AIR 1956 Andh 237 holds that though the marriage of an impotent person is condemned as reprehensible and improper, still if the marriage had been performed and solemnised with the customary rites and ceremonies, it will be deemed to be valid, that the marriage is not void ab initio, but only voidable, and that so long as the wife does not choose to get the marriage annulled under Section 12 of the Hindu Marriage Act, she is entitled to be maintained by her impotent husband.

4. There is no doubt that under English law a marriage such as the one under consideration would be held to be null and void. It does not seem to be correct to distinguish between void and voidable marriage in this connection. Under the ordinary law of contract if the contract is void, it could be so treated and any other remedy sought without having to set aside that contract. But in respect of marriages even when the marriage is null and void, it cannot be so held at the instance of third parties; a declaration of nullity can be asked for only by either party to the marriage and in any case after the death of one of the parties nobody can question the validity of the marriage. Nor can any relief be asked for on the basis that the marriage does not subsist. So resort to a Court is necessary to declare a marriage null and void and no relief can be claimed without asking for such a declaration. For the purpose of this case what I have already said about the third defendant not being fit for normal sexual intercourse would make her an impotent person and therefore such marriage would be null and void in English law.

5. Under ancient Hindu Law an examination of the various Sanskrit texts relating to this question shows that though marriages of impotent persons as well as lunatics and idiots were deprecated, they were not held to be invalid. One of the reasons usually given in those texts is that it was possible for an impotent person to raise a child through his wife by the practice of Niyoga, that is, through an appointed kinsman. But this practice of Niyoga has long since become obsolete. While a lunatic or an idiot may be quite capable of sexual intercourse and therefore of producing children, an impotent person is not so capable. That is the reason why the earlier texts seem to have particular-

ly referred to the case of an impotent person and the practice of Niyoga. Since the practice of Niyoga has now become obsolete, to say that the marriage of an impotent person would be valid is not in consonance with the modern idea. The Hindu Law has vastly changed and the ideas of Hindus have also changed with the times. Whatever might have been the position at a time when the marriage was said to be a Samskara and it was therefore considered that marriage was not merely for the purpose of sexual intercourse, in the context of the enactment of the Hindu Marriage Act, which provides for declaration of nullity of marriage as well as for divorce it is no longer possible to say that marriage with an impotent person is valid. With great respect to the learned Judges who have taken the other view, I prefer to follow the opinion of Tendolkar, J., in AIR 1952 Bom 486 and that of the Calcutta High Court in ILR (1945) 1 Cal 407=(AIR 1949 Cal 44). I hold therefore, that the third defendant's marriage is not a valid one as she was an impotent person.

6. The question still remains whether even though the marriage of the third defendant with Deiva Pandian's father might not be valid that question can be raised in this suit. The importance of this question is because if the third defendant were held to be the widow of Deiva Pandian's father, the plaintiff's suit has to fail on that account alone. On this question Mulla has taken the view in his Principles of Hindu Law, 12th Edn. at page 843 thus—

"The question, as to impotency, cannot be raised by a third person, because, it is solely a personal matter for the spouses, nor can it be raised after the death of one of them."

In AIR 1956 Andh 237, already referred to, Viswanatha Sastry, J., has also taken the view that the marriage with an impotent person is not void ab initio and that so long as the wife does not choose to get the marriage annulled under Section 12 of the Hindu Marriage Act, she is entitled to be maintained by her impotent husband. I have already said that a distinction between a void contract and voidable contract would not be applicable to a case of marriage and even in a case where the marriage is a nullity it would be necessary for the party complaining nullity of the marriage to get a declaration of nullity from Court. The above opinion of the learned Judge supports the view taken by Mulla. With respect, I agree with that view. Originally under the Hindu Law if a man found that he had married a person who was not a woman and therefore unfit for sexual intercourse, it could be open to him to take another wife. But

as there was no provision in that law for any declaration of nullity of marriage, the wife continued to be a wife and there was no possibility for the husband to take steps to see that she could no longer have the status of the wife. But under the Hindu Law which is applicable at present, a husband who finds himself in such circumstances can ask for a declaration of invalidity of the marriage and after getting such a declaration he can marry another wife. Therefore, the law obtaining in England as to the necessity for a husband to obtain a decree of nullity and preventing any other person from raising the question of nullity of a marriage except the parties to the marriage should be held applicable to the Hindus in this country also under the law at present. I am, therefore, of opinion that the conclusion arrived at by the Lower Appellate Court that the question whether the third defendant was the widow of Deiva Pandian's father cannot be raised by the plaintiff in this case. It therefore follows that the plaintiff's suit has to fail on that account. The Lower Appellate Court's finding that the plaintiff was reversioner to Deiva Pandian's estate and that the alienation in favour of the first defendant was not supported by consideration would not affect this result.

7. In the result the second appeal is dismissed. The parties will bear their respective costs throughout.

8. An memorandum of cross-objections is filed by the respondent in respect of the costs disallowed to him by the Lower Appellate Court. The question that arises in this case is one of considerable difficulty, as it has not been decided by this Court so far. In the circumstances, I consider that the decree of the Lower Appellate Court ordering both parties to bear their own costs is correct. The memorandum of cross-objections is therefore, dismissed. No costs. Leave granted.

BNP/D.V.C.

Appeal and cross-objections dismissed.

AIR 1969 MADRAS 126 (V 56 C 31)

M. ANANTANARAYANAN, C. J.
AND NATESAN, J.

The Andhra Perfumery Works joint family Concerns, Appellant v. Karupakula Suryanarayaniah and others, Respondents.

Letters Patent Appeal No 106 of 1964 and O. S. A. No 49 of 1964, D/- 23-8-1967 against judgment of Sadasivam, J., in A. A. O. Nos. 203 and 202 of 1962, D/- 17-4-1964.

HL/HL/D446/68

(A) Trade and Merchandise Marks Act (1958), Ss. 56, 107 — Trade Mark of device of Lord "Ganesh" and legend "Ganesh Durbar Bathi" acquiring distinctiveness of applicants goods — No abandonment — Unsuccessful attempts by others, of piracy — Distinctiveness is not lost — Mark when becomes publici juris — Concealed piracy — Effect — Rectification sought — Onus is on applicant to show that distinctiveness is lost.

A trader using device of Lord "Ganesh" and the legend "Ganesh Darbar Bathi" carried on business of manufacturing Agarbattis for a long time, had advertised his goods, had prospered in business, had taken legal action against some for piracy and had accepted undertakings from others for not using the said marks. He applied for getting those marks registered:

Held, that he was entitled to get the marks registered in spite of some piratical attempts and there was neither any acquiescence nor abandonment and the marks were not publici juris. When a word was publici juris, like the word 'DURBAR' there could be no registration, for there could not be distinctiveness. This however was a question of fact. If on the contrary, the word had attained distinctiveness as the mark of a firm, this distinctiveness might be lost. But, unless it was lost, it was entitled to recognition. The loss might be due to abandonment, acquiescence in successful piracy on a large scale, or a volume of common user, which was public and which destroyed distinctiveness. The Mark might be publici juris in a particular branch of the trade only. The occurrence of a few fraudulent infringements, without the knowledge of the proprietor, would not make the mark common to the trade. Again, mere disuse for a short period, might not amount to abandonment. When rectification was attempted, the onus was on the applicant to show that the Mark had lost its distinctiveness. Mere surreptitious user, sporadic user, piracy in a concealed manner against which action was taken or attempted by the proprietor, when the piracies came to light, could not possibly destroy the distinctiveness earlier achieved. Case law discussed. Kerly on Trade Marks (8th Ed. P. 246) and Halsbury's Laws of England (3rd Ed. Vol. 38 paras 869, 894), and In Venkateshwaran on Trade Marks (1963 Ed.) cited. (Para 18)

(B) Trade and Merchandise Marks Act (1958), Ss. 11, 14 — Device of "Ganesh" as Trade Mark — Deity respected by all Hindus — There is nothing to show that it is unregistrable (Obiter).

The word 'GANESH' applies to the Lord Ganesa who is the deity of auspicious commencement of all undertakings

in Hinduism, and hence it was contended that it would be wrong to create a monopoly in respect of such a term, for one particular proprietor.

Held, (obiter) that there was no valid reason against registering such name; that there are several other names of the deity (Vigneswara, Vinayaka Etc.) which could be appropriately used by persons, desiring to associate their goods with the favour of the deity, if the Mark and device, which are thus invented, do not otherwise infringe any prior registered device under the Trade Mark Law. (Para 28)

Cases Referred: Chronological Paras

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| (1960) AIR 1960 SC 142 (V 47)= | |
| (1960) 1 SCR 968, Corn Products Refining Co. v. Shangrila Food Products Ltd. | 17 |
| (1951) 68 RPC 197, Arthur Fairest Ltd's Application to Registrar a Trade Mark In re | 14 |
| (1941) AIR 1941 Mad 31 (V 28)= | |
| (1940) 2 Mad LJ 793, Devidoss & Co., Bangalore v. Alathur Abboyye Chetty & Co., Madras | 17 |
| (1934) 51 RPC 205, Somerlite Ltd. v. Brown | 19 |
| (1927) 44 RPC 313 In re, Samson Cordage Works' Application | 11 |
| (1925) 43 RPC 18, Bosch Akt's Applications; In re | 19 |
| (1907) 24 RPC 697, Boord & Son v. Thom and Cameron Ltd. | 13 |
| (1902) 20 RPC 61=19 TLR 99, Louise & Co. Ltd. v. Gainsborough | 12 |
| (1897) 14 RPC 591, Ripley v. Bandey | 16 |
| (1894) 1894 AC 275=63 LJPC 112, National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co. | 10 |
| (1893) 10 RPC 141 (HL), Leahy v. Glover | 9 |
| (1890) 7 RPC 395, Barlow & Jones v. Johnson, Jabez & Co. | 15 |
| (1880) 15 Ch D 96=49 LJ Ch 792, Willmott v. Barber | 17 |
| (1872) 7 Ch A 611=41 LJ Ch 682, Ford v. Foster | 8, 9 |
| Mohan Kumaramangalam and K. K. Venugopal, for Appellants; V. Rajagopalachari and B. T. Seshadri, for Respondents. | |

M. ANANTANARAYANAN, C. J.:—These related appeals involve certain problems of great interest and significance, in the application of the law of Trade Marks to the facts of the record. It is not so much that the problems involved are bare of authority; indeed, the contrary is true, and we have a plethora of decisions from which to select leading precedents, but that the issue, whether certain of those dicta now require modification or a certain refinement does appear to arise. We might state, at the outset itself, that the authorities that we have examined fall into three main

groups: (1) English precedents, many of these dating from the last decades of the 19th Century, (2) expositions, supported by authorities, of the relevant principles, appearing in the Treatises, Halsbury's Laws of England, Third Edition, Volume 38; Kerly on Trade Marks, 8th Edition (R. G. Lloyd), The law on the Trade and Merchandise Marks by Dr. Venkateswaran (1963 Edition) and (3) the enactment itself, and one or two decisions of the Supreme Court and of our High Court.

2. Before proceeding to the facts, it may be convenient to formulate certain of the relevant issues, in a broad mode. Before a Trade Mark attains the status of being placed in the Register, when does it become distinctive of the goods of its proprietor and user? What are the criteria to be applied, to test such distinctiveness, at a stage which is prior to placement in the Register? Assuming that such distinctiveness existed, can it be lost by successful piracy alone? Should such common user, whether surreptitious or open, be substantial or is it enough that a certain volume of it exists? Should there be knowledge of this user, on the part of the proprietor of the distinctive mark, and either acquiescence or abandonment, for the mark to sink into a common use? What are the tests of Publici juris? Upon whom lies the onus, in a contest, to prove the elements publici juris, as an objection to the registration?

3. At the outset we shall indicate, in broad outline the facts which led up to these appeals. At a subsequent stage, after examining the precedents and the authorities it will become incumbent on us to make a detailed analysis, of the categories of evidence upon which reliance is placed by the appellant firm, and the effect of this evidence on the issues of the fact involved.

4. In both the appeals, the Andhra Perfumery Works, a joint family concern represented by its Manager, is the appellant firm and will hereinafter be referred to as the appellants. There were two closely-related proceedings before Sadasivam, J., one of which was C. M. A. No. 203 of 1962. This was an appeal from the order of the Assistant Registrar of Trade Marks, directing the placement in the Register of a device of Lord 'Ganesh' and the Legend 'Ganesh Durbar Bathi' in respect of the Agarbathis produced by the National Flag Perfumery Works (respondent) which, admittedly, fell within the category of Item 3 of the Fourth Schedule, of the Trade and Merchandise Mark Act, 1958. LPA NO. 106 of 1964 is the appeal from the judgment of the learned Judge (Sadasivam, J.) O. P. No. 202 of 1962 was a proceeding before the same learned Judge under Sections 56,

107 and 108 of the Act (Act XLIII of 1958) by the Andhra Perfumery Works (Appellants) praying for the rectification of Part A of the Register, by expunging therefrom this registered Trade Mark. The two proceedings involve identical issues of law and fact, and were very properly dealt with together.

5. The order of the Assistant Registrar of Trade Marks, from which the former appeal arose, is a detailed one, and it furnishes the entire history of the proceedings. We shall indicate the salient events here, and also refer, in a condensed form to the averments and the evidence in the related Original Petition for rectification. The respondent applied for registration of the Trade Mark on 24-5-1960. The relevant affidavits disclose the following facts. The respondent claimed that the Mark bearing the device of Lord 'GANESH' and the word 'GANESH' had been adopted by him from the year 1953, and honestly and continuously used, upto the date of the application, in respect of the goods (Agarbathis). The Mark became very popular in the market, and achieved public repute and patronage, as distinctive of those goods. The business of the respondent firm in this respect expanded from Rs. 3,000/- per annum in 1953, to 4½ lakhs of rupees in 1960. Similarly, the advertisement expenses show a steep rise from about Rs. 800/- per annum to Rs. 10,000/- per annum in the relevant period. The Assistant Registrar of Trade Marks himself has pointed out, in his order, that though the actual application was on 24-5-1960, this itself has something of a prior history. The earliest attempt by the respondent firm to register was long prior to the year 1960 (8-1-1954), and there was a subsequent application on 7-1-1957, for registration of the Trade Mark or device on the strip-label. Both the applications were pending, and accepted for advertisement, when certain procedural defects came to light, because of the splitting up of the same attempted registration into distinct applications. A comprehensive application was later filed. Between 1953 or 1954, and 1960, the respondent firm claims to have combated piratical attempts, which came to its knowledge, firstly by two actions in Courts, and next, by several threatened actions, which ended in undertakings by those rivals, to refrain from further surreptitious user of the Mark.

6. The grounds on which the appellant firm and certain associates opposed the registration are of great importance. The main ground was that the word 'GANESH' had been in use for a number of years as a Trade Mark, amongst manufacturers of Agarbathis all over India. This was also partly because Lord Ganesh

is a deity venerated by the Hindus, as a symbol synonymous with success and welfare, and the Mark was thus common to the trade. It was either *publici juris* from the outset, or it had later become so, and the Mark and device of the respondent firm had lost all distinctiveness. There were more than forty manufacturers of Agarbathis in Mysore State alone, using the Mark. Mr. Mohan Kumaramangalam for the appellant firm had stressed, that many of these producers would appear to be concentrated in one town in Mysore-Chintamani, which is also the Headquarters of the respondent firm. Actually, one Srinath Kundanlal and Bros., of Amritsar, had earlier registered this word in respect of incense and Agarbathies, and it is not in dispute that, in view of an opposition from that firm, the respondent firm agreed to exclude the territories of Punjab, Delhi (Union) and Himachal Pradesh (Union) from the rights conferred by the registration. Since the respondent acquiesced in the use of 'GANESH' Mark by many other manufacturers, there is also abandonment. We may take it that, in the related Original Petition, rectification was sought for by the appellant firm on the same grounds, the main development here being the filing of certain further affidavits, referred to and discussed in the order of the Assistant Registrar of Trade Marks

7. At this stage of the discussion, it may not be necessary for us to proceed into the particulars of the categories of evidence, and the contents of those categories. But, since it is on the application of the formulated principles that the issues in this case have to be decided, we shall first refer to the precedents and the dicta laid down therein, and subsequently proceed to the determination of the issues, in the light of the principles and the facts of the record.

8. The first precedent that has to be examined, undoubtedly is the early leading case, *Ford v. Foster*, (1872) 7 Ch A 611. A point of some importance is that this case appears to be anterior to the English Act, whereby the registration of Trade Marks took form. The history of that matter is to be found in Dr. Venkateswaran's *Treatise*, on the "Three Marks Rule" (pp. 266-67). It appears that prior to the enactment of the Trade Marks Act, 1875, in the United Kingdom, the practice was that there were several instances of honest concurrent user, in respect of different persons in the same trade and goods. The test for the registration was then formulated by a Rule, for Jessell, M. R. said:

"Monstrous injustice would have been done if a man who has had a trade mark for perhaps forty years should lose it

because another man who had it for four years had happened to register it first." The formulated Rule was that an identical mark could be registered for the same goods by different persons, upto the number three, and not beyond. Where, more than three persons had acquired common law rights of user in the Mark, it was treated as *publici juris* or common of the trade. The entire history is very revealing, in the light thrown on the difficulties encountered in engrafting the statute and its requirements, on the prior practice and the state of the common law.

9. To return to (1872) 7 Ch A 611, it is not now necessary to set forth the facts of this celebrated case, at any length. But the citation of two passages becomes essential, for both bear intimately on the issue now before us. At page 628, Melish, L. J., said as follows:

"Then the question is, has it become *publici juris*? And there is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of *Harvey's Sauce*. It was admitted that, although that originally had been the name of a sauce made by a particular individual, it had become *publici juris*, and that all the world were entitled to call the sauce they made *Harvey's sauce* if they pleased. Then what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone." As we shall see later, these remarks, which were subsequently approbated by Lord Macnaghten in *Leahy v. Glover*, (1893) 10 RPC 141, (H. L.) still embody the law that applies to such a context; but, perhaps, some refinement may be necessary, for what the learned Judge stated was, no doubt, a vital part of the test of *publici juris*; but it is not the entire test. Another passage, which is

equally important, because it bears upon the principle of the loss of distinctiveness by piratical uses, is in the judgment of James, L. J., in the same case (P. 625).

"It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasions of his neighbour's rights is to convert his piracy into a lawful trade."

10. The next authority that we propose to examine is National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., 1894 AC 275. Without proceeding into unnecessary particulars, we may state that in 1956 the appellants in that case invented 'Maizena' as their Trade Mark for flour made from maize, but did not register this Trade Mark in the Colony of New South Wales, which was the relevant territory in the case, till December 1889. The Trade Marks Act, 1865, permitted such registration. The case is an interesting one, because the lack of promptness on the part of the appellant firm did affect the question of common user, which might have destroyed the distinctiveness emerging in the interval. The matter was put in the form that if, during the period in question, the word had been used for fraudulent purposes by others, though as a mode of common use, it did not impair the Trade Mark of the appellant. But, if it was used and understood before 1889 "as a term descriptive of the article, as a product of maize, and did not denote such product to be of the manufacture or merchandise of a particular person, then it must be regarded as having become, in the sense of law, *publici juris* and was no longer registrable by the appellant as their trade mark".

11. A precedent relied on by Mr. Kumaramangalam for the appellant firm, is in the Matter of, Samson Cordage Works' Application (1927) 44 RPC 313. The Mark consisted of diamond shaped spots arranged in pairs, positioned diagonally, in respect of window sash-cords, trolley cords, etc., Mr. Justice Astbury observed:

"Sir Duncan asks — How came it that ironmongers and others ordered spot cord from the manufacturers that we have heard about in this case? My answer is, I do not know. Sir Duncan's answer is: Because Samson's Cord has acquired a reputation in the market, of which they desired to avail themselves, I am not satisfied about that, nor do I think that there is any sufficient evidence on the point to that conclusion."

Another significant passage in the same judgment, runs as follows:—

"Then it is contended on behalf of the applicants that Section 41 of the Act

shows that a mark may be registered, although another person may have previously used it, provided in the meantime the applicant's mark has become distinctive in the trade. That of course is true, but is only intended to deal with a very limited class of case, where some person or persons happen to have made in the past something for which the applicant asks for registration, by reason of the mark asked for having become distinctive, but it has no bearing on such a case as this, where there has been shown to be a general practice of putting spots and other analogous marks upon various kinds of cords and ropes."

12. *Louise & Co. Ltd. v. Gainsborough*, (1902) 20 RPC 61, decided by Farwell, J., is of great interest, because of the background. Gainsborough painted the picture of the 'Duchess of Devonshire', known by this name which became very celebrated as a painting. Its popularity was used by the plaintiff firm in 1892 to register a Trade Mark, consisting of a reproduction of this painting, for hats, bonnets and headgear. The defendant carried on a similar millinery business under the style of 'Mr. Gainsborough', and was using the same reproduction. The picture was stolen in 1876, which added to popular knowledge concerning it. It was held that the picture had been in common use from 1876 onwards in the 'hat and millinery' trade, and was not distinctive of the plaintiff's goods. It had hence to be expunged from the Register, as lacking distinctiveness.

13. *Boord & Son v. Thom and Cameron Ltd.*, (1907) 24 RPC 697 is the famous 'CAT AND BARREL' case. The facts of this case are well known in the Trade Mark Law, and need not be digressed upon here. But the following passage in the judgment of the Court of Session in Scotland (page 721) is significant:

"My Lords, I do not go into these matters in detail because it would only be reading evidence for hours. I will just say that, taking the matter as a jury would, it seems to me that none of these people have really proved anything more than a very sporadic use of the labels with a cat and barrel on them, and that by none of them is there really any trade proved that would associate their goods with a cat and barrel. On the whole matter, I think the evidence falls far short of what would be necessary to displace Boord & Son from the Register as Owners of the 'Cat and Barrel' mark which has been associated for so long with their gin."

14. In *re. Arthur Fairest Ltd.'s Application to register a Trade Mark* (1951) 68 RPC 197 at p. 207 is significant for the dictum that "before the objection under Section 11 can be sustained it is necessary for an opponent to establish a

reputation in trade in connection with a trading style, device or mark". for it is having regard to that reputation that "the possibility of confusion upon reasonable user of the mark applied for will arise." This is relied on by the learned Counsel for the respondent firm.

15. In *Barlow & Jones v. Johnson Jabez and Co.*, (1890) 7 RPC 395, the question was whether the word 'OSMAN' denoted a particular towel of the plaintiff's manufacture, or like Harvey's Sauce, was a term common to the trade. It was held, on the evidence, that the word was not common to the trade, and that, since the plaintiffs did not know of the defendant's user of the word 'OSMAN' on defendant's towels, the plaintiffs were entitled to register, as they did in 1886. The motion to rectify was declined. The case is important, as showing that surreptitious user, which never comes to the knowledge of the proprietor, cannot suffice to destroy distinctiveness. The following passage is of considerable importance in the present context:

"If so, assuming there is no acquiescence, how can a man acquire a right by wrongful user? How can that which is in the eye of the Court of Equity fraudulent and injurious, defeat the rights of others — unless there is acquiescence? But unless there was knowledge, there could not be acquiescence. Though the points run together they are separate points, and it follows that at the time of the registration in 1886, there was no user, except a wrongful and unknown user, as far as the plaintiffs were concerned, of this name 'OSMAN' by the defendants."

16. There is the judgment of Kekewich, J., in *Ripley v. Bandey*, (1897) 14 RPC 591, which contains a passage of very great interest upon the difficulties that might arise in applying the test of publici juris, to facts very similar to those in the present case. Where a man has expended money, time and ingenuity and achieved distinctiveness of his Trade Mark, in relation to his expanding business, it seems opposed to equity that surreptitious piracy should destroy that distinctiveness, and deprive him of his just gains. It is for this reason that, where piracy alone is the source of the movement or user that might render the mark common to the trade, Courts should be careful to see if any such movement can be inferred, as within the knowledge of the proprietor, and either acquiescence or abandonment, or such feeble action relative to the movement as to amount to forfeiture, can be held established. The learned Judge expressed himself vigorously on this aspect of the law, if we may say so with respect, and the passage runs as follows:

"I do not myself see how it is any answer to a man who comes forward to establish such a common law Trade Mark to say that, some time after your character was established and your goods were known, and your money, time, and ingenuity had been expended, perhaps in large advertisements and otherwise, others began to use it, and so, because they began to use it after your rights had been ascertained, it is in common use. That seems to me to be an argument which contradicts itself in the mere statement. When once appropriation has been made, common use becomes impossible; until (and possibly that is the logical result of this case) the person entitled to the Trade Mark allows others to use it so as to forfeit his right to appropriate the term, and so the words sink again into common use, from which, of course, after that, they cannot be revived. But until something of that kind has happened, it seems to me that words once appropriated cannot be said to be words in common use, merely because others, who ex concessis on the mere statement, are trespassers, have attempted to use those words subsequently. Therefore, to my mind, the defence on the ground of common use entirely breaks down."

17. Lastly, we may take note of a precedent of the Supreme Court in *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, AIR 1960 SC 142 at pages 145 and 146 which has also been quoted in the judgments before us. This passage approbates the statement of law in *Kerly*, and explains the different situation of the same issue, whether a Mark is common to the trade, which might arise in opposition proceedings. In that context, the user of other Marks must be established by evidence. Finally, on the aspect of the precedents, we may refer to *Devidoss & Co. v. Alathur Abboyee Chetty & Co.*, 1940-2 Mad LJ 793 at pages 797 and 798 = (AIR 1941 Mad 31 at p. 33). This bears upon acquiescence on the analogy of the dicta of Fry, J., in *Willmott v. Barber*, (1880) 15 Ch D 96 and the statement of the law is:

"To support a plea of acquiescence in a trade mark case, it must be shown that the plaintiff has stood by for a substantial period and thus encouraged the defendant to expend money in building up a business associated with the mark."

18. We shall deal, in a more condensed form, with the citations which have been placed before us from *Kerly* on Trade Marks (8th Edition, page 246). *Halsbury's Laws of England* (Third Edition) Volume 38, Paragraphs 869 and 894 and Dr. Venkateswaran on Trade Marks Act (1963 Edition), these last passages being cited from a number of pages of the work. In the present case, the diffi-

culty is partly that, in a context of this character, one has to be careful to see that a circular argument does not emerge. Certainly, if there is some evidence on record which shows that the Trade Mark or the word "GANESH", with or without the variance of prefixes or suffixes, was used by about forty traders in that area, as the appellant claims, then it would be common to the trade; that may be so, *ab initio*. If that is the interpretation, then the attempt of the respondent firm to register this mark, on the basis of their business in Agarbathies built up from 1953 to 1960, must necessarily fail. When a word is *publici juris*, like the word 'DURBAR' which the respondent firm disclaimed, there can be no registration, for there cannot be distinctiveness. This is a question of fact, as Kerly points out (paragraph 3, page 119). If, on the contrary, the word had attained distinctiveness as the mark of the respondent firm, this distinctiveness may be lost. But, unless it is lost, it is entitled to recognition. The loss may be due to abandonment, acquiescence in successful piracy on a large scale, or a volume of common user, which is public and which destroys distinctiveness. The Mark may be *publici juris* in a particular branch of the trade only (Kerly, pages 245-246). The occurrence of a few fraudulent infringements, without the knowledge of the proprietor, will not make the mark common to the trade (Dr. Venkateswaran's Treatise, pages 659 to 661). Again, mere disuse for a short period, may not amount to abandonment. When rectification is attempted, the onus is on the applicant to show that the Mark had lost its distinctiveness. There are several authorities, including passages in Kerly, which need not be quoted again here, clearly to the effect that mere surreptitious user, sporadic user, piracy in a concealed manner against which action was taken or attempted by the proprietor, when the piracies came to light, cannot possibly destroy the distinctiveness earlier achieved.

19. Mr. Mohan Kumaramangalam for the appellants has sought to rely on certain dicta in Halsbury, that "user subsequent to that of the applicant, but prior to registration, may render a mark non-distinctive and therefore unregistrable (Re. Bosch Akt's Application, (1925) 43 RPC 18, Somerille Ltd. v. Brown, (1934) 51 RPC 205). Also on the dictum in the same passage that "user by others in a single area may be sufficient to prevent registration."

20. Hence, there are only two issues of fact in these related proceedings. The first, whether the respondent firm has established distinctiveness in respect of this mark prior to 1960, and during the period 1953 to 1960? In other words, was

distinctiveness first achieved, and did infringements or piracies follow in its wake, or do we commence with a situation in which the Mark has become, or is becoming, *publici juris*, and one manufacturer is heading the race to obtain registration? To be very clear about this the decision as between the alternative possibilities is essential, for, otherwise, the argument becomes circular. If the distinctiveness is held as first established, what is the adequacy of the evidence which has been adduced by the opponents (here the appellant firm), to show that distinctiveness was destroyed, and that the Mark has become *publici juris*?

21. From this point onwards, we shall be concerned with the particulars and categories of the evidence. We have no doubt whatever that this Mark achieved distinctiveness first, as the mark of the respondent firm in respect of Agarbathies, and, indeed, this seems to have been beyond controversy. For, the learned Judge (Sadasivam, J.), refers to the relevant facts as practically indisputable. Again, as we have seen from 1954 itself, the respondent firm was not merely achieving this distinctiveness, but attempting to obtain the security of registration, and was taking action against infringers and their piracies. It is sufficient here to refer to the earlier suit by the respondent firm O. S. No. 909 of 1954, a passing off action in respect of 'GANESH DURBAR BATHI', to the subsequent actions in O. S. Nos. 4 and 5 of 1961, and to the several undertakings given by others, some of whom have later filed affidavits, to the effect that they would refrain from using Marks in respect of Agarbathies which are variations of 'GANESH'; those undertakings clearly followed threatened legal action. One of those undertakings alone, reproduced at page 39 of Volume I of the typed papers, given by S. V. Parasuramiah, requires some detailed comment later. In other words, the evidence, as far as the respondent firm is concerned, proves this. They were the proprietors and inventors, of this device and Trade Mark. In respect of their Agarbathies, they had a very prosperous business, which vastly expanded from 1953 to 1960. Their advertisements were considerable, and their goods found very wide markets and public support. They attempted registration fairly early, but owing to complications in procedure a formal shape emerged only in May 1960; in the meantime, a number of other dealers, obviously in the wake of their success, began to manufacture Agarbathies with the Trade Mark of 'GANESH' or palpable variations of the same. These infringements appear to have been on quite a small scale, as we shall presently show. The evidence is quite imperfect and unsatisfactory, to prove that there

were about forty persons of this kind, or that their user could possibly have been adequate in volume, to come within the knowledge of the respondent firm. Certainly, some of these attempted piracies came within the knowledge of the respondent firm. Two or three suits were filed, and in other instances, undertakings to desist were obtained, after threatened legal action. This is the picture which emerges from the record. Added to it, is the circumstance stressed by all the judgments before us. No one, not even the appellants, attempted any parallel or anticipatory registration in respect of 'GANESH' at any time. Even now, the appellant firm has not been able to aver that its trade and user of the Mark have been such, as to amount to an honest concurrent user, justifying a claim for registration.

22. It is in this context that the categories of the evidence have to be examined. They are (1) affidavits of individuals in the list of the forty alleged traders, concurrently using the label, (2) orders from their clients, mainly post-cards and letters, for their goods, accompanying those affidavits, (3) affidavits of two printers in respect of cartons and labels bearing these various Marks, namely, B. N. Jayaraj and N. R. Nanjundiah, along with a number of letters and post-cards to these printers from manufacturers of Agarbathis, for printing labels etc., and (4) affidavits of other users of Agarbathis. There are, of course, certain counter-affidavits filed on behalf of the respondent firm. But one very extraordinary circumstance must at once be noticed. The Assistant Registrar of Trade Marks was apparently concerned with the seven affidavits filed before him, relating to the alleged user of the 'GANESH' Mark. He thought that a viva voce examination of these persons, and inspection of their account books, will be helpful; he attempted to procure these vital pieces of evidence. He failed. The clear representation before him was that the accounts will not show the individual sales in respect of this category of goods, namely, Agarbathis with the word 'GANESH' or variations of that word. Simply stated, no such figures of sales are available, or were ever made available.

23. With regard to the cartons and labels, the affidavits of the printers are supported by the correspondence from the third-party manufacturers. But what does this prove? It proves, at the highest, that there were sporadic instances of user, clearly piracies, by other persons, who became aware of the affluent business of the respondent firm, and the popularity of 'GANESH' Agarbathis. These persons did place orders for cartons and labels with printers, specialising in such

work. But whether those cartons and labels were ever used, on any scale worth notice, is a different matter altogether. The volume of advertisements is practically 'nil', and there is no reliable evidence indicating such advertisements. In those circumstances, we are finally compelled to rely on (1) the documents filed relating to orders in respect of similar goods, (2) affidavits of third parties and (3) the undertakings of S. V. Parasuramiah, to which we have made reference earlier.

24. Mr. V. Rajagopalachari for the respondent firm has made a factual analysis of the correspondence relating to orders placed by persons like K. S. Madar Sahib, K. V. Ramalingiah Chetty, S. V. Parasuramiah, Narayana Rao, C. R. Venugopal, etc. He has shown how, for the relevant years, from 1955 to 1958 or 1960, the orders were extremely meagre, and almost negligible. There is no evidence that even these meagre orders were actually complied with, by the supply of Agarbathis. We have already stressed that the relevant accounts are not produced, and are not forthcoming. Affidavits of third parties are very unsatisfactory, and form no basis for any clear inference of common user, or of the device being *publici juris*.

25. Finally, we are left with the one document on which Mr. Kumaramangalam has placed some reliance, namely the undertaking given by S. V. Parasuramiah (pp. 37 to 29 (39?)) of Vol. I. *Prima facie*, this is evidence in favour of the respondent firm, for Parasuramiah gave an undertaking in respect of 'Balaganesh Durbar Bathi' and another Trade Mark, the latter undertaking being an absolute one. But with regard to the former, the translation of the text runs as follows:

"Many people are trading by the use of many kinds of names, that is to say, many traders are trading using the name of Ganesh Durbar Bathi. But if any of my equals in that group gives it up, I shall also do so. When I told K. S. Krishniah Setty like that, Krishniah Setty said 'Yes' and agreed"

26. Mr. Kumaramangalam places considerable reliance on the language of this document. For, according to him, it is *prima facie* evidence that, in June 1958, the respondent firm was aware that many traders were trading, using the name 'Ganesh Durbar Bathi'. Reliance is also placed on an endorsement in the translation to this effect: "N. B. Scribe K. S. Krishniah Setty, written on plaintiff's letter paper". But when we carefully scrutinised the Photostat of the original, which was in Canarese written in Telugu script, we found that there are no words corresponding to the postscript. It seems to have been added by some unknown

person, in the translated copy; clearly, in the absence of other evidence, it cannot be relied on. Thus apart, we are unable to spell out, from the language of the agreement, anything more than this. The respondent firm was then aware of several piratical attempts, which might have been on quite a small scale. They were putting some of them down by actions in Court, and they were accepting undertakings from others, on threatened action, to desist from further use of the Mark. We are quite unable to infer from this knowledge, assuming that it existed, any acquiescence or abandonment; nor does it amount to knowledge of facts, which would render the mark *publici juris*.

27. Upon an application of all the tests and principles that we have earlier discussed, in relation to the facts of the record, which have been elaborately dissected and placed before us, we have no doubt whatever that the learned Judge (Sadasivam, J.) was right in his conclusions, and that the appeals must fail. They accordingly fail and are dismissed with costs.

28. Before leaving these appeals, we may refer to one argument, that the word 'GANESH' applies to the Lord Ganesa who is the deity of auspicious commencement of all undertakings in Hinduism, and hence that it would be wrong to create a monopoly in respect of such a term, for one particular proprietor. But it was never pretended that the word 'GANESH' cannot become distinctive for respondent firm's Agar-bathis, or that it is not registrable. We need only observe, without proceeding further into this aspect, and leaving the issue quite open, that there are several other names of the deity (Vigneswara, Vinayaka etc.) which could be appropriately used by persons, desiring to associate their goods with the favour of the deity, if the Mark and device, which are thus invented, do not otherwise infringe any prior registered device under the Trade Mark Law.

BDB/D V.C.

Appeals dismissed.

AIR 1969 MADRAS 134 (V 56 C 32)

M. ANANTANARAYANAN, C. J.
AND NATESAN, J.

M/s. Fraser and Ross, Chartered Accountants. Petitioners v. Sambasiva Iyer and another. Respondents.

Writ Petition No 222 of 1966, D/- 5-1-1968

Industrial Disputes Act (1947), S. 2(j) — "Industry" — Firm of Chartered Accountants — Not within scope of S. 2(j). AIR 1963 Cal 310, Not foll.

The pursuit of the profession of Chartered accountancy not merely involves a high Code of ethics and very considerable responsibility, but it also involves, essentially value-decisions and judgments, which cannot possibly be derived from clerical assistance, or the performance of routine or arithmetical duties by subordinate staff. A scrutiny of the several papers for the several subjects for examinations which culminate in entry into the restricted group of qualified Chartered Accountants show that they involve very high intellectual standards, comparable to the qualifications for the legal profession, and that there is very little to distinguish the two professions in that sense. (Para 19)

Since Chartered Accountants and Auditors definitely do constitute a "learned" or "liberal" profession, the profession cannot be termed an "industry". AIR 1963 Cal 610, Not foll; AIR 1968 SC 554 & AIR 1967 Ker 31, Rel. on, Case law Ref. (Para 20)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 554 (V 55)=
Civil Appeal No. 572 of 1966,
Secy. Madras Gymkhana Club
Employees' Union v. Management
of the Gymkhana Club 2, 3, 9, 13,
14A, 15, 20

(1968) AIR 1968 Bom 283 (V 55)=
1967-69 Bom LR 758=1968 Cri
LJ 1041, N. E. Merchant v. Bom-
bay Municipal Corporation 16

(1967) AIR 1967 SC 1257 (V 54)=
(1967) 2 SCR 256, H. A. K. Rao
v. Council of Institute of Char-
tered Accountants of India, New
Delhi 17

(1967) AIR 1967 Ker 31 (V 54)=
1966-2 Lab LJ 613, T. K. Menon
& Co., Calicut v. Dist. Labour
Officer, Kozikode-2 2, 9, 20

(1966) 1966-2 Lab LJ 608 (Ker),
T. K. Menon & Co. v. District
Labour Officer 2

(1964) AIR 1964 SC 903 (V 51)=
1964-2 SCR 458, Harinagar Cane
Farm v. State of Bihar 9

(1963) AIR 1963 SC 1873 (V 50)=
1964-2 SCR 703, University of
Delhi v. Ramnath 9

(1963) AIR 1963 Cal 310 (V 50)=
1963-1 Lab LJ 567, Rabindranath
Sen v. First Industrial Tribunal,
West Bengal 2, 12

(1962) AIR 1962 SC 1080 (V 49)=
1962-1 Lab LJ 241, National Union
of Commercial Employees v.
Meher Industrial, Tribunal, Bom-
bay 7, 8, 11

(1961) AIR 1961 SC 484 (V 48)=
1961 (2) SCR 480, Ahmedabad
Textile Industry, Research Asso-
ciation v. State of Bombay 8

(1961) AIR 1961 Cal 95 (V 48), N.
R. Mukerjee v. A. H. Just 2

- (1960) AIR 1960 SC 610 (V 47)=
1960-1 Lab LJ 251. State of Bom-
bay v. Hospital Mazdoor Sabha 4, 7, 8
(1960) AIR 1960 SC 675 (V 47)=
1960-2 SCR 942. Corporation of
City of Nagpur v. Its Employees 6
(1957) AIR 1957 SC 110 (V 44)=
1957-1 Lab LJ 8. Baroda Borough
Municipality v. Its Workmen 6
(1953) AIR 1953 SC 58 (V 40)=
1953 SCR 302=1953-1 Lab LJ 195.
D. N. Banerjee v. P. R. Mukherjee 4, 14A
(1928-29) 41 Com LR 569. Federated
State School Teachers' Association
of Australia v. State of Victoria 5
(1921) 1921-2 KB 332=90 LJKB
499. Currie v. Inland Revenue
Commr. 9
(1919) 1919-1 KB 647=88 LJKB 752,
Commr. of Inland Revenue v.
Maxse 9, 14
(1918-19) 26 Com LR 508. Federated
Municipal and Shire Council Em-
ployees of Australia v. Melbourne
Corporation 5

T. Thiagarajan for King and Partridge,
for Petitioners; B. R. Dolia, for Respon-
dent No. 1.

ANANTANARAYANAN, C. J.— A question of considerable interest and importance, in the domain of Industrial Law, arises in this proceeding, namely, whether a Firm of Chartered Accountants and Auditors, a registered partnership which is conducting this profession, will be an 'industry' within the scope of Section 2 (j) of the Industrial Disputes Act. The matter arises for our determination, in the following context of facts. Messrs. Fraser and Ross (writ-petitioners) had employed the first respondent, (V. Sambasiva Ayyar) as a stenographer in the Firm, and, under the Rules relating to his service, he was to be retired in February, 1963, when he would have attained the age of superannuation. We need not now concern ourselves with the minute particulars, but it may be noted that the first respondent was permitted to avail himself of earned leave from 1-2-1963 to 31-5-1963, and that he finally retired on 1-6-1963. He made a claim that he ought to be continued in service till the completion of his 60th year, or at least for three years more, but this was rejected by the Firm, and he instituted a proceeding in the Labour Court, claiming a sum of Rs. 7,254/-, as retrenchment compensation and wages in lieu of one month's notice. The petitioner Firm raised a preliminary objection to the maintainability of the petition, claiming that the Firm did not constitute an 'industry', within the meaning of the Industrial Disputes Act. The Labour Court negatived this contention, and this has led to the present proceeding in certiorari.

2. Though, at different stages of the arguments, several of the averments and counter-averments relating to the merits of the claims of the first respondent were particularised before us, they need not be here gone into. Admittedly, it is only the general question which concerns us, and if Messrs. Fraser and Ross, a reputed Firm of Chartered Accountants and Auditors, do not come within the ambit of the statutory definition, the writ petition will necessarily have to be allowed. Nor can the matter be merely considered as *res integra*, though there is no previous judgment of this Court on the subject, or any judgment of the Supreme Court. There are two decisions of the Calcutta High Court, N. R. Mukherjee v. A. H. Just, AIR 1961 Cal 95 and Rabin-dranath Sen v. First Industrial Tribunal, West Bengal, 1963-1 Lab LJ 567=(AIR 1963 Cal 310) on this specific issue. In the first of these precedents, a contention was raised that the activities of that particular firm of Chartered Accountants were not confined to the business of a Chartered Accountant simpliciter, but extended to other activities, which might be viewed as commercial activities, and which were not strictly related to the business or profession of a Chartered Accountant. The learned Judge held that evidence was essential on two related questions of fact, and the decision really turned upon considerations of that character. But in the second precedent, 1963-1 Lab LJ 567=(AIR 1963 Cal 310), Banerjee, J., did hold that a Firm of Chartered Accountants and Auditors, like the petitioner Firm here, might be included within the definition of the expression 'industry' in Section 2 (j) of the Act. These precedents were considered, and a decision was rendered by Mathew, J., on the very point, in T. K. Menon and Co. v. District Labour Officer (1966-2 Lab LJ 608 (Ker)). This judgment came up in appeal before Govinda Menon and Krishnamurthi Ayyar, JJ., in the High Court of Kerala, in T. K. Menon and Co. Calicut v. District Labour Officer Kozikode-2, 1966-2 Lab LJ 613=(AIR 1967 Ker 31), and, after a considered review of the case-law, the learned Judges allowed the appeal, and held that the work of a Chartered Accountant or of Chartered Accountants could not be included in the definition of the word 'Industry' in Section 2 (j) of the Act. Subsequent to this judgment of this Division Bench, we have the judgment of the Supreme Court in the Secretary, Madras Gymkhana Club Employees' Union v. Management of the Gymkhana Club, Civil Appeal No. 572 of 1966=(AIR 1968 SC 554). That reviews the entire prior case-law on the subject, and formulates afresh the principles upon which the

matter now before us will really have to be determined.

3. At a later stage of this judgment, we propose to refer, in some detail to the profession of Chartered Accountants and Auditors in the context of the Chartered Accountants Act (Act XXXVIII of 1949), the Chartered Accountants Regulations, 1964, and certain treatises and authorities, such as (1) Professional Ethics of Certified Public Accountants, by John L. Carey (1956), New York, and (2) The Accountant in Public Practice, by K. L. Milne (1959), Butterworth & Co., London, as well as extracts from Halsbury's Laws of England. For the moment we shall relegate this task to the subsequent stage, and focus attention on the evolution of case-law. For this purpose, it is really necessary to keep in mind, throughout, three relevant definitions, namely, definition of 'industry' in Section (2) (j), of 'industrial dispute' in Sec. 2 (l) and of 'workmen' in Section 2 (s) of the Industrial Disputes Act. But since those definitions have been set forth verbatim in several of the precedents cited at the Bar, including the Gymkhana Club Case, C. A. No 572 of 1966=(AIR 1968 SC 554), it is sufficient for our present purpose to extract the definition in Section 2 (j) alone, namely:

"'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

4. The true commencement of the case-law, as far as this country is concerned, would appear to be D. N. Banerjee v. P. R. Mukherjee, 1953 SCR 302 at p 311=1953-1 Lab LJ 195 at p. 199=(AIR 1953 SC 58 at p. 61). The following dicta of Chandrasekhara Ayyar, J., may be here relevantly set forth:

"Though the word 'undertaking' in the definition of 'industry' is wedged in between business and trade on the one hand and manufacture on the other, and though, therefore, it might mean only a business or trade undertaking, still it must be remembered that if that were so, there was no need to use the word separately from business or trade. The wider import is attracted even more clearly when we look at the latter part of the definition which refers to 'calling, service, employment, or industrial occupation or avocation of workmen'. 'Undertaking' in the first part of the definition and 'industrial occupation or avocation' in the second part obviously mean much more than what is ordinarily understood by trade or business." At the same time the Court was careful to observe that every aspect of employer and employee connection did not result in industry, and in the Hospital Mazdoor Case, 1960-

1 Lab LJ 251=(AIR 1960 SC 610), their Lordships again emphasised that though the words were of a very wide denotation, "a line would have to be drawn in a fair and just manner."

5. While upon this aspect of the commencement of the evolution of the case-law, it is necessary to refer to two decisions from Australia, namely, Federated Municipal and Shire Council Employees of Australia v. Melbourne Corporation, (1918-19) 26 Com LR 508 and Federated State School Teachers' Association of Australia v. State of Victoria, (1928-29) 41 Com LR 569. These embodied certain dicta of Isaac, J., which have subsequently coloured the perspective of approach to a considerable extent, that an 'industry' involves "co-operation between employer and employees for the object of satisfying material human needs". It is understood that the co-operation may result in services, as much as in products, and that the contingency of profit-making need not necessarily exist.

6. We may now pass on to Baroda Borough Municipality v. Its Workmen, 1957-1 Lab LJ 8=(AIR 1957 SC 110), which extended the expression of 'industrial dispute' to include disputes between the Municipality and its employees "in branches of work that can be regarded as analogous to the carrying on of a trade or business." This was followed by the Corporation of City of Nagpur v. Its Employees, 1960-2 SCR 942=(AIR 1960 SC 675), in which precedent the Supreme Court made a distinction as between (a) regal and (b) municipal functions of the Corporation, the latter being held analogous to business or trade.

7. We now come to the Hospital Mazdoor Case, 1960-1 Lab LJ 251=(AIR 1960 SC 610), which constitutes a landmark. This precedent attempted to evolve a working test, and, perhaps, the best manner in which the decision could be explained would be the citation of a passage, not from this decision itself, but from a subsequent commentary furnished by the Supreme Court in National Union of Commercial Employees v. Meher Industrial Tribunal, Bombay, 1962-1 Lab LJ 241 at p. 244=(AIR 1962 SC 1080 at pp. 1083-84).

"When in the Hospital Case, 1960-1 Lab LJ 251=(AIR 1960 SC 610) this Court referred to the organization of the undertaking involving the co-operation of capital and labour or the employer and his employees, it obviously meant the co-operation essential and necessary for the purposes of rendering material service or for the purpose of production. It would be realised that the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under

this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of service, co-operation between capital and labour or between the employer and his employees must be direct and must be essential."

"In the hospitals, the service to the patients begins with proper diagnosis followed by treatment, either medical or surgical, according to the requirements of the case. In the case of medical treatment, the patients received medical treatment according to the prescription and are kept in the hospital for further treatment. In surgical cases, the patients receive surgical treatment by way of operation and then are kept in the hospital for further treatment until they are discharged. During the period of such treatment, all their needs have to be attended to, food has to be supplied to them, nursing assistance has to be given to them, medical help from time to time has to be rendered and all incidental services required for their recovery have also to be rendered. Now, in the case of the activities of an organised hospital, the co-operation of the employees is thus directly involved in rendering one kind of service or another which it is the duty of the hospital to render. It is true that the patients are drawn to the hospital primarily because of the doctors or surgeons associated with them. But there can be no doubt that the work of the hospital and its purpose are not achieved merely when a surgical operation is performed or medical prescription provided. After medical treatment is determined or a surgical operation is performed, the patient coming to a hospital as an indoor patient needs all kinds of medical assistance until he is discharged and the services rendered to him both initially and thereafter until his discharge are all services which the hospital has been established to render and it is in the rendering of the said services that the employees of the hospital co-operate and play their part. That is how the test of co-operation between the employer and

his employees is satisfied in regard to hospitals which are properly organized and maintained. It is, of course, true that the quality, the importance and the nature of the service rendered by different categories of employees in a hospital would not be the same, but nevertheless, all the categories of service rendered by respective classes of employees in a hospital are essential for the purpose of giving service to the patients which is the objective of the hospital. That is how the hospitals satisfy the test of co-operation between the employer and his employees".

8. In Ahmedabad Textile Industry Research Association v. State of Bombay, 1961-2 SCR 480=(AIR 1961 SC 484), the question arose whether an association for research maintained by the Textile Industry, and employing technical and other staff fell within the definition. The tests set forth in the Hospital Mazdoor Case, 1960-1 Lab LJ 251=(AIR 1960 SC 610) were recapitulated, and applied to the context of facts. We might immediately pass on to 1962-1 Lab LJ 241=(AIR 1962 SC 1080), which is important, as it held that though a solicitor's firm might be superficially organized like an industrial concern, the Legislature could not have intended to include a 'liberal profession' of that character in the definition of 'industry'. Their Lordships observed at p. 246:

"A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession in his special or peculiar intellectual and educational equipment. This is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'industry' under Section 2 (j)."

9. In Harinagar Cane Farm v. State of Bihar, 1964-2 SCR 458=(AIR 1964 SC 903) the agricultural operations of a cane farm purchased by a sugar factory and worked as a department for the supply of sugar-cane, were held to amount to an 'industry' on the facts, though agriculture could not be termed an 'industry' irrespective of circumstances. In University of Delhi v. Ramnath, 1964-2 SCR 703=(AIR 1963 SC 1873) it was held that educational institutions do not constitute an 'industry' within the Act. In the Kerala case, 1966-2 Lab LJ 613=(AIR 1967 Ker 31), emphasis has been laid on the dicta of Judges in English decisions, upon what would constitute a 'profession' or a 'liberal profession'. There were extensive citations from the judgments of Scrutton, L. J., in Commissioners of Inland Revenue v. Maxse, 1919-1 KB 647

and Currie v. Inland Revenue Commissioners, 1921-2 KB 332.

10. Subsequently, we have the Gymkhana Club Case, C. A. No. 572 of 1966= (AIR 1968 SC 554). Before proceeding to an analysis of this case, certain possible misconceptions might have to be removed. One argument sought to be advanced, on the facts themselves, by the first respondent was that Messrs. Fraser & Ross actually carried on certain activities, which could not be purely characterised as those within the scope of a reputed Firm of Chartered Accountants and Auditors. For this purpose, several records were called for and scrutinised, and emphasis was placed on certain of the documents in an additional statement in the Lower Court. But, as Mr. Thyagarajan, for the petitioner Firm, has now made it clear beyond doubt, those items of work really relate either to assignments of Liquidation, or Receivership and Managership, most of which were executed many years previously, prior to the Chartered Accountants Act, 1949, and derived from orders of Court. We are fully satisfied that Messrs. Fraser & Ross have only been conducting the business of the profession, or strictly legitimate extensions of such business, as advisers of firms upon taxation matters, provident fund structures, etc.

11. Another misconception can be very easily resolved, in terms of the case-law itself. This is that the Firm cannot claim that it is not included within the definition, because here we have a group of Chartered Accountants and Auditors, registered as a partnership firm and carrying on business as such, and not an individual practitioner of the profession, assuming that it is a 'learned profession'. But this distinction was repelled as unsubstantial by their Lordships of the Supreme Court in 1962-1 Lab LJ 241 at p. 244=(AIR 1962 SC 1080 at pp. 1083-84).

"In our opinion, the distinction sought to be drawn by Sri Chari between professional service rendered by an individual acting by himself and that rendered by a firm is not logical for the purposes of the application of the test in question. What is true about a firm of solicitors would be equally true about an individual solicitor working by himself. As the firm engages different categories of employees, a single solicitor also engages different categories of employees to carry out different types of work and so the presence of co-operation between the employees working in a solicitor's office and their employer, the solicitor, could be attributed to the work of a single solicitor as much as to the work of the firm; and, therefore, if Sri Chari is right and if the firm of solicitors

is held to be an industry under the Act, the office of an individual solicitor cannot escape the application of the definition of Section 2 (j)."

12. The true argument of Mr. Dolia for the first respondent is not this. It is obvious that, so long as the learned profession of the law was strictly being pursued by the persons constituting the partnership, a partnership of lawyers will not be an 'industry' within the meaning of the definition, merely because there are two or more lawyers, and not a single lawyer. Clearly, the same argument will hold good for members of the medical profession. The true argument of Mr. Dolia is that, even if the learned professions are to be excluded, they should be limited to the three Institutions, the Law, Medicine, and the Church, to which the appellation was originally employed. As far as Chartered Accountants and Auditors are concerned, it is stressed that there is intimate co-operation between the Chartered Accountants themselves, and the clerical staff, which carries out a great deal of the routine work of actual scrutiny of accounts and effective preparation of the audit material. Without this co-operation, which is substantial, of the employee forces or of labour, whichever it might be termed, the Chartered Accountant could not function at all. It is this which led Banerjee, J., in 1963-1 Lab LJ 567=(AIR 1963 Cal 310) to hold that a firm of Chartered Accountants did come within the definition. The learned Judge stated at p. 579 (of Lab LJ)=(at pp. 319-20 of AIR):

"A Chartered Accountant doing audit work assisted by stenographers, personal clerks and menial servants, that is to say, doing the entire auditing work, from examination of accounts to the making of the report, all by himself, but only with such subsidiary and incidental help as may be rendered by his stenographers, typists, personal clerks and servants, may not be carrying out an industry. But if a Chartered Accountant carries on auditing work in a magnified scale, with more clients than he can himself manage, and is perforce compelled to have a division of labour, his clerks doing the examination of accounts and he himself drawing up the audit report, on the result of such examination, it may not be said that this type of co-operation is not industry".

13. But this argument cannot be really sustained, for a very important reason. The true criterion is not the degree of co-operation between the employee personnel and the employer or employers, in the process, which has to be judged for inclusion in the definition, whether it results in a product or service. As we shall see a little later, that has been very clearly laid down in the

Gymkhana Club Case, C. A. No. 572 of 1966=(AIR 1968 SC 554). Logically, it will be almost impossible to draw a line, concerning the degree or the quality of the co-operation, from case to case. Again, the entire argument really overlooks the actual organization of the profession of Chartered Accountants, and the equipment necessary for the practice of this profession, taken in conjunction with the quality of the service rendered. All these features, as we shall presently see, make this profession a 'learned' one, almost indistinguishable from the profession of the lawyer, with a high code of professional ethics, and a firm structure within which the members of the profession have to function.

14. It is not necessary here to define the word 'profession'. English cases make it unambiguous that even a description may not suffice. But, as Scrutton, L. J., observed in 1919-1 KB 647, the essential idea of 'learned profession' which cannot, in the modern context, be merely limited to the original categories of Church, Medicine and Law, is that it is the pursuit of an avocation or occupation, substantially involving the intellect. There is a complementary feature to this, that the services rendered by a 'learned profession' are primarily characterised by an equipment of learning, skill or judgment, acquired through intellectual means; the employment of capital for this purpose is, or should be, largely subsidiary or incidental in character. So long as these criteria are fulfilled, such a profession is a 'learned profession'. Persons organizing this profession, whether singly or banded together, do not constitute an 'industry', within the scope of the definition. They may employ other persons, for the skilful accomplishment of their tasks, such a labour force may be large, or small. Its services may even be considerable, in the quantitative sense. But, ultimately, if the qualitative contribution is distinct and supreme, this is not an 'industry', within the meaning of the Act. This appears to be established beyond doubt, relegating, in such cases, the test of co-operation between capital or the employer, and labour, to a relatively minor magnitude.

14-A. This is very clear from the following discussion in the Gymkhana Club Case, C. A. No. 572 of 1966=(AIR 1968 SC 554) and we have set forth verbatim these passages, which serve to bring out the essential criteria in terms of the latest formulation by their Lordships of the Supreme Court

"Of these categories 'undertaking' is the most elastic. According to Webster's Dictionary, 'undertaking' means 'anything undertaken' or 'any business, work or project which one engages in or attempts, as an enterprise'. It is this cate-

gory which has figured in the cases of this Court. It may be stated that this Court began by stating in Banerjee's case, 1953 SCR 302=(AIR 1953 SC 58) that the word 'undertaking' is not to be interpreted by association with the words that precede or follow it but after the 'Solicitor's' and the 'University' cases 'It is obvious that liberal arts and learned professions educational undertakings and professional service dependent on the personal qualifications and ability of the donor of services are not included'. (Emphasis ours (here into ')). Although business may result in service, the service is not regarded as material. That is how the service of a Solicitor firm is distinguished from the service of a building corporation. Otherwise what is the difference between the services of a typist in a factory and those of another typist in a Solicitor's office or the service of a bus driver in a municipality and of a bus driver in a University. The only visible difference is that in the one case the operation is a part of a commercial establishment producing material goods or material services and in the other there is a non-commercial undertaking. The distinction of an essential or direct connection does not appear to be so strong as the distinction that in the one case the result is the production of material goods or services and in the other not." Again:—

"Too much insistence upon partnership between employers and employees is evident in the Solicitor's case and too little in the Association case. And yet it is impossible to think that this test is universal. What partnership can exist between the Company and or Board of Directors on the one hand and menial staff employed to sweep floors on the other? What direct and essential nexus is there between such employees and production? This proves that what must be established is existence of an industry 'viewed from the angle of what the employer is doing' (emphasis ours (here into ')) and if the definition from the angle of the employer's occupation is satisfied, all who render service and fall within the definition of workmen come within the fold of industry irrespective of what they do What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an industry, his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part."

15. It will thus be clear that, if Chartered Accountants and Auditors can be considered as members of a 'learned profession' rendering professional services essentially "dependent on the personal qualifications and ability of the donor of services" (Gymkhana Club Case, C A. No 572 of 1966=(AIR 1968 SC 554)), they will not come within the definition. The simple further question is, whether the material placed before us justifies the assumption that Chartered Accountants and Auditors are members of a profession rendering service in this sense, and, therefore, not within the ambit of the definition. We have no doubt whatever that this must be answered in favour of the writ petitioner Firm.

16. Perhaps, the best account of the profession and its setting, is to be found in *N. E. Merchant v. The Bombay Municipal Corporation*, 1967-69 Bom LR 758=(AIR 1968 Bom 283). This account runs as follows at p. 763 (of Bom LR)=(at p. 287 of AIR):

"We further think that in considering whether an activity is a profession or not, we may perhaps be guided by the fact that the Church, the Medicine and the Law have been for centuries regarded as learned professions. In each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. These qualities displayed by the practitioners of these learned professions inspire confidence in persons approaching them for advice or guidance. The first is approached for spiritual comfort and guidance, the doctor for physical or mental ailment and the lawyer for legal advice. But in each case the person who approaches them chooses them according to his own conception of the skill, intelligence and integrity, of the person approached, and since he approaches in entire confidence, the priest, the doctor and the lawyer have a corresponding obligation not to betray the confidence and advise his client as best as he can. The same element of trust and confidence must be a test in more or less degree in modern professions. A Chartered Accountant is approached by his client for advice and guidance in his problems with regard to trade, business or industry, and it is expected that the Chartered Accountant, to the best of his ability, would be in a position to help him in his difficulties and not betray the confidence that is placed in him. This, in our opinion, is one of the elements which should be sought when considering whether a particular person is practicing a profession or is merely doing a business.

"A rapid survey of the general functions performed by a Chartered Accountant in practice will go to show that

the functions are of a highly individualistic character requiring the personal skill, intelligence and integrity on the part of a Chartered Accountant. The Company Law requires that the accounts of a company should be audited by auditors. Section 226 of the Companies Act, 1956, lays down the qualifications and the disqualifications of auditors. Under that section an auditor will not be qualified unless he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949. Section 227 then prescribes the powers and the duties of the auditors. Every auditor of a company has a right of access at all times to the books of accounts and vouchers of the company and is entitled to require from the officers of the company such information and explanation as the auditor may think necessary for the performance of his duties as an auditor. In carrying out these duties, he cannot be cowed down either by the managing director of the company or the managing agents because his duties require that he shall faithfully carry out his duties as an auditor without fear or favour and audit the accounts of the company in such a manner that the shareholders get a correct picture of the financial position of the company. Punishment is also provided under Section 233 of the Indian Company Law if the Auditor's report is made otherwise than in conformity with the requirements of Sections 227 and 229 of the Act. In other affairs, also relating to companies, a Chartered Accountant plays a very vital role. Being trained to maintain costing records he can ascertain the cost of production and of process at different levels of operations in the manufacture of a product. He can by his expert knowledge help a manufacturing company. His services are also frequently sought in connection with the formation and the financial structure in liquidation of limited companies. He is also called upon to carry out investigation to ascertain the financial position of a business in connection with matters such as new issues of share capital, the purchase or sale of a business, reconstructions and amalgamations. He is also fitted to undertake valuation of shares of public and private companies when amalgamations or reorganisations take place. In other words, the Chartered Accountant plays a very valuable role in relation to the financial aspects of the business of a company. He is also well equipped for advising the preparations of tax returns. Drastic forms of taxation are being introduced. The Chartered Accountant has to keep himself abreast of the current and continuing tax information. Section 288 of the Income-tax Act, 1961, shows that a Chartered Accountant is entitled to appear before the Income-tax

Authorities as the authorised representative of the assessee."

17. This description shows the highly responsible character of the vocation, the intellectual standards underlying the nature of the services of a Chartered Accountant, the equipment of learning that he has to obtain before he can practice his profession, and the rigid structure of the profession along with a strict code of professional ethics, as can be easily gleaned from the Chartered Accountants Act, 1949 and the Regulations of 1964. In *H. A. K. Rao v. Council of Institute of Chartered Accountants of India*, AIR 1967 SC 1257, the following passage at p. 1258 refers to the importance of this profession, and its organization as a profession requiring, primarily, the use of intellectual faculties:

"Before we consider the relevant provisions of the Act it is necessary to notice at the outset the nature and objects of the Institute. The Institute is a statutory body having perpetual succession and a common seal. It is governed by the Act and the Chartered Accountants Regulations, 1949, hereinafter called the Regulations. The Central Council of the Institute shall be composed of not more than 24 members elected by the members of the Institute from among the fellows thereof and 6 persons nominated by the Central Government. There are Regional Councils which function in their respective regions subject to the control, supervision and direction of the Central Council or any of its committees. Elections to the Councils are held once in three years. Therefore, the Act, through its provisions, regulates the profession of Chartered Accountants. It establishes an Institute of Chartered Accountants and provides for the constitution of a Council for carrying out the objects of the Act. The Central Council, inter alia, has the power to admit members to the Institute, to take disciplinary action, and to regulate and maintain the status and standard of the professional qualifications of the members of the Institute. It is needless to say that the profession of Chartered Accountant is a respectable one and the duties of Chartered Accountants are onerous and responsible. They are all educated and qualified men and on their efficiency and integrity depends the stability of many of the institutions in the country. It cannot, therefore, be gainsaid that the candidates seeking to become members of the said Council which regulates the conduct of Chartered Accountants shall necessarily be persons of high integrity and above criticism."

18. In addition to this, we may set forth the following passages from "The Accountant in Public Practice" by K. L. Milne, and from Halsbury's Laws of England, Third Edition, Volume 6.

(1) K. L. Milne's Book:—

"Today public accountants carry tremendous responsibility as auditors of vast enterprises, as trustees in bankruptcy, as liquidators, and as financial advisers in all kinds of ways. The care which accountants take to improve their service, the organization of national and international congresses, the effort that is made to train new members, are but a few of the ways in which accountants indicate how seriously they take their responsibilities. It can truthfully be said, therefore, that a sense of mission exists for accountants, and that it is developing more and more as greater responsibility is placed upon them."

(Page 18, Para 2).

"The accountant is expected to have a knowledge of commercial law, particularly company law, bankruptcy law and taxation law, not for the purpose of interpreting it (the province of the lawyer) but for the purpose of implementing it. An accountant can make his knowledge useful only after several years of arduous study and practical experience. Furthermore, in common with other intellectual services, his study must continue throughout his career as the technique of his calling develops and laws affecting it alter. It is largely the professional man's ability to keep abreast of the developments of his calling which brings him success and makes his service of value."

"The service provided by the accountant is essentially that of a trained mind. He needs a mental capacity above the average to practice accountancy effectively, and accountants are beginning to realise that a broad academic training is of tremendous value in an accountancy career."

(Page 18, para 4)

"The leading societies set a very high standard in their administration and in their activities. It is safe to say, therefore, that the leading accountancy bodies, in English speaking countries at least, qualify as professional bodies for the purpose of this definition".

(Page 23, Para 2).

"Since health, finance, engineering, teaching and justice are the five main fields of professional endeavour, it follows that accountancy is not only a profession, it is one of the major learned professions of our time. The challenge to Accountants is therefore clear and inescapable."

(Page 51, Para 1).

(2) Halsbury.

"Para 748. Auditor's Report. The auditors of a company must make a report to the members on the accounts examined by them, and on every balance-sheet, every profit and loss account and all group Accounts laid before the company in general meeting during their tenure

of office. In this context 'balance-sheet' and 'profit and loss Account' include any notices thereon and documents annexed thereto giving information which is required by the Act and thereby allowed to be so given. The Directors' report, if it gives information required by the Act to be given in accounts but permitted thereby to be given in a statement annexed is to be annexed to the Accounts but the auditors are only to report thereon so far as it gives that information.

"The report must state (1) whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of their audit; (2) whether, in their opinion, proper books of account have been kept by the company so far as appears from their examination of those books and proper returns adequate for the purposes of their audit have been received from branches, not visited by them (3) whether the company's balance-sheet and (unless it is framed as a consolidated profit and loss Account) profit and loss Account dealt with by the report are in agreement with the books of Account and returns; (4) whether in their opinion and to the best of their information and according to the explanations given them, the accounts give the information required by the Act in the manner so required and give a true and fair view (i) in the case of the balance-sheet of the state of the Company's affairs as at the end of its financial year; and (ii) in the case of the profit and loss account, of the profit or loss for its financial year; or, as the case may be, give a true and fair view thereof subject to the non-disclosure of any matters (to be indicated in the report) which by virtue of the exceptions for special classes of company set forth previously are not required to be disclosed; and (5) in the case of a holding company submitting group accounts whether, in their opinion, the group accounts have been properly prepared in accordance with the provisions of the Act so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries dealt with thereby so far as it concerns members of the company or as the case may be, so as to give a true and fair view thereof subject to the non-disclosure of any matters which by virtue of the exceptions for special classes of company set forth previously are not required to be disclosed.

"In addition, where the accounts do not give such particulars of directors' salaries and pensions or loans to officers as required by the Act, it is the duty of the auditors to include in their report, so far as they are reasonably able so to do a statement giving the required particulars."

"The auditors' report must be read, before the company in general meeting and must be open to inspection by any member."

"Para 749. Attendance at general meetings. The auditors of a company are entitled to attend meeting of the company and to receive all notices of and other communications relating to any general meeting which any member of the company is entitled to receive and to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors."

"Para 751. Duties of auditors. It is the duty of an auditor to verify not merely the arithmetical accuracy of the balance-sheet, but its substantial accuracy to see that it includes the particulars required by the articles and by statute, and contains a correct representation of the state of the company's affairs. While therefore, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance-sheet shows the true financial position of the company. To do this he must examine the books and take reasonable care to see that their contents are substantially accurate. Except in special cases he should place before the shareholders the necessary information as to the true financial position of the company, and not merely indicate the means of acquiring it. Apart from his statutory duty, which cannot be removed by the articles or an agreement, the exact duties of an auditor are regulated by the contract under which he is employed. The statutory duty is not absolute but depends upon the explanations furnished and information given. But an auditor must ask for information on matters which call for further explanation. An auditor must take steps to learn his statutory duties and his duties under the articles. It is his duty to consider whether payments made by the company before the audit were authorised by the articles and he will be liable for improper payments made by the directors and naturally resulting from his breach of duty. So an auditor who reports confidentially to the directors the insufficiency of the sureties on which the capital is invested and the difficulty of realisation, but who only reports to the shareholders that the value depends on realisation, with the result that the shareholders ignorantly approve an improper dividend, is liable to make good the amount paid. An auditor should not be content with a certificate that securities are in the possession of any person or body of persons however trustworthy, unless the certificate is given by a bank or other person who in the ordinary course

of business would usually be entrusted with securities."

19. Consequently, the argument of Mr. Dolia that, with regard to a firm like the writ petitioner, the work is largely made up of the scriptory and clerical duties of the staff employed under the Chartered Accountants, is totally misleading and unacceptable. In the affidavit of the first respondent, this argument has been expressed in the form that "but for the assistance of the clerks and stenographers the audit report cannot be finalised, and the auditing work could not be carried by the petitioner firm". Again, "though the report and certification of the balance-sheet should be given by qualified auditor, the essential part of the main work which is to be performed prior to the finalisation of such report is turned out only by the employees viz., clerks and typists but for whose help the petitioner firm cannot prepare its audit report at all."

This is clearly to misconceive the quality of the services rendered by those following the esteemable and intellectual profession of Chartered Accountancy. The pursuit of the profession not merely involves a high code of Ethics and very considerable responsibility, but it also involves, essentially value-decisions and judgments, which cannot possibly be derived from clerical assistance, or the performance of routine or arithmetical duties by subordinate staff. Indeed, we have taken the trouble, during the arguments, to obtain and scrutinise the several papers for the several subjects for the Examinations which culminate in entry into the restricted group of qualified Chartered Accountants who are members of the Institute. We are fully satisfied that they involve very high intellectual standards, comparable to the qualifications for the legal profession, and that there is very little to distinguish the two professions in that sense.

20. It follows that, in our view, the Division Bench judgment of the Kerala High Court in 1966-2 Lab LJ 613=(AIR 1967 Ker 31) must be accepted with respect, as laying down the correct law; the excerpts from the judgment in the Gymkhana Club Case, C. A. No. 572 of 1966=(AIR 1968 SC 554), that we have set forth, further fortify this conclusion, and render it practically inevitable. Since Chartered Accountants and Auditors definitely do constitute a 'learned' or 'liberal profession', which cannot be termed an 'industry' within the definition, it is a necessary consequence that the writ petition must be allowed, and this preliminary order of the Labour Court set aside. It is accordingly allowed.

VGW/D.V.C.

Petition allowed.

AIR 1969 MADRAS 143 (V 56 C 33)

VEERASWAMI AND RAMA-
PRASADA RAO, JJ.

N. Bella Gouder, Petitioner v. Tahsildar of Coonoor and another, Respondents.
Writ Petn. No. 409 of 1964, D/- 14-2-1968.

Income-tax Act (1961), S. 179 and Second Sch., Part I, R. 2 — Failure on part of Recovery Officer to issue notice to defaulter — Defaulter clearly aware of recovery proceedings and in fact participating in them — Held, principle of cases under O. 21, R. 22, Civil P. C. (1908) that judgment-debtor appearing in proceedings cannot later raise objection that they are bad for want of notice, should apply to recovery proceedings under Part I and in particular to R. 2. (Para 3)

N. C. Rangarajan for Rao and Reddy, for Petitioner; V. Balasubramaniam and J. Jayaraman, for Respondents.

VEERASWAMI, J.:— The petitioner, an erstwhile director of a private limited company by name The Coonoor Talkies (Pvt.) Ltd., prays for a rule forbidding the respondents from attaching his personal properties for recovery of penalty levied on the company for non-payment of tax due for the years 1959-60 and 1960-61. On 10-1-1962, he filed a declaration of solvency with the Registrar of Companies and on 19-1-1962, there was a resolution of the company for going into voluntary liquidation. In regard to that matter correspondence followed between the Registrar of Companies and the petitioner which does not appear to be relevant to the present petition. On 27-11-1962, there was an order levying penalty. On a certificate issued by the Income-tax Officer, the first respondent has taken recovery proceedings.

2. Two points for the petitioner are urged. One of them is that he has not been negligent or guilty of misfeasance or breach of duty in relation to the affairs of the company and therefore he could not be personally proceeded against for recovery of the penalty. The petitioner adds that he has been given no opportunity to show that he is not liable under Section 179 of the Income-tax Act 1961. It is not disputed that during the accounting years the petitioner was one of the directors. If that be so, Section 179 of the Income-tax Act makes every person, who was a director of the private company at anytime during the relevant previous years, jointly and severally liable for payment of tax and this liability attaches notwithstanding anything contained in the Companies Act of 1956. Nowhere before filing the writ petition had the petitioner stated that he was not negligent or was not guilty of mis-

feasance or breach of duty in relation to the affairs of the company. Quite apart from that, in a petition addressed to the Commissioner of Income-tax not to proceed with recovery he admitted his joint and several liability, but only pleaded that all the share-holders of the company should be made responsible and not himself alone. Even before us there is no proof that he has not been grossly negligent or has not been guilty of misfeasance or breach of duty. We are therefore, of opinion that under Section 179 the liability to pay the penalty clearly attached to the petitioner. It follows the certificate for recovery proceedings was properly issued.

3. The second point of the petitioner is based on Rule 2 of Part I in the Second Schedule to the Income-tax Act. That rule requires that a notice shall issue from the Recovery Officer calling upon the defaulter to pay the amount specified in the certificate within fifteen days from the date of the service and intimating that in default, steps would be taken to realise the amount due. It is not in dispute that the first respondent, who is the Recovery Officer, issued no such notice to the petitioner. The contention for the petitioner is that this rule is mandatory and failure to comply with it will vitiate the entire recovery proceedings. We would have been inclined to accept this contention had it not been for the fact that the petitioner came to have knowledge of the recovery proceedings. He wrote to the first respondent a detailed letter explaining the circumstances why he would request him not to proceed with recovery. Rule 2 referred to above is more or less *in pari materia* with Rule 22, of Order XXI, C. P. Code where an application for execution is made more than two years after the date of the decree. The cases decided under Rule 22 are to the effect that the object of the rule is but to give the judgment-debtor an opportunity to show cause why execution should not proceed, but if the judgment-debtor is aware of the proceedings, the Court has jurisdiction to hold the same and that *a fortiori* if he appears in the proceedings, he cannot later raise the objection that they are bad for want of notice. As we mentioned, the petitioner is clearly aware of the recovery proceedings and in fact participated in them by making a request to the first respondent, for the reasons stated by him not to proceed with recovery. The principle of those cases should equally apply in our opinion to recovery proceedings under Part I of the Second Schedule to the Income-tax Act, and in particular to Rule 2 therein. It is argued for the petitioner that there is a difference, because Rule 22 of Order XXI, C. P. Code relates to the judgment-debtor.

But this difference to distinguish the decision under Rule 22 of Order XXI is without substance because Section 179 of the Income-tax Act makes the petitioner jointly and severally liable to the tax in arrears from the company.

4. The petition is dismissed. No costs.
MBR/D.V.C. Petition dismissed.

AIR 1969 MADRAS 144 (V 56 C 34)
VEERASWAMI, J.

T. R. Rajagopala Iyer, Petitioner v. T. R. Ramachandra Iyer, Respondent.

Civil Revn. Petn. No. 691 of 1967, D/-16-2-1968 from order of Dist. Court, Coimbatore in I. A. No. 695 of 1966.

Civil P. C. (1908), S. 107 (2), O. 41, R. 27 (1) (b) — Power of appointment of Commissioner in appeal — When should be exercised.

Appointment of a Commissioner in the appeal is a rarity and is seldom resorted to. Such an appointment is not authorised by Rule 27 of O. 41. That rule relates to additional evidence and the language of Rule 27 (1) (b) does not lend itself to a construction that the report of a Commissioner to be appointed and submitted in the appellate stage is regarded as additional evidence for purposes of that rule. Wide as the phraseology of sub-section (2) of S. 107 may appear, when sub-section (1) and the matters mentioned therein are kept in view, the power of the appellate court under sub-section (2) should be understood not as widely as it may *prima facie* appear to justify. In any case, assuming that S. 107 (2) authorises the appellate court to appoint a Commissioner for inspection, that is a power which should be very sparingly used and only in the interests of justice. (Para 2)

M. S. Venkatarama Aiyar and K. Chandramouli, for Petitioner; V. P. Raman, for Respondent.

ORDER:— This petition by the plaintiff is directed against an order of the Second Additional District Judge, Coimbatore, appointing a Commissioner for local inspection. The suit was one for specific performance and for mesne profits which was eventually decreed after the litigation had seen several courts, including the Supreme Court. In the enquiry for mesne profits the trial Court found that a sum of Rs 5,000/- per annum could be fixed as mesne profits. It appears 14 acres of single crop wet lands, 3 acres of cocoanut grove and 58 acres of dry lands are the properties involved in the suit. In the Lower Appellate Court in support of the application for Commissioner it was stated that it was necessary to have

additional evidence does not vitiate such admission."

Their Lordships have also observed at para 16 of the judgment as follows:

"Apart from this, it is well to remember that the appellate Court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause.' There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence 'for any other substantial cause' under R 27 (1) (b) of the Code."

Here the learned District Judge has pointed out that the doubt raised by the defendants was whether the plaintiff was a partner of the firm. To help to decide this controversy between the parties and to arrive at a just decision of the case, the learned District Judge thought fit to admit the registration certificate issued by the Registrar of Firms which showed who were the partners of the said firm. The appellate court required this document to be produced to enable it to pronounce judgment I am, therefore, of the opinion that there is no merit in the second contention urged by Sri Swami

6. The first contention of Sri Swami is that the suit has been brought on behalf of Mahadevappa and it cannot be said to be on behalf of the firm. In the plaint Mahadevappa has stated that he is the owner of the firm. Sri Swami contends that under Order 30 Rule 1 only a partner of the firm can bring a suit on its behalf and the trial court was fully justified in dismissing the suit. He has cited before me AIR 1936 Patna 140, AIR 1951 Nag 448 and AIR 1958 Punj 260 in support of his contention that the suit is not maintainable

7. Sri Basawalingappa on behalf of the respondents, on the other hand, argued that the plaint clearly discloses that the suit was filed by the firm. The plaint throughout discloses that the said loan was taken from the firm, after signing in the account books of the firm. Instead of describing himself as partner of the firm, Mahadevappa has described himself as owner of the firm. He argues that the evidence discloses that the plaintiff was in custody and the suit was filed in a hurry on the last day of limitation. It was open to the defendants under Order 30 Rule 2 to demand from the plaintiff particulars and the

names of the persons constituting the firm, which the defendants did not do. It was open to the court under S. 153 of the C. P. C. to amend any defect in proceedings. Sri Basawalingappa contends that the amount involved in the suit is a big amount and the plaintiff should not be ousted only on a technical point. He has relied on AIR 1961 SC 325; AIR 1955 Mad 294; AIR 1952 All 695; AIR 1931 Cal 770 and AIR 1940 Oudh 443 in support of his contentions.

8. In view of the authoritative ruling of the Supreme Court on the point in question, I think it is unnecessary to (enquire?) into the rulings of the various High Courts referred to by counsel on either side. In AIR 1961 SC 325 their Lordships at para 8 of the judgment have observed thus:

"It is clear from this provision of the Act that the word 'firm' or the 'firm name' is merely a compendious description of all the partners collectively. It follows, therefore, that where a suit is filed in the name of a firm it is still a suit by all the partners of the firm unless it is proved that all the partners had not authorised the suit. A firm may not be a legal entity in the sense of a corporation or a company incorporated under the Indian Companies Act but it is still an existing concern where business is done by a number of persons in partnership. When a suit is filed in the name of a firm it is in reality a suit by all the partners of the firm."

In the same paragraph lower down their Lordships have observed as follows:

"The High Court referred to a number of decisions to which no particular reference need be made but they do support the view taken by the High Court that in the present case the plaintiff described in the plaint as the firm of Manilal & Sons was a mere misdescription capable of amendment and not a case where a plaintiff had been filed by a non-existent person and therefore a nullity."

In this case, as contended by Sri Basawalingappa, suit has been filed by the firm. The whole loan transaction was with the firm. The loan amount was taken after signing in the account books of the firm. Mahadevappa is undoubtedly one of the partners of the firm. Instead of saying that he has filed a suit as a partner, by mistake he has described himself as owner of the firm. It has been pointed out by Rajagopala Ayyangar J. as he then was in the Bench decision of the Madras High Court *Mura Mohideen v. Mohomed*, AIR 1955 Mad 294 as follows:

"If however imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addi-

tion or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error of mistake. The question in such a case is one of intention of the party and if the Court is able to discover the person or persons intended to sue or to be sued a mere misdescription of such a party can always be corrected provided the mistake was bona fide vide O. 1 R. 10, C. P. C."

9. As pointed out by the said Madras decision, under Order 1, Rule 10 where a suit has been instituted in the name of a wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit if satisfied that the suit has been brought through bona fide mistake, order any other person to be substituted or added as plaintiff. Under Order 6 Rule 17, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Under Section 153, C. P. C. also the court may at any stage as it may think fit, amend any defect or error in any proceedings in a suit, and all such necessary amendments shall be made for the purpose of determining the real question or issue raised in the suit.

10. I am therefore clearly of the view that the trial court has erred, that too after recording full evidence in the case, in dismissing the plaintiff's suit solely on the ground plaintiff is not entitled to file the suit. In the circumstances of the case, the learned District Judge was justified in setting aside the order of the trial court and remanding the matter and directing the trial court to hear the case and dispose it of according to law.

11. In the result, for the reasons mentioned above, there is no merit in this appeal and the same is dismissed. In the circumstances of the case, there will be no order as to costs.

VGW/D.V.C.

Appeal dismissed.

AIR 1969 MYSORE 114 (V 56 C 25)

SANTHOSH, J.

Gangawwa, Petitioner v. State of Mysore, Respondent.

Criminal Revn. Petn. No. 311 of 1966, D/- 17-2-1967.

(A) Criminal P. C. (1898), S. 236, Illustration (b) — Contradictory statements — Charge need not say which one is

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false — (Penal Code (1860), S. 193 — Contradictory statements — Prosecution need not prove which one is false).

In a case arising under section 193 of Penal Code, it is not necessary for the charge to state specifically which of the statements made by the accused is false. It is open to the court under section 236 of Cr. P. C. to frame alternative charges against a person. Illustration (b) to that section provides that a person may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of those contradictory statements is false. AIR 1954 All 424, Rel. on. AIR 1941 Bom 408, Dist. (Paras 4 & 6)

(B) Criminal P. C. (1898), Ss. 342, 364 and 533 — Examination of accused by court — Non-compliance of provision — Fatal only if accused is prejudiced.

In a case where the simple charge against the accused was whether she made two totally contradictory statements on oath in two different proceedings the court questioned her if she made the statement in one of the proceedings and she denied that she made it. Held that under the circumstances the long questions put to her in her examination under section 342 Criminal P. C. did not prejudice her so as to vitiate the proceedings. AIR 1956 SC 536, Rel. on. AIR 1953 SC 76 and AIR 1962 SC 1239, Ref. (Paras 7 and 8)

(C) Criminal P. C. (1898), Ss. 479-A, 512 and 4 (m) — Proceeding under S. 512 is a 'judicial proceeding' under S. 4 (m) — Statement on oath therein can be subject matter of complaint under section 479-A — (Penal Code (1860), S. 193 — Proceeding under S. 512, Criminal P. C. — Offence can relate to statement made therein).

A statement made by a witness in a proceeding under section 512 Criminal P. C. can be made use of against him in a prosecution for an offence under section 193 of Penal Code. Section 479-A merely speaks of a judicial proceeding and not an enquiry or trial. A proceeding under section 512 Criminal P. C. is a judicial proceeding within the meaning of section 4 (m) of the Code. Explanation 2 to section 193 of Penal Code further affirms the above view. (Para 10)

(D) Criminal P. C. (1898), Ss. 512 and 479-A — Prohibition has reference only to the absconding accused — Statement by witness in S. 512 proceeding — Prosecution of witness for giving false evidence — Statement in S. 512 proceeding can be used against him — (Penal Code (1860), S. 193).

The prohibition against user of evidence of a witness examined in a proceeding under section 512 Criminal P. C.

only relates to the absconding accused subsequently arrested. The statement made on oath by the witness in such proceeding can be used against him (witness) in a proceeding instituted against the witness under section 193 of Penal Code. (Para 10)

A person examined under section 512 Criminal P. C. is deposing as a witness. AIR 1965 Mad 100, Dist. (Para 11)

(E) Criminal P.C. (1898), S. 479-A — Committal Court too can make the complaint.

The Committal Court too has the power to make a complaint contemplated under section 479A. It cannot be said that conflicting orders by Committal Court and the Sessions Court would result if both should be taken to possess such power and that in the committal proceedings there is no final proceedings. Committal proceedings are final so far as they result in discharge or committal. Such an order would be final order disposing of such proceeding within the meaning of section 479A Criminal P. C. AIR 1961 Andh Pra 130, Rel. on; AIR 1963 S. C. 816, Dist. (Paras 12 and 13)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Mad 100 (V 52) =
(1965) 1 Cri LJ 311, In re, Ramalingam 41
(1963) AIR 1963 SC 816 (V 50) =
1963 (1) Cri LJ 803, Shabir Hussain Bhola v. State of Maharashtra 12
(1962) AIR 1962 SC 1239 (V 49) =
1962 (2) Cri LJ 296, Ramashankar Singh v. State of W. B. 7
(1961) AIR 1961 Andh Pra 130 (V 48) = 1961 (1) Cri LJ 368, D. Dastagiramma v. State 13
(1956) AIR 1956 SC 536 (V 43) =
1956 Cri LJ 940, Moseb Kaka v. State of W. B. 8
(1954) AIR 1954 All 424 (V 41) =
1954 Cri LJ 860, Umrao Lal v. State 6
(1953) AIR 1953 SC 76 (V 40) =
1953 Cri LJ 521, Ajmer Singh v. State of Punjab 7
(1951) AIR 1951 SC 441 (V 38) =
52 Cri LJ 1491, Tara Singh v. State 8
(1941) AIR 1941 Bom 408 (V 28) =
43 Bom LR 864=43 Cri LJ 167, Emperor v. Ningappa Ramappa Kurbar 5

V. S. Malimath, for Petitioner; S. Vijaya Shankar for Public Prosecutor, for the State.

ORDER: The petitioner has been convicted of an offence under section 193 I.P.C. by the Judicial Magistrate, 1st Class, Bijapur, and sentenced to suffer one year's R. I. In the appeal filed by the petitioner against the said conviction and sentence to the Sessions Judge of

Bijapur, the conviction was confirmed, but the sentence was reduced to three months' R. I. The petitioner has come up in revision to this Court questioning the correctness and legality of the said order of the Sessions Judge confirming her conviction.

2. In P. R. Case No. 5/1963, in a proceeding under section 512 Cr. P. C., the petitioner was examined as a witness by the Judicial Magistrate, I Class, Bage-wadi, and made a certain statement on oath. When the petitioner was examined in the committal proceedings in P R. Case No. 2/65, she made another statement wholly irreconcilable and contradictory to the previous statement. After issuing a show cause notice, the learned Magistrate directed that a complaint be filed against the petitioner under S. 193 IPC. After trial, the Judicial Magistrate, I Class, Bijapur, convicted her of an offence under S. 193, IPC.

3. Sri Malimath learned counsel on behalf of the petitioner, has contended that the charge framed against the petitioner is defective. The charge simply says that either of the statements made by her in the two different proceedings is false and it does not say which particular statement made by her is false. He also argues that the charge framed is not consistent with the complaint or the committal order in the case I see no force in the said contentions.

4. It is not necessary for the charge to state specifically which of the statements made by the petitioner is false. As pointed out by Sri Vijaya Shankar, learned Counsel appearing on behalf of the State, it is open to the Court under section 236 Cr. P. C. to frame alternative charges against a person. Illustration (b) to section 236 Cr. P. C. states that a person may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of those contradictory statements is false. The charge framed by the Court must depend on the evidence in the case and does not depend on either the complaint or the order passed in the committal proceedings.

Further, there is no inconsistency between the complaint filed and the charge framed in this case. The complaint sets out the two contradictory statements made by the petitioner and states that the answers given by her go to show that she has perjured. In any case, even assuming there are defects in the charge, S. 225 Cr. P. C. states, that no error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as

material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

5. Sri Malimath has next contended that the prosecution has failed to establish which of the statements made by the petitioner is false and therefore the petitioner cannot be convicted under S. 193, IPC. He has strongly relied on *Emperor v. Ningappa Ramappa Kurbar*, 43 Bom LR 864 : (AIR 1941 Bom 408) in support of his said contention. The facts of that case were entirely different from the facts of the present case. Their Lordships were considering there the question whether it was expedient to prosecute a person under S. 476, Cr. P. C. and not under S. 479A, Cr. P. C. They were considering the statement made by the accused under S. 164 Cr. P. C. in the committal Court.

6. I have already referred to Illustration (b) of S. 236 Cr. P. C. which states that a person may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of the contradictory statements was false. Sri Vijaya Shankar has also relied on *Umrao Lal v. State*, AIR 1954 All 424, which is an authority for the proposition that in a prosecution under S. 193 IPC, if the prosecution succeeds in proving that the accused in the witness box deliberately made two statements which are so contradictory and irreconcilable with each other, that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true.

7. Sri Malimath also contends that the examination of the petitioner by the learned Magistrate under S. 342 Cr. P. C., is not according to law and it has gravely prejudiced the petitioner. He has relied on *Ajmer Singh v. State of Punjab*, AIR 1953 SC 76 and *Ramashankar Singh v. State of W. B.*, AIR 1962 SC 1239. He argues that the questions put by the Court to the petitioner were so long, involved and confusing that it was not possible for the petitioner to understand the same and give proper answers. If the petitioner had been properly questioned, she would have come out with an explanation. There is no doubt, the question put by the Magistrate are long and complicated. But the point for consideration is whether the petitioner has been prejudiced in her defence and whether it has caused failure of justice.

8. In *Mosch Kaka v. State of W. B.*, AIR 1956 SC 535, their Lordships, in paragraph 8, page 540, have observed as follows:

"There can be no doubt that this is very inadequate compliance with the salutary provisions of S. 342, Cr. P. C. It is regrettable that there has occurred

in this case such a serious lacuna in procedure notwithstanding repeated insistence of this Court, in various decisions commencing *Tara Singh v. State*, AIR 1951 SC 441 on a due and fair compliance with the terms of S. 342 Cr. P. C. But it is also well recognised that a judgment is not to be set aside merely by reason of inadequate compliance with Section 342 Cr. P. C. It is settled that clear prejudice must be shown. This Court has clarified the position in relation to cases where accused is represented by Counsel at the trial and in appeal. It is up to the accused or his Counsel in such cases to satisfy the Court that such inadequate examination has resulted in miscarriage of justice."

The charge, which the petitioner was called upon to meet was a simple one. The case was that she made two totally contradictory statements on oath in P.R. Case No. 5/63 and P. R. Case No. 2 of 1965. The petitioner denied that she made the statement alleged in P. R. Case No. 5/63. Hence, I am of opinion that it cannot be said that the petitioner has been prejudiced and it has resulted in miscarriage of justice.

9. Sri Malimath has further contended that the statement under S. 512 Cr. P. C. made by the petitioner cannot be made use of when the petitioner is alive and can give evidence. Further, he contends S. 512 Cr. P. C. is only a mode of recording evidence. It is neither an inquiry nor a trial. The petitioner was not a witness when her statement was recorded under S. 512 Cr. P. C. He also argues that a complaint could not be made under S. 479A Cr. P. C. by the Committal Court. It could be made only by the Sessions Court to whom the accused is committed. There is no final order disposing of the case when the accused is committed to the Court of Session for trial. Committal proceedings are not independent proceedings, but only a stage of the judicial proceedings before the Sessions Court and it is only the Sessions Judge who has jurisdiction to file a complaint under S. 479-A Cr. P. C. If the Committal Court and the Sessions Court both have jurisdiction to pass an order under S. 479A, this would result in conflicting orders.

9A. It may be pointed out that the contentions mentioned above have not been urged either in the trial Court or in the appeal before the Sessions Court. This Court has not got the benefit of the views of the Courts below on these questions. Since Sri Malimath argues that they are questions of law and could be raised in revision, I will deal with these points shortly.

10. With regard to the contention that the statement under S. 512 Cr. P. C.

cannot be made use of when the petitioner is alive and could give evidence, it may be pointed out that this has reference only to the absconding accused in the said proceedings. There is no prohibition for making use of a statement given by the petitioner under section 512 Cr. P. C. against herself in proceedings instituted under section 193 IPC. With regard to the contention that S. 512 proceedings are neither inquiry, nor trial, it may be pointed out that S. 479A, Cr. P. C. does not refer to any inquiry or trial. All that it states is "giving false evidence in any stage of the judicial proceeding". What is a 'judicial proceeding' is defined in S. 4 (m) Cr. P. C. It reads thus:

"'Judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath."

Explanation 2 to S. 193 IPC. states that even an investigation directed by law, preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice. Explanation 3 to the same section also states that an investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding though that investigation may not take place before a Court of Justice. It is therefore clear that both under the Code of Criminal Procedure and the Indian Penal Code, a proceeding under section 512 Cr. P. C. comes within the definition of 'judicial proceeding.'

11. Sri Malimath has also contended that when a person is examined under S. 512 Cr. P. C. he is not deposing as a witness. He has relied on in re: Ramalingam, AIR 1965 Mad 100 in support of his contention. What was decided in that case was that section 479A, Cr. P. C. applied only to persons appearing before Court as witnesses and does not apply to a case where a person does not appear as a witness before Court but only files an affidavit without entering the box. Here, it cannot be disputed that the petitioner had appeared before Court in both the proceedings as a witness.

12. Sri Malimath has argued that committal proceedings are only a stage of the judicial proceedings before the Sessions Court and that only the Sessions Judge has got the power to take proceedings under S. 479A, Cr. P. C. and not the Committal Court. He has strongly relied on the observations made by their Lordships of the Supreme Court in *Shabir Husain Bholu v. State of Maharashtra*, AIR 1963 SC 816 in support of his contention.

The question which their Lordships were considering in the said case was, in a case where proceedings under S. 479A Cr. P. C. should have been taken, whether it was open to the Court to proceed under S. 476 Cr. P. C. Their Lordships held that the provisions of S. 476 are totally excluded where the offence is of the kind specified in S. 479A. In that particular case, the accused had made conflicting statements before the Committal Court and the Sessions Court.

Their Lordships held that the committal proceedings were not independent proceedings and it was only the Sessions Court which could decide whether proceeding under S. 479A could be taken against the accused. It may be pointed out in this case, the petitioner was never examined in the Sessions Court. Hence the question of Sessions Court taking proceedings S. 479A did not arise. The question of conflicting orders by the Sessions Court and the Committal Court also does not arise in the case.

13. There is equally no force in the contention of Sri Malimath that in the committal proceedings there is no final order disposing of such proceedings. So far as the Committal Court is concerned, once it commits an accused to the Sessions Court, there is final disposal of the proceedings before it. In *Dastagiramma v. State*, AIR 1961 Andh Pra 130 it has been held that committal proceedings are final so far as they result in discharge or in committal. Such an order would be final order disposing of such proceeding within the meaning of S. 479A, Cr. P. C.

14. Finally, Sri Malimath has contended that the statement made by the petitioner was not intentional and that she is an illiterate woman. It is not possible to accept this contention. The learned Magistrate, who recorded the evidence in both the proceedings has been examined as a witness. He has stated that the petitioner after being administered oath, made the above mentioned contradictory statements. The evidence given by her was read over and explained to her and she admitted the statements to be correct. There is, therefore, no force in any of the contentions urged by Sri Malimath on behalf of the petitioner.

15. In the result, there is no merit in this revision petition and the same is dismissed.

TVN/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 118 (V 56 C 26)

A. NARAYANA PAI

AND AHMED ALI KHAN, JJ.

C Venkata Reddy and another, Petitioners v. Income Tax Officer (Central)-I and others, Respondents.

Writ Petn. No. 2310 of 1966, D/- 3-1-1967.

(A) Income-tax Act (1961), S. 132 — Scope and validity — Constitution of India, Arts. 14, 19, 21, 31 — S. 132 is neither incompetent nor invalid as infringing any of fundamental rights guaranteed under Arts. 14, 19, 21 and 31.

Section 132 of the Income-tax Act, 1961, is neither incompetent nor invalid as infringing any of the Fundamental rights guaranteed under Arts. 14, 19, 21 and 31 of the Constitution.

(Para 75)

In view of the fact (1) that section 132 does not to any extent do away with the applicability of the normal procedure prescribed under the statute for assessment or reassessment of income, nor does it therefore deprive the assessee concerned of his normal rights of appeal, second appeal and reference to High Court, (2) that the provisions of the impugned section 132 made with the object of preventing evasion of payment of tax are limited to getting hold of evidence sought to be withheld from the assessing authorities and getting at income believed to have been undisclosed with a view to bring it under assessment and ensure recovery of tax evaded or sought to be evaded, and (3) that the application of the special provisions of the impugned section is possible only when the appropriate authority on the basis of information in his possession has reason to believe that the assessee is withholding or attempting to withhold evidence or is in possession of undisclosed income either in the shape of money or in the shape of bullion, jewellery or the like, which belief furnishes the criterion for making a separate classification having a reasonable relation with the object of the law, section 132 cannot be considered as violative of Art. 14 of the Constitution.

(Para 52)

The use of the words "has reason to believe" on the basis of information in his possession excludes the possibility of any unreasonable exercise of the power. The basis for the exercise of the power is not mere suspicion but a reasonable belief upon information already in possession of the appropriate officer. It would also postulate that information in the possession of the officer is not a mere canard or an unverified piece of gossip but information which, in the circumstances, may be regarded as fairly

reliable, because no belief can ever be said to flow reasonably from anything but information which may be regarded as fairly reliable. Hence, the careful selection of these words by the statute and the drastic nature of the powers necessarily point to a judicial application of the mind to some substantial material by the officer acting with a sense of responsibility. If so much can be gathered from the wording of the section, and it is the only reasonable and fair way of reading the same, the suggestion that the section gives no guidance or that it authorises or renders possible arbitrary exercise of the power becomes difficult of acceptance. (Para 56)

The further argument that the section does not make it necessary or obligatory for the authorising officer to specify or particularise the documents or that it permits of the issue of an authorisation for what may be regarded as a general search need not necessarily lead to arbitrary exercise of the power. In the first place, it may not be possible in the nature of things to give a clear description of the books or documents, item by item; secondly, the books and documents to be searched for are described in the section itself as those which will be useful for or relevant to any proceeding under the Act; and thirdly the searching officer is also authorised to seize only such books or documents, that is to say, books or documents which will be useful for or relevant to any proceedings under the Act, which means that the searching officer is also required to apply his mind to the question of usefulness or relevance of the books of account or documents as the case may be. (Para 57)

It is no doubt true that an officer of the Department cannot be said to be wholly free from some interest in the result as a Magistrate can be said to be. But the result that he is interested in is the same as, and not different from, the object of the statute itself, viz. bringing under assessment all income liable to tax and preventing evasion of tax. Such an interest cannot be said to disable an officer from performing the statutory duties impartially and with a sense of responsibility, unless of course any personal bias is alleged and is proved. Ordinarily, in the case of high ranking officers functioning under statutes and discharging statutory duties, bias is not to be presumed because they are expected to act with a sense of responsibility appropriate to their position and duties which the statutes impose on them. Wherever personal bias is proved and wherever an officer acts in disregard of his statutory responsibility and issues an authorisation without satisfying himself about the

preliminary conditions required by the particular statute, such whimsical act on his part is certainly open to correction by the High Court under Art. 226 of the Constitution. (Para 64)

A search by itself does not constitute an invasion of any fundamental right, and the seizure of books is temporary and so also the seizure of the assets. When the assets are to be applied only in discharge of tax liability, the excess over which is to be returned, there is also no deprivation of property in contravention of the constitutional provisions in that regard. That restrictions, if any, are imposed in public interests is clear from the fact that it is certainly in the interests of the public that taxes legitimately exigible are recovered and not evaded. (Para 68)

In the second explanation to the section, the proceedings are said to include not merely proceedings pending on the date of the search or completed prior thereto but also proceedings which may be commenced after the date of such search in respect of any year. So far as the pending proceedings are concerned, the retention of books for their purpose may not be and is not to be excessive. The proceedings referred to as those which may be commenced after the date of the search are apparently those relating to reopening of closed proceedings under S. 147 initiated in the light of the result of the search. The only basis for the argument that the period of retention may be conceivably excessive is the use of the words "in respect of any year" occurring at the end of the Explanation. But what is obviously intended is that the books and papers seized would be available as evidence for the purpose of completing pending assessments, for bringing under assessment income discovered at the search to have been omitted to be disclosed within the period of limitation prescribed by the statute for reopening of assessments already closed and for completing the assessments so reopened consequent upon information gathered at the search. It also appears obvious from the context that the expression "in respect of any year" occurring at the end of the Explanation should have the same meaning as the same expression occurring at the commencement of the Explanation which there is no doubt, refers to years relevant to assessments pending at the time of the search or already closed by that time. That such is the intention is also clear from the fact that sub-section (8) prescribes a period of 180 days from the date of seizure as the maximum for retention of books and papers, requires the seizing officer to record his reasons in writing for extending the period and obtain the approval of the

Commissioner for further retention, and imposes a further limit to the extension in relation to proceedings for which the said books and papers may be relevant. The Commissioner's approval for retaining the books and papers beyond the period of 180 days is also subject to control and correction by the Central Board of Revenue under sub-section (10) of the Section. The restrictions imposed by section 132 on fundamental rights guaranteed under Art 19 (1) (f) and (g) are, therefore, reasonable and are in the interests of the general public

(Paras 71, 72)

As to the fundamental right under Art. 19 (1) (d) the restriction of movement is limited to the period of search, and further the presence of the person at the search is really in his interest. The restriction is temporary and perfectly reasonable. (Para 73)

If therefore the law is thus a valid law involving no infringement of Art. 14 or Art. 19 of the Constitution, there is no violation of the fundamental right of personal liberty under Art. 21 either, because to the extent a person is deprived of his personal liberty by reason of the search, such deprivation is in accordance with a valid law (Para 74)

(B) Constitution of India, Arts. 21, 31 (f) — Articles contemplate a valid law i.e. a law which does not infringe any of fundamental rights such as those established in Arts. 14 and 19.

(Para 23)

(C) Income-tax Act (1922), S. 37 (1) or (2) — Scope — Field of operation of the two sub-sections is different: AIR 1964 Assam 1 (FB), Dissent. from.

If the objective viz. prevention of evasion of tax is borne in mind, it will become clear that the special provisions of sub-section (2) of S 37 necessarily proceed upon the assumption that the normal powers under sub-section (1) might in certain circumstances be ineffective from the point of view of preventing evasion. That itself would indicate that circumstances, in which the exercise of special powers under sub-section (2) becomes necessary, are special circumstances incapable of being effectively dealt with under sub-section (1), which means that the field of operation of the two is different and that the invoking of the powers under sub-section (2) can arise and can be justified only upon an opinion reasonably justifiable on peculiar circumstances of a case that the exercise of the normal powers under sub-section (1) would not help to achieve the purpose of preventing evasion : AIR 1964 Assam 1 (FB), Dissent. from. (Para 35)

(D) Income-tax Act (1961), S. 132 — Scope.

Section 132 is directed against three types of persons—

(1) those who have omitted or failed to produce books or documents as required by any summons or notice issued to them;

(2) those who, whether so summoned or not to produce documents, will not or would not produce books of account or documents; and

(3) those who are believed to be in possession of money, bullion, jewellery or other valuable article or thing representing, either wholly or in part, income or property which has not been disclosed for purposes of taxation. (Para 44)

It is intended to achieve two limited objectives, (1) to get hold of evidence bearing on the tax liability of person in which the said person is seeking to withhold from the assessing authority and (2) to get hold of assets representing income believed to be undisclosed income and applying so much of them as may be necessary in discharge of the existing and anticipated tax liability of the person concerned. (Para 45)

(2) Income-tax Act (1961), Ss. 132, 147, 69A — S. 132 does not purport to substitute provisions of Ss. 147 and 69A.

Section 132 does not purport to substitute procedure of assessment and final quantification of tax liability for the procedure provided by S. 147 relating to income which has escaped assessment or the normal procedure of assessment under the Act. The books and documents seized, are intended to be used and can only be used as evidence in connection with a pending normal assessment or a proposed reopening of assessment or re-assessment under S. 147. The seizure of assets is for the satisfaction of any tax liability in respect of which the person concerned is in default or is deemed to be in default and for satisfaction of any anticipated liability which may arise upon a reassessment in respect of undisclosed income. (Para 46)

Section 69A forms part of the general scheme for the computation of income and provides for a presumption in the case of money, bullion, jewellery, etc., of which the assessee is found to be the owner in any financial year and in respect of which he is not in a position to offer any explanation about its nature or the source of its acquisition. No such actual computation on the basis of the presumption is permissible under subsection (5) of S. 132. The estimation is only for the purpose of determining the amount to be retained to go in satisfaction of the existing or anticipated tax liability. (Para 49)

(F) Income-tax Act (1961) Ss. 132 (5), 156, 220 — Existing liability referred to in S. 132 (5) — It is a liability in respect of which person concerned is already in default or can be deemed to be in default — He is not deprived of benefit of Section 220.

(Para 50)

(G) Income-tax Act (1961), S. 132 — Orders made under — They are in the nature of interlocutory orders in aid of ultimate order of assessment or reassessment.

(Para 60)

(H) Income-tax Act (1961), S. 132 — — "On the information in his possession had reason to believe" — Meaning of — Extent of judicial review of action of Commissioner — Constitution of India, Art. 226.

The information itself, in possession of Commissioner, will have to be of a fairly reliable character — whatever may be the source of it, — because unless the information is of such a character, it cannot furnish a reasonable basis for entertaining the belief that any of the circumstances mentioned in the section exists. Secondly, the information must have relevant bearing in the formation of the belief and must not be extraneous or irrelevant to the purpose of the section. If the High Court is satisfied on these two matters, the adequacy or sufficiency of the grounds will not be a matter for the High Court to investigate. (Para 85)

(I) Income-tax Act (1961), S. 132 — Usefulness or relevancy of documents.

What the section requires is that documents should be useful for or relevant to the proceedings under the Act. In the context of the section, the usefulness or relevancy referred to could only be usefulness or relevancy of the type appropriate to the stage of investigation but not to an actual trial or enquiry. It would only suggest or require an application of the mind to make out a prima facie case of usefulness or relevancy and not a final or absolutely correct decision about the relevancy. The point really is that the searching officer should act with restraint and should not seize documents unless, on a prima facie examination, he honestly feels that they may be useful for or relevant to the proceedings under the Act.

(Para 93)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 523 (V 54)=

Civil Appeal No. 562 of 1965 =
1963-62 ITR (SN) 9, Narayanappa
v Commr. of Income Tax, Ban-
galore

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(1966) AIR 1966 SC 1209 (V 53)=
1966-2 SCJ 665, Durga Prasad v.
H. R. Gomes

16, 55

- (1966) 1966-62 ITR 58 (Punj), N.K. Textile Mills v. Commr. of Income Tax New Delhi 95
- (1965) AIR 1965 All 487 (V 52)= 1966-62 ITR 44, Seth Bros v. Commr. of Income Tax U. P. 95
- (1964) AIR 1964 Assam 1 (V 51) = (1964) 52 ITR 637 (FB), S. Doongarmal Agency (P) Ltd. v. K. E. Johnson 31, 35
- (1963) AIR 1963 SC 591 (V 50)= 1962-48 ITR (SC) 21, Khandige Sham Bhat v. Agricultural Income Tax Officer, Kasaragod 22
- (1963) AIR 1963 SC 1295 (V 50)= 1963 (2) Cri LJ 329, Kharak Singh v. State of U. P. 17, 23
- (1962) AIR 1962 SC 1563 (V 49)= 1962-46 ITR 169, Jagannath Baksh Singh v. State of U. P. 22
- (1961) AIR 1961 Cal 578 (V 48) (SB), Surajmull v. Income Tax Commr. 31
- (1960) AIR 1960 SC 210 (V 47)= 1960 Cri LJ 286, State of Rajasthan v. Rehman 16
- (1960) AIR 1960 SC 554 (V 47) = 1960 Cri LJ 735, Hamadard Dawakhana v. Union of India 69
- (1956) AIR 1956 SC 246 (V 43) = 1955-2 SCR 1196, T. K. Musaliar v. Venkatachalam 42
- (1956) AIR 1956 SC 269 (V 43)= 1955-2 SCR 1247, Muthiah v. Income Tax Commr. Madras 37, 41
- (1955) AIR 1955 SC 13 (V 42) = 1955 SCR 787, Sri Meenakshi Mills Ltd. v. Vishwanatha Sastri 37, 41
- (1954) AIR 1954 SC 300 (V 41) = 1954 Cri LJ 865, M. P. Sharma v. Satish Chandra 14, 17, 67, 69
- (1954) AIR 1954 SC 415 (V 41) = 1954 Cri LJ 1029, Wazir Chand v. State of Himachal Pradesh 16
- (1954) AIR 1954 SC 545 (V 41)= 1955 SCR 448, Suraj Mall Moha & Co v. Viswanatha Sastri 37, 39, 41, 42

K. Srinivasan, T. V. Srinivasan, V. K. Thiruvengkatachar, K. Narayana Swamy and G. P. Srinath, for Petitioners; G. R. Ethirajulu Naidu, V. Balasubramaniam, S. R. Rajashekara Murthy, for Respondents

NARAYANA PAI, J.: The 2nd petitioner, the Madras Bangalore Transport Company, is a firm of four partners P. V. S. Mani, C. Munireddy, C Venkatareddy and J. Ramakrishniah. Of these, C Venkatareddy is the 1st petitioner.

2. The firm has its principal place of business at Nos. 36-37, Second Line Beach, Madras City, and is an assessee to income tax within the jurisdiction of the Income-tax Officer, Central Circle VIII, Madras. The Firm carries on extensive business as a road transport operator and common carrier with over

200 offices situated in various parts of the country including the Mysore State. One of its branch offices is at No. 34, Infantry Road, Bangalore, and another at No. 14, Second Main Road, Taragupet, Bangalore. Two out of the partners are residents of Bangalore. C. Munireddy resides on Nanjappa Road, Shantinagar; Venkatareddy, the 1st petitioner resides at No. 20 (1), Sir M. N. Krishna Rao Road, Basavangudi, Bangalore. The Partners also are assessee to income-tax in their individual capacity.

3. So far as the firm is concerned, the assessments for four years 1962-63, 1963-64, 1964-65 and 1965-66 are pending, that is to say, the returns having been filed they are awaiting scrutiny by the Department. It is not clear from the affidavits filed whether the firm has filed its return for the current assessment year 1966-67. The accounting year of the firm is the year commencing from 1st July and ending with the 30th of the immediately succeeding month of June.

4. On 11-10-1966, searches were conducted at various offices of the firm and residences of its partners by the officers of the Income-tax Department pursuant to authorisations by the Commissioner of Income-tax (Central), Madras, the 3rd respondent in the petition, issued under Section 132 of the Income-tax Act, 1961. The residence of the 1st petitioner Venkatareddy at No. 20 (1), Sir M. N. Krishna Rao Road, Basavangudi, Bangalore, was searched by C R Sundararajan, Income-tax Officer, Central Circle I, Bangalore, the 1st respondent in the petition. The search of the business premises of the firm at No 14 Second main Road, Taragupet, was conducted by M. M. Kurup, Income-tax Officer, Central Circle II, Bangalore, the 2nd respondent in the petition. The search at the residence of Munireddy on Nanjappa Road, Shantinagar, Bangalore, was conducted by G. Sarangan, Income-tax Officer, Company Circle, Bangalore, and the search at the branch office of the firm at No 34, Infantry Road, Bangalore, was conducted by S. P. Narayanappa, III Income-tax officer, City Circle II, Bangalore, these two officers are not impleaded as respondents in the petition

5. Thereafter, this writ petition was presented to this court on 7th November 1966, the principal prayers in which are to quash by the issue of appropriate writ the warrants or authorisations said to have been issued by the 3rd respondent, the Commissioner of Income-tax, under Section 132 of the Income-tax Act and to direct the return of all books and documents taken possession of at the searches conducted as stated above. The preliminary orders were passed on the writ petition on 10th November 1966

admitting the petition and directing the respondents to deposit into this Court all books and papers seized from the Bangalore premises of the petitioners, with the further direction that neither side should have access to the books and papers or inspection thereof without an order of this Court. A further direction was also made requiring the production of authorisation issued by the 3rd respondent.

6. Immediately on service of the copies of the order, the respondents appeared by counsel. On 17-11-1966, having obeyed the directions of this court in the aforesaid preliminary order, the respondents filed I. A. No. III praying for the return of books and papers put into Court with an undertaking to produce them whenever called upon by this Court. The application was supported by the affidavit of C. R. Sundararajan. With that affidavit he produced five authorisations issued by the Commissioner of Income-tax authorising the searches at the four places mentioned above and another business place of the firm at 23-24, Basavaraja Street, Avenue Road, Bangalore. The last mentioned place, however, was not searched because it appears that the firm had closed down its business in the said premises about two years ago. To the affidavit were also annexed the lists of books and documents seized at the four places actually searched. Annexure F relates to the search at Venkatareddy's residence at 20 (1), M. N. Krishna Rao Road, Annexure G to the search at business premises of the firm at Taragupet, Annexure H to the search conducted at the business premises of the firm at the Infantry Road, and Annexure J to the search conducted at the residence of Munireddy on Nanjappa Road, Shantinagar, Bangalore. Items Nos. 76, 77 and 78 in Annexure F were three sealed packets containing documents of which a detailed inventory could not be prepared at the search for want of time. They were subsequently opened under orders of this Court dated 5-12-1966, made on I. A. No. IV filed on 2-12-1966, in the presence of the III Deputy Registrar of this Court, and a detailed inventory was prepared and filed into Court. In terms of the order, one copy of the inventory was given to the Department and another to the petitioners. The prayer in I. A. No. III was also granted with the direction that books and papers should be produced at the hearing and whenever called upon by this Court, recording at the same time the undertaking of the Department that till the disposal of this Writ petition, there will be no interrogation of the petitioners in respect of the contents of those documents.

7. Pursuant to the direction of this Court and the undertaking given by the

Department, the books and papers were brought to court at the hearing of the Writ petition on 16th, 19th, 20th and 21st December, 1966. At the close of the arguments, we told the counsel for the respondents that the Department may retain the books and papers with it subject to the undertaking stated above, until we produced orders in this Writ Petition.

8. The arguments in support of the prayer may be considered under two principal heads, viz.,—

(1) that section 132 of the Income-tax Act, 1961, is ultra vires and unconstitutional,

and

(2) that even otherwise, the impugned searches are liable to be struck down because the circumstances contemplated in Section 132 of the Income-tax Act as constituting sufficient justification for the issue of an authorisation to search do not exist in this case, and also because the searches have been conducted in a high-handed manner without regard for the rights of the petitioners or the safeguards provided by the law.

9. The second contention bears more upon the facts and circumstances of the case than upon any question which can be regarded as pure question of law. It will be convenient to deal with this at a later stage.

10. On the first question, it is not the contention that Parliament has no legislative competence whatever to enact Section 132 in the Income-tax Act, it being conceded that the impugned section can be related not only to the general topic of taxes on income enumerated in Entry 82 of the first list in the Seventh Schedule to the Constitution but also to the accepted incidental power of providing against evasion of taxes. The attack is on the ground that the impugned section is violative of the fundamental rights guaranteed under Article 19 (1) (d), (f) and (g) and Article 14 of the Constitution. In the course of the arguments on behalf of the petitioners, the fundamental rights guaranteed by Articles 21 and 31 (1) were also invoked and relied upon to invalidate Section 132 of the Income-tax Act.

11. The power of search and seizure was not originally one of the powers conferred on the assessing authorities under the Income-tax Act. Such powers were statutorily conferred on them only in 1956 in circumstances, to which we shall make a reference at a later stage. But such a power of search and seizure is and has been regarded in all systems of jurisprudence as an over-riding power of the State for protection of social security and other public interests, — the said power, however, being controlled or regulated by law.

12. In India, the best example we have of the statutory power of search and seizure and the regulation thereof by the statute is the power under certain sections of the Code of Criminal Procedure. Apart from the power of search and seizure in relation to particular matters or in special circumstances, the general provision we have is the one made in Section 96 of the Code of Criminal Procedure. Under the said section, where any Court has reason to believe that a person to whom a summons or order or a requisition has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition, or where such document or thing is not known to be in the possession of any person, or where the Court considers that the purposes of any enquiry, trial or other proceeding under the Code will be served by a general search or inspection, it may issue a search warrant. Section 97 empowers the Court which issues a search warrant to restrict the same in such manner as it may think fit. Section 103 of the Code contains detailed provisions regarding the manner in which a search could be conducted. All such searches are searches conducted pursuant to and in accordance with the terms of a warrant issued by a Magistrate. The documents or things searched are also produced before the Magistrate whereafter they will be used as evidence in connection with some proceeding in accordance with the provisions, general or special, of the Evidence Act. With special reference to investigation into offences, Section 165 of the Code authorises a search by an investigating police officer even without obtaining a search warrant from a Magistrate in cases of emergency subject to certain strict conditions, such as the previous recording of the reasons by the investigating officer and subsequent submission by him of a report of the result of the search to the jurisdictional Magistrate. Such searches are also governed by the general provisions contained in Sections 102 and 103 of the Code.

13. The Code of Criminal Procedure is a pre-Constitution law. After the promulgation of the Constitution, questions were raised as to whether the provisions relating to search contained in the Code of Criminal Procedure were and if so, to what extent violative of any of the fundamental rights guaranteed under the Constitution.

14. The earliest case on the topic is the one decided by the Supreme Court and reported in *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300. The search in that case was conducted pursuant to a warrant issued under Section 96 of the Code of Criminal Procedure. The ruling

is of importance not merely from the point of view of the specific questions decided in that case as to alleged violation of the fundamental rights guaranteed under Article 19 (1) (f) and Article 20 (3) of the Constitution but also from the point of view of the general content of the said fundamental rights themselves in comparison with the provisions of the IV Amendment of the Constitution of the United States of America.

15. According to the American IV Amendment,—

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the places to be searched, and the persons or things to be seized."

The Supreme Court pointed out that the whole idea conveyed or all the ideas conveyed by the American IV Amendment has not or have not been incorporated in our Constitution and that therefore there is no justification to import it into a totally different fundamental right by some process of strained construction. It may, however, be noted that the first part of the IV Amendment providing against what are described as unreasonable searches and seizures may be regarded as sufficiently dealt with or accepted by the formulation and statement of fundamental rights under Articles 14, 21 and 31 (1) and also certain attributes of personal liberty enumerated in Article 19 as fundamental rights, as appears from certain subsequent rulings of the Supreme Court, to which we shall presently refer. The specific decision in that case was that searches under or pursuant to a warrant under section 96 of the Code of Criminal Procedure did not involve any violation of the protection against testimonial compulsion guaranteed by the fundamental right under Article 20 (3) or of the fundamental right of acquiring, holding and disposing of property guaranteed under Article 19 (1) (f) of the Constitution. As to the latter, their Lordships observe as follows in para 2 of the judgment at page 302 of the Report:

"So far as the contention based on Article 19 (1) (f) is concerned, we are unable to see that the petitioners have any arguable case. Article 19 (1) (f) declares the right of all citizens to acquire, hold and dispose of property subject to the operation of any existing or future law in so far as it imposes reasonable restrictions, on the exercise of any of the rights conferred thereby in the interests of general public. It is urged that the searches and seizures as effected in this case were unreasonable

and constitute a serious restriction on the right of the various petitioners, inasmuch as their buildings were invaded, their documents taken away and their business and reputation affected by these large-scale and allegedly arbitrary searches and that a law (Section 95 (1), Criminal Procedure Code) which authorises such searches violates the constitutional guarantee and is invalid.

But, a search by itself is not a restriction on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is a necessary and reasonable restriction and cannot 'per se' be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. We are unable to see how any question of violation of Article 19 (1) (f) is involved in this case in respect of the warrant in question which purport to be under the first alternative of section 95 (1) of the Criminal Procedure Code."

16. The cases of Wazir Chand v. State of Himachal Pradesh AIR 1954 SC 415 and State of Rajasthan v. Rehman AIR 1960 SC 210, were cases of searches either without any authority of the law or without proper compliance with the relevant provisions of the law, which were struck down as illegal by the Supreme Court. In the former, the court held that the search was bad because it had no authority of any law at all to support it; in the latter, it was held that an obstruction to the search conducted by an Excise Officer in disregard of the provisions of section 165 of the Code of Criminal Procedure which applied to the situation did not constitute any offence whatever. In Durga Prasad v. H. R. Gomes (1966) 2 SCJ 665 : (AIR 1966 SC 1209) the Supreme Court examined the legality of a search conducted under Section 105 of the Customs Act. That section empowers the Assistant Collector of Customs either himself to search or authorise an officer to search for goods, documents or things, if he has reason to believe that any goods liable to confiscation or any documents or things which, in his opinion, will be useful for or relevant to any proceedings under the Act are secreted in any place; the provisions of the Code of Criminal Procedure are made applicable to such searches so far as may be, with the modification that in sub-section (5) of S. 165,

the word 'Magistrate' wherever it occurs is substituted by the words 'Collector of Customs'. Their Lordships rejected the argument that any specification or description of the documents in advance in the authorisation was essential but held that the search may be regarded as a general search (like one under Section 95 of the Code of Criminal Procedure), and that what was essential was that before such power was exercised, the preliminary condition required by the section must be strictly satisfied, i. e., the officer concerned must have reason to believe that any documents or things which, in his opinion, are relevant for proceedings under the Act are secreted in the place searched.

17. In Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295, while examining the constitutionality or otherwise of certain of the provisions of Regulation 236 of the U. P. Police Regulations providing for surveillance of persons suspected of subversive activities their Lordships made certain observations about the applicability of the principle underlying the American IV Amendment. While observing that our Constitution does not in terms confer any like constitutional guarantee their Lordships state that the principle could nevertheless be regarded as constituting the ultimate essential of ordered liberty and that the American IV Amendment embodies an abiding principle which transcends mere protection of property rights and expounds the concept of personal liberty. Their Lordships, of course, did not depart from the statement of law as to the content of the fundamental rights under our Constitution made in the case of AIR 1954 SC 300.

18. From the principles discussed in the above cases, it would follow that searches and seizures are in any jurisprudence an aspect of the overriding power of the State exercised in public interests either for ensuring social security or for protecting some public interests, but that the power is not to be exercised merely on what may be called an executive fiat. It is a power whose exercise has to be regulated and controlled by law. Law undoubtedly means a valid law which stands the test of competence and constitutionality under the Fundamental Law of the land — the Constitution. Under our Constitution, the tests of competence and constitutionality are two-fold. In the first place, the law must be within the legislative competence of the legislature which enacts it, whether it be Parliament or a State legislature; secondly, the law should not be violative of any fundamental right guaranteed under part III of the Constitution.

19. The said two tests are applicable to all laws including the laws relat-

ing to taxation. At one time, there was no doubt a general impression that the taxation laws were controlled only by Article 265 of the Constitution and that the said Article did not enshrine any fundamental right. But the position has been clarified by the Supreme Court in later decisions and the principle clearly laid down that the taxation laws are also laws which must pass the test of being in accord with, and not violative of, the fundamental rights guaranteed under Part III of the Constitution.

20. In dealing with taxation laws inclusive of provisions not merely for assessment and collection of taxes but also of such provisions as those for searches and seizures the principal Articles in Part III of the Constitution which arise for consideration are Articles 14, 19, 21 and 31 (1). Article 14 guarantees to every person throughout the territory of India equality before the law or equal protection of the laws. Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 19 enumerates certain special attributes of larger right of personal liberty. Article 14, it is now well established does not prohibit class legislation or legislation governing a particular defined class but requires that the classification should be based on intelligible criteria distinguishing persons or things placed within a class from those left out of it and that the criterion or criteria selected must have a reasonable nexus or relationship with the object of the legislation. Of the attributes of personal liberty enumerated in Article 19 (1), those that are likely to be affected by particular provisions of the laws relating to taxation, —and those which it is alleged have been infringed in the present case, — are the rights to move freely throughout the territory of India, to acquire, hold and dispose of property and to practise any profession or to carry on any trade, occupation or business enumerated in clauses (d), (f) and (g) of Article 19 (1). All these are subject to reasonable restrictions imposed in the interests of general public, — vide clauses (5) and (6) of Article 19.

21. Whereas Article 14 insists upon what is commonly described as a reasonable classification (i.e., reasonable in the sense explained above) and the fundamental rights under Article 19 (1) may be validly subjected to reasonable restrictions in the interests of general public, the fundamental rights under Article 31 (1) and Article 21 are that a person shall not be deprived of his property save by authority of law nor can he be deprived of his life or personal liberty except according to the procedure established by law. The law referred to in the said Articles, we

need hardly repeat, should be a valid law. If a law is valid, in the sense that it is a law enacted by a legislature competent to enact it and is not violative of any of the fundamental rights guaranteed under other Articles—particularly Articles 14, 19 (1) (d), (f) and (g) for our present purpose, then the said law would be a good law for the purpose of Articles 21 and 31 (1) also. With special reference to taxation laws, we should mention, they are placed outside the purview of clause (2) of Article 31, because clause (5), *inter alia*, states that nothing in clause (2) shall affect any law for the purpose of imposing or levying any tax or penalty.

22. What is stated above is the effect of the decision of the Supreme Court reported in *Jaganath Baksh Singh v. State of Uttar Pradesh* (1962) 46 ITR 169: (AIR 1962 SC 1563). We might also refer in this connection to what the Supreme Court has stated, with reference to the application of Article 14 to taxation laws, in the case reported in *Khandige Sham Bhat v. Agricultural Income Tax Officer Kasaragod*, (1962) 48 ITR (SC) 21 = (AIR 1963 SC 591). At p. 27 of the Report (ITR): (at p. 594 of AIR) their Lordships state:

"But in the application of the principle, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of classification so long it adheres to the fundamental principles underlying the said doctrine. The power of the legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."

23. In the case of *Kharak Singh*, AIR 1963 SC 1295, there was a difference of opinion among the learned Judges as to the relative position of Articles 19 and 21 of the Constitution the majority taking the view that Article 21 deals with the residue of personal liberty after carving out from its general content the particular instances of personal liberty set out in Article 19, and the minority expressing the opinion that there is no such carving out of a portion from out of the general right set out in Article 21 but that the two Articles must be regarded as two independent provisions, both equally important with the difference that the particular attributes of personal liberty set out in Article 19 can be controlled only by imposition of restrictions which are reasonable in the interests of general public. But there is not, so far as we are able to gather, any difference of opinion on the general question that the law referred to in Article 21 is a valid law; that is to say, a law which does not infringe any of the fundamen-

tal rights such as those enshrined in Articles 14 and 19.

24. We have therefore to examine, in the light of these principles, in the first instance, whether Section 132 of the Indian Income-tax Act, 1961, is to any extent violative of the fundamental rights guaranteed under Articles 14 and 19 (1) (d), (f) and (g).

25. Before doing so, we might very briefly refer to the legislative history behind the present section 132 of the Income-tax Act

26. As already stated, the authorities under the Income-tax Act did not originally possess the power of searching and seizure; they had only the powers normally exercised by Civil Courts under the Code of Civil Procedure, such as the powers of discovery and inspection, enforcing attendance of witnesses, examining them on oath, compelling the production of books and documents, issuing commissions, etc. In 1938, a Bill was moved in the Central Legislature to amend the Income-tax Act so as to confer certain additional powers to enter business premises, seize books, etc. The Bill was, however dropped on account of serious opposition to it. After the first World War, with a view to effectively tax vast profits said to have been made by certain category of persons compendiously referred to as war profiteers, the Taxation on Income (Investigation Commission) Act No. 30 of 1947 was enacted setting up an Investigation Commission with vast powers to which we shall refer presently. The said Commission in its report recommended the conferment of special powers of search and seizure on the Income-tax authorities subject to certain safeguards. In 1948, some rules were framed under the said Act including such powers. Thereafter, certain of the sections of the said Act were declared ultra vires by the decisions of the Supreme Court, to which we refer presently. In 1956, a Commission called the Taxation Enquiry Commission appointed by the Central Government made a report and recommended that with a view to avoid or prevent evasion, it was essential to confer such powers on the Income-tax authorities. It is pursuant to their recommendation that Section 37 of the Income-tax Act, 1922, was recast. The section so recast reads as follows:

"37 Powers of income-tax authorities —

(1) The Income-tax Officer, Appellate Assistant Commissioner, Commissioner and Appellate Tribunal shall, for the purposes of this Act, have the same powers as are vested in a Court under the Code of Civil Procedure 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:

(a) discovery and inspection.

(b) enforcing the attendance of any person including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(2) subject to any rules made in this behalf, any Income-tax Officer specially authorised by the Commissioner in this behalf may,—

(i) enter and search any building or place where he has reason to believe that any books of account or other documents which in his opinion will be useful for, or relevant to, any proceeding under this Act may be found and examine them, if found;

(ii) seize any such books of account or other documents or place marks of identification thereon or make extracts or copies therefrom;

(iii) make a note or an inventory of any other article or thing found in the course of any search under this section which in his opinion will be useful for, or relevant to, any proceeding under this Act;

And the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches shall apply so far as may be to searches under this section.

(3) subject to any rules made in this behalf, any authority referred to in sub-section (1) may impound and retain in its custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under this Act;

"Provides that an Income-tax officer shall not—

(a) impound any books of account or other documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Commissioner therefor.

(4) Any proceeding before any authority referred to in this section shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860)." It will be noticed that the new powers are those defined in sub-section (2). The old powers which may be referred to as normal powers are those set out in the first sub-section. In 1958-59, there was another Enquiry Committee appointed by the Government called the Direct Taxes Administration Enquiry Committee. This Committee also had something to say about the special powers and their utility from the point of view of preventing evasion.

27. When the Income-tax Law was thoroughly revised and a fresh Act was enacted in 1961 (i.e., the present Act), the

provisions of sub-sections (1) and (3) of S. 37 of the 1922 Act were re-enacted as S. 131 of the new Act and the provisions of Section 37 (2) of the 1922 Act were re-enacted in Section 132 of the present Act. There is not much difference between the old Section and the new one. A further amendment of Section 132 took place pursuant to the Finance Act of 1964. It was later amended once again by Ordinance No 1 of 1965 which came into force on 6-1-1965 which was replaced by Central Act No. 1 of 1965 which came into force on 15-3-1965. The Act also made certain further changes in the Section. The Section as it now stands, which is the one for detailed consideration in this case, reads as follows:

"132 Search and seizure.—

(1) Where the Director of Inspection or the Commissioner, in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of Section 37 of the Indian Income-tax Act, 1922 (11 of 1922) or under Sub-section (1) of Section 131 of this Act, or a notice under Sub-section (4) of Section 22 of the Indian Income-Tax Act, 1922 or under sub-section (1) of Section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce or cause to be produced, such books of account, or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act, (hereinafter in this section referred to as the undisclosed income or property).

He may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer (hereinafter referred to as the authorised officer) to—

(i) enter and search any building or place where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

"(ii) break open the lock of any door, box, locker, safe, almirah or other recept-

acle for exercising the power conferred by clause (i) where the keys thereof are not available.

(iii) seize any such books of account, other documents, money, bullion, jewellery, or other valuable article or thing found as a result of such search;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts of copies therefrom;

(v) make a note or any inventory of any such money, bullion, jewellery or other valuable article or thing.

(2) The authorised officer may requisition the services of any police officer or of any officer of the Central Government, or of both, to assist him for all or any of the purposes specified in sub-section (1) and it shall be the duty of every such officer to comply with such requisition.

(3) The authorised officer may, where it is not practicable to seize any such book of account, other document, money, bullion, jewellery or other valuable article or thing, serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act.

(5) Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and S 132A referred to as the assets) is seized under sub-section (1), the Income tax officer, after affording a reasonable opportunity to the person concerned for being heard and making such enquiry as may be prescribed, shall, within ninety days of the seizure, make an order, with the previous approval of the Commissioner,—

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income tax Act, 1922 (11 of 1922) or this Act;

(iii) Specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of Section 230-A in respect of which such person is in default or is deemed to be in default; and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from custody they were seized.

Provided that if, after taking into account the materials available with him, the Income tax officer is of the view that it is not possible to ascertain to which particular previous year or years such income or part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part, were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized.

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (i) and (iii) or any part thereof, the Income-tax Officer may, with the previous approval of the Commissioner, release the assets or such part, thereof as he may deem fit in the circumstances of the case.

(6) The assets retained under sub-section (5) may be dealt with in accordance with the provisions of section 132A.

(7) If the Income-tax Officer is satisfied that the seized assets or any part thereof were held by such person for or on behalf of any other person the Income-tax Officer may proceed under sub-section (5) against such other person and all the provisions of this section shall apply accordingly.

(8) The books of account or other documents seized under sub-section (1) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained.

Provided that the Commissioner shall not authorised the retention of the books of account and other documents for a period exceeding thirty days after all the proceedings under the Indian Income-tax Act, 1922 (11 of 1922), or this Act in respect of the years for which the books of account or other documents are relevant are completed.

(9) The person from whose custody any books of account or other documents are seized under sub-section (1) may make copies thereof, or take extracts therefrom, in the presence of the autho-

rised officer or any other person empowered by him in this behalf, at such places and time as the authorised officer may appoint in this behalf.

(10) If a person legally entitled to the books of account or other documents seized under sub-section (1) objects for any reason to the approval given by the Commissioner under sub-section (8), he may make an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents.

(11) If any person objects for any reason to an order made under sub-section (5), he may, within thirty days of the date of such order, make an application to such authority, as may be notified in this behalf by the Central Government in the Official Gazette (hereinafter in this section referred to as the notified authority), stating therein the reasons for such objections and requesting for appropriate relief in the matter.

(12) On receipt of the application under sub-section (10) the Board, or on receipt of the application under sub-section (11) the notified authority, may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit.

(13) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898) relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1).

(14) The board may make rules in relation to any search or seizure under this section in particular and without prejudice to the generality of the foregoing power, such rules may provide for the procedure to be followed by the authorised officer—

(i) for obtaining ingress into such building or place to be searched where free ingress thereto is not available.

(i) for ensuring safe custody of any books of account or other documents or assets seized.

Explanation 1. —In computing the period of ninety days for the purpose of sub-section (5) any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

Explanation 2. — In this section, the word "proceeding" means any proceeding in respect of any year, whether under the Indian Income-tax Act, 1922 (11 of 1922) or this Act, which may be pending on the date on which a search is authorised under this section of which may have been computed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year.

28. From this brief summary of the legislative history, two things become quite clear: The first is that the principle or the sole objective of enacting these special provisions was and continues to be prevention of evasion. The second is that the obvious purpose of amending the section from time to time was to plug the loopholes, from time to time discovered or brought to light, with a view to make evasion of taxes more difficult, and simultaneously so to shape the law as to be in consonance with, and not violative of, the fundamental rights. Whether or not tax evasion has been made more difficult is a matter for the legislature itself to consider based on the experience gained by the actual working of the statutory provisions. But the question whether the attempts made to meet the challenge to the law on the ground of infringement or unreasonable abridgement of the fundamental rights is successful is a question for the courts to examine.

29. From that point of view, the one circumstance which is of considerable importance is the clear identification of the objective of the special provision, viz., prevention of tax evasion. That is of importance because it is with reference to it that the reasonableness of the classification for purposes of Article 14 of the Constitution has to be examined. In fact, it is on this footing that the arguments on both sides have been addressed on the question of the constitutionality of section 132 of the Act under or in relation to Article 14 of the Constitution.

30. The arguments on behalf of the petitioners in this regard are principally two-fold. In the first place, it is contended that the impugned section deals with the same class of tax evaders as are sought to be dealt with under other relevant provisions of the Income-tax Act like section 147 of the Act of 1961, corresponding to S. 34 of the Act of 1922, and that because the impugned section picks out for special treatment some assessees from out of the general class of tax evaders and imposes on them a more drastic and more onerous type of procedure, the section must be struck down as manifestly discriminatory and thus violative of Article 14 of the Constitution. Secondly, it is stated that the section is wholly devoid of any guidance to the authorities functioning under the statute, on the basis of which they could pick out persons for special treatment under the section, and that, therefore, the said section should be struck down as conferring naked, unguided and arbitrary discretion on the authorities of such a type as to authorise unconstitutional discrimination.

31. Before dealing with these arguments which have special reference to present Section 132 of the 1961 Act, we might refer to two cases dealing with the constitutionality of Section 37 (2) of the 1922 Act, viz., *Surajmull v. Income Tax Commissioner*, AIR 1961 Cal 578 and *S. Doongarmal Agency(P) Ltd. v. K. E. Johnson*, AIR 1964 Assam 1 (FB). In the former, all the three learned Judges constituting the Special Bench, which decided the case, unanimously held that Section 37 (2) was not violative of either Article 14 or Article 19 of the Constitution. In the latter, two out of the three learned Judges constituting the Full Bench held that the said Section 37 (2) was violative of Article 14 as well as Article 19 (1) (f) and (g), the other learned Judge holding that the said section was perfectly constitutional and involved no violation of any of the Articles mentioned above.

32. The said rulings have been cited not as having a direct bearing on the constitutionality of Section 132 of the 1961 Act but only as indicating or as containing a fairly full statement of the arguments in support of the opposing views on the constitutionality of the said old section, which may be regarded as proceeding on, more or less, the same lines as the arguments in support of the opposing view on the constitutionality of the present Section 132. Viewed in that light, the only considerations or propositions which may be regarded as basic considerations or propositions underlying the approach made to the question are the following:—

33. The general approach was whether sub-sections (1) and (2) of Section 37 dealt with the same topic or same class of persons and whether, for the purpose of making a choice between the two in relation to any given case, the section did or did not contain sufficient guidance to the authorities. All the Judges who decided the two cases, appear to proceed on the assumption that the object of Section 37 (2) was to prevent tax evasion. Although the argument that some sort of unreasonable classification from out of the larger class of tax evaders was sought to be made by the section appears to have been mooted before the Court, it does not appear that the argument was developed or pursued except against the background of the relative positions of sub-sections (1) and (2) of Section 37. The learned Judges, who upheld the constitutionality of the said section, were clearly of the opinion that the powers under sub-section (2) were intended to be exercised and could properly be exercised only in cases where it was apprehended that the exercise of normal powers under sub-section (1) would not yield the desired result of subjecting to tax income, the

tax in respect of which was sought to be evaded or was apprehended might be evaded. At the time the action impugned in the Calcutta case was taken, the rules referred to in section 37 (2) had not been framed; nevertheless, the Calcutta High Court rejected the argument that the power under Section 37 (2) could not be exercised in the absence of the rules and held that even in the absence of the rules, the section, in the light of the obvious policy or objective underlying the same, contained sufficient guidance to the authorities in the matter of deciding whether a particular case was a fit one for the exercise of special powers under Section 37 (2). The two learned Judges of the Assam High Court who took a different view proceeded on the footing that sub-sections (1) and (2) of section 37 covered the same field, that the former dealt with judicial powers and the latter with what the learned Judges call the police powers, and that the section was wholly devoid of any guidance to the authorities and must therefore be held to authorise discrimination violative of Article 14.

34. We have already copied S. 37 of the 1922 Act as well as present section 132 of the 1961 Act. On a mere reading of the two sections, one will not fail to notice that although the objective has remained the same, there are certain material differences in the details of the scheme under the two sections. It may not, therefore, be quite necessary to express our opinion about the two opposing views regarding Section 37 (2) arising out of the decisions cited above. As, however, the matter has been argued at some length and each side has tried to derive assistance from the lines of arguments considered and reasoning set out in the judgments, we will briefly indicate our views in the matter to the extent they are necessary for our discussion on the constitutionality of the present section 132.

35. Once it is recognised that the objective of the impugned provisions of the Act is prevention of evasion, the reasonableness of the classification, if any, sought to be made by the said provisions has to be examined only with reference to the said objective and not with reference to any other. If this central factor is borne in mind, it will become clear that the special provisions of sub-section (2) of Section 37 necessarily proceed upon the assumption that the normal powers under sub-section (1) might in certain circumstances be ineffective from the point of view of preventing evasion. That itself would indicate that circumstances, in which the exercise of special powers under sub-section (2) becomes necessary, are special circumstances incapable of being effec-

tively dealt with under sub-section (1),—which means that the field of operation of the two is different and that the invoking of the powers under sub-section (2) can arise and can be justified only upon an opinion reasonably justifiable on peculiar circumstances of a case that the exercise of the normal powers under sub-section (1) would not help to achieve the purpose of preventing evasion. If we may say so with respect, the following observations made by Naidu, J. of the Assam High Court appear to miss the above essential feature bearing upon the reasonableness of the classification for the purpose of Article 14:

"It is clear that both sections 37 (1) and 37 (2) of the Act deal with the production of the documents, account books, etc., required in connection with any proceeding under the Act, for the purpose of the Act, namely, the proper assessment of the income-tax leviable on and payable by any person liable for such levy and payment. Both the provisions cover the same subject and answer the same purpose and are capable of being employed against probable income-tax assesses fulfilling the policy of the Act namely to secure correct assessment of the income-tax payable and to prevent the evasion of income tax."

(Vide para 55 at page 16 of AIR 1964 Assam 1 (FB)).

We are also unable to see the logic of the reasoning in the next succeeding paragraph of the judgment wherein it is stated that whereas for purpose of exercising the powers under sub-section (1) guidance can be sought from the Code of Civil Procedure which is not referred to in said sub-section, there is no guidance so far as the second sub-section is concerned in spite of the fact that it is expressly declared that the provisions of the Code of Criminal Procedure relating to searches shall apply, so far as may be, to searches under the sub-section.

36. It is unnecessary to say more about these rulings because the more serious argument in relation to present section 132 before us on the question of unreasonable classification is based not so much on the choice between the present section 131 (corresponding to old section 37 (1)) and the present S. 132 (corresponding to old Section 37 (2)) as on the effect of the impugned section 132 in relation to the provisions of the present Section 147 (corresponding to old section 34). The reference to the powers under Section 131 in the argument before us is not of the type which found acceptance with Naidu, J. of the Assam High Court in relation to old S. 37 (1). The central point of the contention is that both Section 147 as well as Section 32 deal with the same class of as-

sessees called the tax evaders and that the application of the more drastic and more onerous procedure under Section 132 to some only of such evaders leads to discrimination violative of Article 14 of the Constitution.

37. In developing the said argument and in support of it, reliance is placed on three rulings of the Supreme Court dealing with section 5 of the Taxation on Income (Investigation Commission) Act 30 of 1947, viz., *Suraj Mall Mohta and Co. v. Visvanath Sastri*, AIR 1954 SC 545; *Sri Meenakshi Mills Ltd. v. Vishvanath Sastri*, AIR 1955 SC 13 and *Muthiah v. Income Tax Commissioner, Madras*, AIR 1956 SC 269.

38. The object of the said Act 30 of 1947 was to ascertain whether the actual incidence of taxation on income during the years immediately preceding its promulgation had been in accordance with the provisions of the law and whether the procedure for assessment and recovery of tax was adequate to prevent evasion thereof. Sub-sections (1) and (4) of Section 5 of the Act which were the subject of discussion in the above cases read as follows:

"5 (1) The Central Government may at any time before the first day of September 1948 refer to the Commission for investigation and report any case or points in a case in which the Central Government has 'prima facie' reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief and may at any time before the first day of September 1948 apply to the Commission for the withdrawal of any case or points in a case thus referred....

5(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe:

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation, it may make a report to the Central Government, stating the reasons for such belief and, on receipt of such report, the Central Government shall, notwithstanding anything contained in sub-section (1), forthwith refer to the commission for investigation the case of such other person or such additional points as may be indicated in that report."

Other sections of the Act gave vast powers to the Commission set up under section 3 of the Act. Apart from being authorised to collect material from different sources against the assessee be-

hind his back with liberty to the assessee to look only such portion thereof as the Commission considered relevant, the most drastic provision was that in all assessment or re-assessment proceedings taken in pursuance of a direction of the Commission, the findings recorded by the commission, were to be final, without any right to the assessee to get them corrected by appeal or other proceedings directed against the findings of the Commission.

39. In the case of *Suraj Mall Mohta and Co.*, reported in AIR 1954 SC 545 which was a case of a reference made pursuant to sub-section (4) of Section 5 of the Act, the principal arguments on behalf of the assessee were that sub-section (1) of Section 5 was not based on any valid classification, the word 'substantial' being vague and uncertain and having no fixed meaning so as to furnish a basis for any classification at all, and the sub-section (4) had no independent existence and should therefore fall along with sub-section (1). On behalf of the Department, the principal answer was that sub-section (1) of Section 5 was based on a broad and rational classification taking in persons who had made vast profits on account of war conditions during an identifiable or ascertainable period and who may be briefly described as war profiteers, and that sub-section (4) referred to the same class and not to any other classes. The Supreme Court did not pronounce on the arguments relating to sub-section (1), proceeding on the assumption that the argument of the Department in relation thereto may be correct, held that sub-section (4) on its language cannot be restricted in its operation to war profiteers alone but to all persons who had evaded tax and who could be brought within the ambit of sub-section (1) of Section 34 of the Indian Income-tax Act, 1922, and that therefore the imposition on some out of those evaders of the drastic procedure under Act 30 of 1947, while leaving the rest to be governed by the more humane provisions of S 34 of the Income-tax Act, 1922, with the right of appeal, etc., amounts to a discrimination in contravention of Article 14 of the Constitution. Hence, sub-section (4) of Section 5 was struck down as unconstitutional.

40. After the decision.—and obviously with a view to meet the criticisms addressed against the constitutionality of Section 5 (1) of Act 30 of 1947, — Indian Income-tax Amendment Act, 1954 (33 of 1954) was passed whereby S. 34 of the Indian Income-tax Act was amended by inserting new sub-sections (1-A) to (1-D). These amendments made it possible to ascertain the class of substantial evaders referred to in sub-section (1) of Section 5 of Act 30 of 1947.

41. The result of this amendment was that the class of assessee evading tax sought to be dealt with under sub-section (1) of Section 5 of Act 30 of 1947 became incorporated into Section 34 of the Indian Income-tax Act, 1922. Consequently, on the reasoning in *Mohta's case*, AIR 1954 SC 545 cited above, sub-section (1) of Section 5 was struck down as unconstitutional in the case of *Shree Meenakshi Mills Ltd.* reported in AIR 1955 SC 13. The same view was taken by the majority in the case of *Muthiah* reported in AIR 1956 SC 269.

42. The difference in principle becomes clear from another decision of the Supreme Court reported in *T. K. Musaliar v. Venkatachalam*, AIR 1956 SC 246. In that case, their Lordships dealt with the Travancore Taxation of Income (Investigation Commission) Act which was *pari materia* with the Indian Act 30 of 1947. But the position in the Travancore case was that whereas Section 34 of the Indian Income-tax Act, 1922, underwent the amendments of 1955 referred to above, the corresponding Section 47 of the Travancore Income-tax Act continued to be *pari materia* with the unamended Section 31 (1) of the Indian Income-tax Act, 1922. Their Lordships, taking up for decision the point which was left open in the case of *Mohta*, AIR 1954 SC 545 regarding Section 5 (1) of the Investigation Commission Act, held that the class of substantial evaders mentioned therein was not a vague, indefinite or undefinable category but in the light of the attendant circumstances, could be clearly recognised as the class described as war profiteers and quite different from the general class dealt with under Section 47 of the Travancore Income-tax Act corresponding to unamended section 34 (1) of the Indian Income-tax Act, 1922. In that view, their Lordships upheld the constitutionality of Section 5 (1) of the Travancore Investigation Commission Act.

43. The general effect of the decisions discussed above relating to the Investigation Commission Act is that Section 34 of the Indian Income-tax Act, 1922, corresponding to Section 147 of the present Act is a provision intended to prevent evasion of tax and that therefore to subject persons who can be dealt with under the said provisions to a different and more drastic or more onerous procedure for the same purpose of preventing evasion is discriminatory, because it would amount to applying two standards to the same class. The question now is whether the impugned Section 132 of the 1961 Act is open to such a criticism or attack.

44. Now, Section 132 of the 1961 Act is directed against three types of persons—

"(1) those who have omitted or failed to produce books or documents as required by any summons or notice issued to them;

(2) those who, whether so summoned or not to produce documents, will not or would not produce books of account or documents, and

(3) those who are believed to be in possession of money, bullion, jewellery or other valuable article or thing representing, either wholly or in part, income or property which has not been disclosed for purposes of taxation."

When the Director of Inspection or the Commissioner of Income-tax in consequence of information in his possession has reason to believe that any person falls under any one or more of the three categories mentioned above, he may authorise one of the officers of the Department mentioned in the section to conduct a search and seize any such books of account or documents, money, jewellery or other valuable article or thing found as a result of the search. The searching officer is also empowered by the section to examine any person on oath at the time of the search who is found to be in possession or control of any book, document, money, etc. The provision made in the section for the period of retention of the books or documents goes to show that they are to be used in evidence in connection with any assessment proceedings under the Act and that they are to be returned after the said purpose is served. The money, bullion, jewellery or other valuable article or thing seized at the search is to be dealt with under sub-sections (5) and (6) of the Section. The general effect of the said sub-sections is that an estimate of undisclosed income is to be made in a summary manner to the best of his judgment by the assessing Income-tax Officer and that only so much of the said assets are to be retained as are in his opinion sufficient to satisfy any existing liability for payment of tax and an estimated liability for payment of tax in respect of the undisclosed income, the balance has to be returned. Section 132-A referred to in sub-section (6) of S 132 contains detailed provisions regarding the manner in which the seized assets are to be applied, all of which go to show that they are to be applied in discharge of tax liability or estimated tax liability.

45. The impugned Section 132 is therefore intended to achieve two limited objectives, — (1) to get hold of evidence bearing on the tax liability of a person which the said person is seeking to withhold from the assessing authority and (2) to get hold of assets representing income believed to be undisclosed

income and applying so much of them as may be necessary in discharge of the existing and anticipated tax liability of the person concerned.

46. Apart from the reasonableness or otherwise of this provision which we will separately consider in connection with the arguments about the alleged infraction of the fundamental rights under Article 19, the point to note at this stage is that S. 132 does not purport to substitute a procedure of assessment and final quantification of tax liability for the procedure provided by section 147 of the 1961 Act relating to income which has escaped assessment or the normal procedure of assessment under the Act. The books and documents seized, as already pointed out, are intended to be used and can only be used as evidence in connection with a pending normal assessment or a proposed reopening of assessment or reassessment under Section 147 of the Act. The seizure of assets is for the satisfaction of any tax liability in respect of which the person concerned is in default or is deemed to be in default and for satisfaction of any anticipated liability which may arise upon a reassessment in respect of undisclosed income.

47. So far as the seizure of material in the nature of evidence is concerned, like books of account and/or documents, it cannot be said either that a different procedure for assessment or reassessment is being pursued or applied in the case of persons who can be normally dealt with under Section 147 or that a person to whom the provisions of Section 132 are applied is sought to be deprived of his normal right of appeal, second appeal and reference to High Court as a last resort. Although some special powers are exercised with a view to get hold of evidence which is sought to be withheld, once the evidence is made available it is dealt with in the same way as evidence produced in the normal way.

48. The only question is whether a further classification of evaders for the purpose of exercising special powers of eliciting evidence as aforesaid is a classification which is not sanctioned by Article 14 of the Constitution. For this purpose, as already stated, the starting point of enquiry is what is the object of this legislation. The answer, as already given, is prevention of evasion. That attempts to prevent evasion are or may be in the nature of what is called plugging the loopholes in the law is not and cannot be disputed. The way in which the law seeks to prevent evasion is to make it impossible or more difficult for evaders to pursue several ways in which tax could be evaded. One of the ways certainly is the withholding of evidence on the basis of which a correct computation of income for assessment may be made and the

correct amount of tax ascertained. Steps taken therefore to prevent or frustrate attempts to withhold evidence and to get hold of evidence which is sought to be withheld from or made unavailable to the assessing authority would surely be one of the legitimate methods in which the law could seek to prevent evasion of tax. The powers under Section 132 are not to be used unless the Director of the Inspection or the Commissioner of Income Tax in consequence of information in his possession has reason to believe that the assessee in question has withheld or is attempting to withhold valuable evidence relevant for the purpose of correct assessment. If there is such belief reasonably entertained by the appropriate officer on the basis of information in his possession, that belief itself would furnish the criterion for a reasonable classification for Article 14 because the criterion has a direct and perfectly reasonable relation with the object of the legislation, viz., prevention of evasion of tax.

49. So far as the dealing with the assets seized at the search pursuant to Section 132 is concerned, the argument strongly pressed before us was that the relevant provisions of the section prescribe a distinct, different and more onerous procedure, any errors committed in relation to which are subject to correction only by means of a petition of objection presented to the prescribed authority under sub-section (11). But upon a closer scrutiny of the provisions in the course of the arguments this extreme position had to be and was given up. It is clear that the estimation of undisclosed income and of the anticipated tax liability in respect of it is only for the purpose of determining the extent of the assets to be retained, the purpose of retention being the satisfaction of existing or anticipated tax liability. The section does not, in our opinion, authorise or empower the Income-tax Officer to complete any assessment in a summary manner to the best of his judgment depriving the assessee of the benefit of other normal provisions of the statute relating to assessment or reassessment. The provision was compared in the course of the arguments with the provisions of Section 69A of the Act and the point was made that the relevant provisions of the impugned section were sought to be substituted for S. 69A. We find it difficult to accept the contention. Section 69A forms part of the general scheme for the computation of income and provides for a presumption in the case of money, bullion, jewellery, etc., of which the assessee is found to be the owner in any financial year and in respect of which he is not in a position to offer any explanation about its nature or the source of its acquisition. No such

actual computation on the basis of the presumption is permissible under sub-section (5) of the impugned Section 132. The estimation, as already pointed out, is only for the purpose of determining the amount to be retained to go in satisfaction of the existing or anticipated tax liability.

50. Regarding the application of the assets towards existing liability, it is contended that the assessee is sought to be deprived of the benefit of a notice of demand under Section 156 and of the time for payment provided under Section 220 of the Act. But the argument is unavailable because the existing liability referred to in sub-section (5) of Section 132 is a liability in respect of which the person concerned is already in default or can be deemed to be in default which clearly gives him the benefit of Section 220.

51. As to the provision made for retention of the assets to go in discharge of anticipated tax liability in respect of undisclosed income, the question is whether there is any departure from the normal procedure in disregard of the mandate of Article 14. In one sense, it appears to be not far different from the normal provisions for advance payment of tax. But to the extent it can be regarded as a departure from the normal procedure, it is, in our opinion, capable of being supported as proceeding upon a classification reasonable for the purposes of Article 14. Here again, we must remember that the object of the statute is preventing evasion of tax. One of the ways in which payment of tax is evaded is by not disclosing income and converting undisclosed income into bullion, jewellery, etc., or by simply secreting money. The steps taken to get at that money or other things into which money is converted, would be one of the methods of preventing evasion and of collecting taxes sought to be evaded. This power is to be exercised, be it remembered, only when the appropriate authority has in consequence of information in his possession reason to believe that the money, bullion or the like in the possession of the person concerned represents either wholly or partly undisclosed income or property. That belief reasonably entertained on the basis of information in possession of the appropriate officer would furnish the criterion for classification, which criterion clearly bears a direct and reasonable relationship with the object of the law.

52. The result of this discussion is—

(1) that the impugned section 132 does not to any extent do away with the applicability of the normal procedure prescribed under the statute for assessment or reassessment of income, nor does it

therefore deprive the assessee concerned of his normal rights of appeal, second appeal and reference to High Court;

(2) that the provisions of the impugned section 132 made with the object of preventing evasion of payment of tax, are limited to getting hold of evidence sought to be withheld from the assessing authorities and getting at income believed to have been undisclosed with a view to bring it under assessment and ensure recovery of tax evaded or sought to be evaded; and

(3) that the application of the special provisions of the impugned section is possible only when the appropriate authority on the basis of information in his possession has reason to believe that the assessee is withholding or attempting to withhold evidence or is in possession of undisclosed income either in the shape of money or in the shape of bullion, jewellery or the like, which belief furnishes the criterion for making a separate classification having a reasonable relation with the object of the law.

53. This answers the first part of the arguments in relation to Article 14 of the Constitution.

54. We shall now proceed to examine the second part of the argument dealing with the alleged arbitrary nature of the powers under Section 132 and the alleged absence of guidance therein leading to unconstitutional discrimination.

55. This second part of the arguments appears to us to be weaker than the first one. Even with reference to old Section 37 (2) which did not clearly specify the circumstances in which the powers thereunder may be validly exercised, the Calcutta High Court had, as already stated, taken the view that the policy of the statute and the clear purpose underlying the special provisions were sufficient to indicate that those special powers were expected to be and could validly be exercised only in cases where it was apprehended that the exercise of the powers under sub-section (1) of Section 37 would not yield the desired result of preventing evasion of tax. The present section 132 clearly states the circumstances in which and the conditions subject to which the powers thereunder are to be used. There can be little doubt that the entertainment of a reasonable belief of the type mentioned in the first sub-section by the appropriate officer is the condition precedent to the exercise of the powers under the section. That such is the position in law and that the essential pre-requisite to the exercise of the special power is the strict compliance with the preliminary conditions prescribed by the section follows not only from the normal rule of interpretation applied to provisions of this nature but also from a

direct decision of the Supreme Court in regard to Section 105 of the Customs Act already referred to by us, viz., 1966 (2) SCJ 665 : (AIR 1966 SC 1209). It should be noted further that the preliminary conditions set out in the first sub-section of the section are analogous or similar to the conditions stated in Section 96 of the Code of Criminal Procedure as necessary for the issue of a search warrant by the Magistrate.

56. In view of the said detailed provisions of the section, it is difficult to contend that the Director of Inspection or the Commissioner of Income-tax is without any guidance in the section for deciding when and in what circumstances the authorisation for conducting a search should be issued. The use of the words "has reason to believe" on the basis of information in his possession excludes the possibility of any unreasonable exercise of the power. The basis for the exercise of the power, it should be noticed, is not mere suspicion but a reasonable belief upon information already in possession of the appropriate officer. It would also, in our opinion, postulate that information in the possession of the officer is not a mere canard or an unverified piece of gossip but information which, in the circumstances, may be regarded as fairly reliable, because no belief can ever be said to flow reasonably from anything but information which may be regarded as fairly reliable. Hence, the careful selection of these words by the statute and the drastic nature of the powers necessarily point to a judicial application of the mind to some substantial material by the officer acting with a sense of responsibility. If so much can be gathered from the wording of the section, — and we feel convinced that it is the only reasonable and fair way of reading the same, — the suggestion that the section gives no guidance or that it authorises or renders possible arbitrary exercise of the power becomes difficult of acceptance.

57. The further argument that the section does not make it necessary or obligatory for the authorising officer to specify or particularise the documents or that it permits of the issue of an authorisation for what may be regarded as a general search need not necessarily lead to arbitrary exercise of the power. In the first place, it may not be possible in the nature of things to give a clear description of the books or documents, item by item; secondly, the books and documents to be searched for are described in the section itself as those which will be useful for or relevant to any proceeding under the Act; and thirdly the searching officer is also authorised to seize only such books or documents,

which will be useful for or relevant to any proceedings under the Act, which means that the searching officer is also required to apply his mind to the question of usefulness or relevance of the books of account or documents, as the case may be.

58. The same or similar application of the mind by the searching officer is required when he makes up his mind to seize any money, bullion or jewellery or the like. He could do so only if he believes prima facie that the said money or articles represent either wholly or partly undisclosed income or property. Any statement on oath of any person which he is empowered to record under sub-section (4) of Section 132 can, according to the said sub-section, be used as evidence in any proceeding under the Act, but cannot, in our opinion, be said to be immune from the test of cross-examination at the stage of hearing or trial of the proceeding referred to. The retention of any part of the seized assets under sub-section (5) is to be done only after affording a reasonable opportunity to the person concerned of being heard and after making such enquiry as may be prescribed. The nature of enquiry is prescribed in Rule 112A of the Income-tax Rules 1962. The rule requires the issue of a notice to the person concerned fixing a date for enquiry, giving him an opportunity to explain his position or to produce or cause to be produced evidence on which he may rely for explaining the position or the source of acquisition of the assets. While sub-rule (3) thereof states that—

"The Income-tax Officer may examine on oath any other person or make such other enquiry as he may deem fit." Sub-rule (4) expressly provides that before any material gathered in the course of the examination or enquiry under sub-rule (3) is used by the Income-tax Officer against any person, the person concerned or person affected should be given reasonable notice to show cause why such material should not be used against him. It has been argued that the use of the expression "such other enquiry as he may deem fit" in sub-rule (3) in effect fails to prescribe the nature of the enquiry as required by the section by leaving it to the officer to proceed in his own way uncontrolled by any rules. The first suggestion that no enquiry is prescribed is not correct, because sub-rules (1) and (2) make sufficient provision for the issue of notice to the person concerned and the affording of an opportunity to him to adduce evidence. The further enquiry referred to in sub-rule (3) is obviously intended to empower the officer to test the veracity of the material, if any, already placed on record by the person concerned. But the use

of such material against the said person is made conditional upon the person concerned being given reasonable notice to show cause why such material should not be used against him. While showing such cause, we are clearly of the opinion that the person concerned will be entitled to ask for an opportunity to cross-examine any person whose statement on oath has been recorded by the officer in the course of further enquiry under sub-rule (3) and also to call as a witness any person from whom the officer might have gathered material or any other person who may be in a position to speak to the value or veracity of such material.

59. An order made by the officer under sub-section (5) is subject to correction by the prescribed authority under sub-section (11) of Section 132.

60. Over and above all these safeguards, the action taken or orders made under Section 132 are really in the nature of interlocutory orders in aid of the ultimate order of assessment or reassessment which may be made under the other normal provisions of the statute, in respect of which the assessee has the normal right of appeal, second appeal, and reference to High Court.

61. So far as the conduct of the search itself is concerned, there is the general provision in sub-section (13) of Section 132 to the effect that the provisions of the Code of Criminal Procedure relating to searches and seizures shall apply, so far as may be, to searches and seizures under sub-section (1) of Section 132 of the Income-tax Act. One of those provisions would certainly be Section 103 of the Code of Criminal Procedure which contains salutary provisions, the value of which has always been recognised.

62. With such clear indication of the policy and the objective of the statute specifying all preliminary conditions on the satisfaction of which alone an authorisation for search could issue, and with all the safeguards as to the manner in which the search has to be conducted and enquiries in relation to it are to be held or made with full opportunity to the person concerned to explain away the suspicious circumstances appearing against him, we do not think it is possible to argue that the impugned section suffers from the vice of either lack of guidance or authorising arbitrary executive action.

63. The only argument strongly pressed on this part of the case is that the initial authorisation of the search is left in the hands of an officer of the Department and not in the hands of an independent person like the Magistrate under Section 96 of the Code of Crimi-

nal Procedure. It is urged that an officer of the Department, however high, cannot be said to be wholly free from an interest in the result in the same way as a judicial Magistrate may be said to be and that therefore it may not be quite safe to proceed upon the assumption that the departmental officer will bring to bear on the question an independent, judicial, unbiased mind. It is further stated that an order by a Magistrate directing the issue of a warrant is amenable to correction by the High Court on revision and that there have been instances in which the High Courts have quashed the warrants issued by the Magistrates without proper application of the mind and without ascertaining whether the circumstances justifying the issue of a warrant actually exist.

64. It is no doubt true that an officer of the Department cannot be said to be wholly free from some interest in the result as a Magistrate can be said to be. But the result that he is interested in is the same as, and not different from, the object of the statute itself, viz., bringing under assessment all income liable to tax and preventing evasion of tax. Such an interest cannot be said to disable an officer from performing the statutory duties impartially and with a sense of responsibility, unless of course any personal bias is alleged and is proved. Ordinarily, in the case of high ranking officers functioning under statutes and discharging statutory duties, bias is not to be presumed because they are expected to act with a sense of responsibility appropriate to their position and duties which the statutes impose on them. Wherever personal bias is proved and wherever an officer acts in disregard of his statutory responsibility and issues an authorisation without satisfying himself about the preliminary conditions required by the particular statute, such whimsical act on his part is certainly open to correction by the High Court under Article 226 of the Constitution.

65. We are not therefore satisfied that the safeguards provided in Section 132 of the Income-tax Act are ineffective, illusory for reason only for the fact that the original authorisations for search are issued by an officer of the Department and not by an independent authority like the Magistrate.

66. We therefore hold that Sec 132 of the Income-tax Act, 1961, is not violative of the fundamental right guaranteed under Article 14 of the Constitution.

67. Regarding Article 19, the line of reasoning in the judgment of the Supreme Court in the case of M. P. Sharma, AIR 1954 SC 300 furnishes, in our opinion, an almost complete answer to the argument that the impugned Sec-

tion 132 of the Income-tax Act imposes unreasonable or excessive restrictions on the fundamental right under the said Article.

68. As pointed out by their Lordships in that case, search by itself does not constitute an invasion of any fundamental right, and the seizure of books is temporary and so also the seizure of the assets. When the assets are to be applied only in discharge of tax liability, the excess over which is to be returned, there is also no deprivation of property in contravention of the constitutional provisions in that regard. That restrictions, if any, are imposed in public interests is clear from the fact that it is certainly in the interests of the public that taxes legitimately exigible are recovered and not evaded.

69. The two arguments in support of the theory of unreasonableness are that the distinguishing feature of Sharma's case, AIR 1954 SC 300 is that the independent mind of a judicial Magistrate is interposed between the executive action and the citizen who is the object of such action and that the seizure of material under Section 8 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, was struck down as unconstitutional by the Supreme Court in the case of Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.

70. Regarding the interposition of a Magistrate's mind, we have already discussed the matter at some length. The reason for the decision in the case of Dawakhana relied upon was the opinion of their Lordships that the impugned portion of the section went far beyond the purpose for which the Act was enacted and the absence of safeguards which the legislature has thought it necessary and expedient to provide in other statutes like the Indian Drugs Act, made the restrictions quite unreasonable (Vide paragraph 36 of the judgment at page 568 of the Report). In the present case, it cannot be said that there are no safeguards at all. We have already expressed our opinion that the section itself provides adequate safeguards.

71. So far as the seizure is concerned, it cannot certainly be said to be excessive in the case of assets for the reasons already stated. In the case of books and documents, an argument is advanced that the period of retention may conceivably be excessive in view of the definition of the word 'proceeding' in connection with which the books and papers may be retained, contained in the second Explanation to the section. In the said Explanation the proceedings are said to include not merely proceedings pending on the date of the search or completed prior thereto but also proceedings which

may be commenced after the date of such search in respect of any year. So far as the pending proceedings are concerned, the retention of books for their purpose may not be and is not to be excessive. The proceedings referred to as those which may be commenced after the date of the search are apparently those relating to reopening of closed proceedings under Section 147 initiated in the light of the result of the search. The only basis for the argument that the period of retention may be conceivably excessive is the use of the words "in respect of any year" occurring at the end of the Explanation. At first sight, it would appear that the expression 'any year' may take in every subsequent year without any limitation whatever. We do not think, however, that such an extended meaning can be given to the expression as suggested. A reasonable construction should always be placed upon the provisions of law, — an interpretation which subserves the purpose of the law and does not reduce it to an absurdity. What is obviously intended in this case is that the books and papers seized should be available as evidence for the purpose of completing pending assessments, for bringing under assessment income discovered at the search to have been omitted to be disclosed within the period of limitation prescribed by the statute for reopening of assessments already closed and for completing the assessments so reopened consequent upon information gathered at the search. It also appears obvious from the context that the expression "in respect of any year" occurring at the end of the Explanation should have the same meaning as the same expression occurring at the commencement of the Explanation which, there is not doubt, refers to years relevant to assessments pending at the time of the search or already closed by that time. That such is the intention is also clear from the fact that sub-s. (8) prescribes a period of 180 days from the date of seizure as the maximum for retention of books and papers, requires the seizing officer to record his reasons in writing for extending the period and obtain the approval of the Commissioner for further retention, and impose a further limit to the extension in relation to proceedings for which the said books and papers may be relevant. The Commissioner's approval for retaining the books and papers beyond the period of 180 days is also subject to control and correction by the Central Board of Revenue under sub-section (10) of the Section.

72. We are therefore of the opinion that the restrictions imposed by S. 132 on the fundamental rights guaranteed under Article 19 (1) (f) and (g) are

reasonable and are in the interests of the general public.

73. As to the fundamental right under Article 19 (1) (d) the restriction of movement is limited to the period of search, and further the presence of the person at the search is really in his interest. The restriction is temporary and perfectly reasonable.

74. If therefore the law is thus a valid law involving no infringement of Article 14 or Article 19 of the Constitution, there is no violation of the fundamental right of personal liberty under Article 21 either, because to the extent a person is deprived of his personal liberty by reason of the search, such deprivation is in accordance with a valid law.

75. For all these reasons, we hold that the impugned Section 132 of the Income-tax Act, 1961, is neither incompetent nor invalid as infringing any of the fundamental rights guaranteed under Articles 14, 19, 21 and 31 of the Constitution.

76. We come now to the second point in the case, viz., whether the search itself has been conducted without justification and in a high-handed manner.

77. The first point for consideration under this is whether the Commissioner, in issuing the authorisations, can be said to have entertained such reasonable belief as is required by the first sub-section of Section 132,

78. The statement in the authorisations is that he has reason to believe that the circumstances mentioned in clauses (b) and (c) of the first sub-section of Section 132 exist; that is to say, the Commissioner believes that the assessee in this case would not produce or cause to be produced books of account or other documents which will be useful for or relevant to proceedings under the Act, if required or summoned to produce the same, and also that the assessee is in possession of money, bullion, jewellery, etc., which either wholly or partly represents income or property not disclosed. The authorisation also states that the Commissioner has reason to suspect that such books, documents, money, bullion, etc., have been kept and are to be found at the various places authorised by him to be searched.

79. The Commissioner has filed a counter-affidavit to which he has annexed a record of the reasons made by him pursuant to the relevant rules before issuing the authorisations. He stated therein that he has perused certain reports of the Assistant Director of Inspection relating to the assessee, that there are several circumstances indicating that the assessee and his partners have not been

declaring their correct income, that their statement regarding the absence of books or loss of books is not believable and that there is information furnished by some informants that though the books are said to have been lost, several statements and documents written in the course of the business are still available which may be of considerable help in determining the correct income. He also states that he has received reports that the assessee was bundling up some of the statements probably with a view to place them beyond the reach of the Department. He therefore states that "it is clear that the assessee will not produce these papers if called for". He also refers to the existence of several loans on Hundis believed to be bogus Hundis and to the reports that the assessee and its partners have lot of unaccounted wealth in the form of cash, jewellery, etc.,

80. In the affidavit, he had taken up the stand that the reports received from his subordinate officers were confidential documents in respect of which he could claim privilege. This position was, however, later given up when we indicated that the position taken up by him may not be quite correct, specially in view of the powers of this Court under Article 226 of the Constitution. The Original reports were later placed before us for our perusal and authenticated copies thereof placed in the record of this petition, and copies furnished to the petitioners' counsel.

81. A perusal of these reports submitted by the Assistant Director of Inspection (Intelligence) to the Commissioner of Income-tax go to show that considerable material had been collected in respect of the alleged loss of books and non-disclosure of income and accumulation of wealth not explicable on the basis of the income actual returned for assessment. The reports also record information made available to the Department by certain informants. Such information is to the effect that the reported loss of books by fire on two different occasions made by the assessee is not completely true that all the books have not been lost, that some books and papers which may be useful for assessment were still available and secreted at certain places. It was also mentioned that a secret circular had been issued to all the branches of the assessee-firm immediately to send up to the Head Office all papers and documents in their possession, offering cash bonuses for those who did the work briskly. The informants also pointed to the vast growth of wealth of the firm and its partners and alleged that cash, gold, jewellery, documents relating to purchases of properties, etc., could be found either in the residences of the partners or in bank lockers.

82. The information given by informants to the officers of the Department which was reduced to writing and got signed by them was also made available to us in original. But we do not propose to make use of it for our decision. We looked into it only for the purpose of satisfying ourselves that the informants are persons who may be reasonably said to have personal knowledge about the matters they are speaking about.

83. We have already stated what, according to us, is the meaning and effect of the expression "on the information in his possession had reason to believe" occurring at the commencement of the section, and it is unnecessary to repeat the same here.

84. We should now refer to a short-note of the decision of the Supreme Court in Civil Appeal No. 562 of 1965, Narayanappa v. Commissioner of Income Tax, Bangalore published at page 9 of the short note section of part 3 of 1967-63 ITR 219:(AIR 1967 SC 523). Dealing with the similar expression "The Income-tax officer has in consequence of information in his possession reason to believe" occurring in S. 34 (1) (b) of the Income-tax Act, 1922, their Lordships explained the legal position as follows:

"But the legal position is that if there are in fact some reasonable ground for the Income-tax officer to believe that there has been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice under Section 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Again, the expression "reason to believe" in section 34 does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith; it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under Section 34 of the Act is open to challenge in a court of law."

84-A. We think the same principles would apply to the same expression occurring in Section 132 of the Income-tax Act and would indicate the extent of judicial review of the action of the Commissioner of Income-tax in issuing the authorisations for search under the said Section.

85. What the High Court has to examine in such a case would be whether there was in fact information in possession of the Commissioner and whether there is a rational connection between the information and the belief entertained by him. As already explained by us, the information itself, will have to be of a fairly reliable character — whatever may be the source of it, — because unless the information is of such a character, it cannot furnish a reasonable basis for entertaining the belief that any of the circumstances mentioned in the section exists. Secondly, the information must have relevant bearing on the formation of the belief and must not be extraneous or irrelevant to the purpose of the section. If the High Court is satisfied on these two matters, the adequacy or sufficiency of the grounds will not be a matter for the High Court to investigate.

86. Viewed in this light, the position in this case is that there was in possession of the commissioner a considerable body of information originally received by his subordinate officers from persons who may be said to have personal knowledge about the matters they were speaking to, and sifted or checked by officers of the Department whose duty it is to collect such intelligence. He had also had access to the assessment record of the assessee. That record showed, among other things, that out of the returns in respect of four years which are now pending scrutiny, two were supported by regular balance sheets or similar statements of account whereas the other two were prepared only on the basis of estimated figures. The assessee had also reported that as a result of an accidental fire on one of its premises, all the books of account kept at those premises were destroyed by fire.

87. In the light of this information, we do not think it can be said that the belief stated by the Commissioner that the assessee will not produce books or documents useful for or relevant to proceedings under the said Act, if called upon to do so, and that they had in their possession undisclosed wealth can be said to be wholly impossible or wholly unreasonable. When the assessee carries on extensive business in various places with over 200 branches and all its transactions are in the usual course of business evidenced by regular papers prepared for the purpose and in the light of the information furnished by the informants,

the assessee's report that all books and papers have been lost is open to suspicion or is not readily believable, it may not be unreasonable to state that the loss of books, even if true, may not be so crippling and that the assessee may still be in possession of many papers which would be useful and relevant for the purpose of computing the correct income. Against that background, the statement of estimated figures and the report of loss of books and papers could reasonably furnish the basis for the belief that the assessee, even if called upon to produce such books and papers as might still be in his possession, would omit or fail to produce the same.

88. We are satisfied therefore that the attack by the petitioner that the Commissioner has not had relevant information in his possession or that such information was insufficient to support a reasonable belief of the type stated by him in the authorisations issued by him or that the circumstances justifying the issue of such authorisations did not at all exist in this case is not well founded.

89. Regarding the manner in which searches themselves had been conducted by the respondents in this case, the allegations contained in the principal affidavit are a little vague and also are not quite accurate.

90. In paragraph 8 of the affidavit it is stated.

"In respect of the search carried out in my business premises, the first respondent seized about 78 items of documents and about 31 items of articles, and things consisting of jewellery and other items of Bank pass books, and cheque books, etc., consisting of 23 items. The items of jewellery taken by him were also sought to be valued by him." The first respondent in his counter-affidavit stated that he did not search the business premises of the first petitioner at all but only his residence on Krishna Rao Road. He denied as absolutely false the statement that 31 items of articles and things consisting of jewellery and other items of pass books and cheque books consisting of 23 items were seized by him. He also denied the statement that he had seized or taken personal correspondence of the petitioner of a purely private nature. In Annexure F to his affidavit in support of I. A. No. III to which we have already made a reference, he has given a detailed list of 78 items seized by him. The contents of the three sealed packets, items 76, 77 and 78, were also inventoried in the presence of the III Deputy Registrar of this Court. The list fully supports the statements and denials made by the 1st respondent in his affidavits and bring out

the inaccuracies in the statements made by the petitioner in his affidavit. No reply has been filed on behalf of the petitioners to the affidavits of the 1st respondent Sundarajan although we told the counsel for the petitioner that if his clients would like to file a reply, they could do so. The other searching officers have also filed affidavits to which also no replies have been filed.

91. In all the counter-affidavits filed by the searching officers, it has been stated that the searches were conducted quite peacefully and with restraint, that no obstruction or objection was offered by the petitioners or any one on behalf of the petitioners, and that the seizures by them were restricted and confined only the books and documents which were believed to be useful for and relevant to the proceedings. In this connection, we might also refer to the set of instructions issued by the commissioner while sending his authorisations, the original of which was produced for our perusal and an authenticated copy thereof placed in the record of this petition. In the said instructions, the Commissioner has pointed out what the searching officer should look for and appended a note to the effect that great restraint should be exercised in seizing documents and every attempt made to sift the material and seize only those which are important.

92. To further satisfy ourselves that the seizing officers had applied their mind to the usefulness or relevancy of the documents seized, we have had an analysis prepared of the papers seized at the four searches in questions detailed in the annexures to the affidavit in I. A. No. III and the inventory prepared in I. A. No. IV. It is seen therefrom that of the 256 papers seized at the residence of the 1st petitioner, 120 are documents evidencing investments in property and money lending relating to the period 1-7-1960 onwards, 71 are similar documents relating to the previous period 1-7-1949 to 30-6-1960, 56 relate exclusively to the firm and the remaining 9 are described as documents such as partition deeds, gift deeds, which may be relevant to or useful for examining the first mentioned 120 and 71 documents. Of the 53 documents seized at the business premises at Taragupet, 16 are accounts relating to pending assessment, 4 relate to the years 1957 to 1960 showing monetary transactions which may be useful to reopen those earlier assessments, 33 are hundis, payment and receipt sheets, loose sheets showing profits and loss account, etc., none of which relates to a period prior to 1955. 8 out of 11 items, books and documents, seized at the Infantry Road premises, relate to pending assessment and all the 11 relate to the business of

the assessee-firm. At the residence of Munireddy at Shantinagar, only 8 papers were seized, of which 7 relate to pending assessments for the year 1962-63 and one relates to the assessment for 1961-62. The last mentioned one consists of four sheets containing inter-branch transfers to the tune of about Rs 40,000/-.

93. The above analysis shows that the searching officers did apply their mind generally to the question of usefulness or relevancy. By saying so, we do not of course mean that every one of the documents may ultimately be shown to be fully and completely relevant. What the section requires is that documents should be useful for or relevant to the proceedings under the Act. In the context of the section, the usefulness or relevancy referred to could only be usefulness or relevancy of the type appropriate to the stage of investigation but not to an actual trial or enquiry. It would only suggest or require an application of the mind to make out a prima facie case of usefulness or relevancy and not a final or absolutely correct decision about the relevancy. The point really is that the searching officer should act with restraint and should not seize documents unless, on a prima facie examination, he honestly feels that they may be useful for or relevant to the proceedings under the Act.

94. Viewed in that light, we are not persuaded that there is any strength in the case suggested on behalf of the petitioners that the searching officers gone about their work in a high-handed manner and seized documents without any regard whatever for their usefulness or relevancy.

95. In the cases cited on behalf of the petitioners one decided by the Allahabad High Court and reported in *Seth Brothers v. Commissioner of Income Tax*, U. P., (1966) 62 I. T. R. 44 : (AIR 1965 All 487) and the other decided by Punjab High Court and reported in *N. K. Textile Mills v. Commissioner of Income Tax*, (1966) 62 I. T. R. 58 (Punjab), the constitutionality of section 132 was upheld but the searches were struck down as illegal on the peculiar facts of each case.

96. For the reasons stated above, we hold that no case has been made out of any failure to comply with the provisions of section 132 or of any disobedience or disregard thereof either in the matter of the issue of authorisations for search or seizure or in the matter of actual searches and seizure of documents.

97. The Writ Petition therefore fails and is dismissed.

98. The respondents may therefore retain the books and papers with them

and will deal with them strictly in accordance with the provisions of S. 132 of the Income-tax Act. The Department is relieved of the undertaking given by it in I. A. Nos. III and IV.

99. We make no order as to costs.

RSK/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 141 (V 56 C 27)

B. VENKATASWAMI, J.

Basappa Tippanna Durgannavar, Petitioner v. Bhimappa Ramappa Durgannavar, Respondents.

Civil Revn. Petn. No. 1258 of 1967, D/- 30-8-1968, against order of Munsiff and J. M. F. C. Mudhol in C. S. No. 57 of 1964, D/- 7-8-1967.

Civil P. C. (1908), O. 23, R. 1 (2) (a) and (b)—Words "other sufficient ground" in Cl. (b) should be read independent of words "formal defect" in Cl. (a) — Court can allow withdrawal from suit in the interest of justice. AIR 1940 Bom 121 (FB) & AIR 1951 All 845 (FB), Diss.

The Court has no absolute discretion while exercising jurisdiction under O. 23, R. 1 (2) (b). The discretion involved in the exercise of this jurisdiction is judicial depending on the facts and circumstances of each case. (Para 33)

The words "other sufficient ground" occurring in Order 23, R. 1 (2) (b) should be read independently of the words "formal defect" occurring in clause (a) of that Rule. Further the meaning to be given to the words "other sufficient grounds" should not be limited to the grounds afforded by the defects which are analogous to formal defects referred to in clause (a), as it would be unnecessarily restricting the provisions of O. 23, Rule 1 C. P. C., which has invested the Court with powers to allow withdrawal from the suit *ex debito justitiae* in cases where such a prayer is not covered by clause (a) of that Rule. AIR 1940 Bom 121 (FB) and AIR 1951 All 845 (FB), Diss.; AIR 1957 Mad 207 and AIR 1956 Orissa 77, Foll. (Para 37)

The plaintiff sued the defendant for mere recovery of possession of property with costs and mesne profits. The prayer was confined to one Survey Number. After the pleadings were completed and the suit was posted for evidence an application under O. 23, R. 1 was filed praying for permission to withdraw from the suit and liberty to file a fresh suit. The grounds stated were that the plaintiff was a minor on the date of the death of his father and that he was unaware of the real nature of the family properties; that the suit related to

JL/LL/E981/68

inam land which was in possession and enjoyment of his father; that he could not instruct his counsel properly in respect of the suit properties and to the nature of the right therein. The trial Court allowed the application.

Held, that the first suit would have failed on account of the defects and the case was covered by O. 23 R. 1 of the Civil P. C. (Paras 7, 38)

Cases Referred: Chronological Paras

(1964) AIR 1964 J & K 18 (V 51)=	
1964 Kash LJ 99, Fateh Shah v. Mst. Bega	12, 30
(1957) AIR 1957 Mad 207 (V 44) =	
69 Mad LW 767, S. Naicker v. R. Ammal	11, 28
(1956) AIR 1956 Orissa 77 (V 43)=	
ILR (1956) Cut 1, Atul Krushna Roy v. Raukishore Mohanty	11, 26
(1953) AIR 1953 Bhopal 32 (V 40), Gorelal v. Nand Lal	12
(1951) AIR 1951 All 845 (V 38)=	
1951 All LJ 607 (FB), Abdul Ghapoor v. Abdul Rahman	10, 24
(1946) AIR 1946 Lah 429 (V 33) =	
48 Pun LR 183, Gurprit Singh v. Punjab Govt.	33
(1940) AIR 1940 Bom 121 (V 27)=	
42 Bom LR 143 (FB), Ramrao Bhagwantrao Inamdar v. Babu Appanna Samage	10, 13, 14
(1934) AIR 1934 Cal 59 (V 21) =	
57 Cal LJ 498, Manidas Sadhu Khan v. Giridhari Sadhu Khan	12
(1922) AIR 1922 PC 112 (V 9) =	
49 Ind App 144, Chhajju Ram v. Neki	27
(1918) AIR 1918 Pat 452 (V 5)=3	
Pat LJ 460, Nathuni Ram v. Mt Sheo Koer	12
(1869-70) 13 MIA 160=3 Beng LR 48 (PC), Robert Watson and Co. v. Collector of Zillah Rajshahye	13, 15, 16, 19
H. F. M. Reddy, for Petitioner; T. J. Chouta, for Respondents.	

ORDER: This revision petition is directed against an order made on 7-8-1967 in Civil Suit No. 57 of 1964 on the file of the learned Munsiff at Mudhol, permitting the plaintiffs therein to withdraw from the suit with liberty to file a fresh suit under Order 23 Rule 1 (2) (b) C. P. C.

2. The few facts relevant for the disposal of this petition are as follows: The respondents in this revision were the plaintiffs in Civil Suit No. 57 of 1964 on the file of the learned Munsiff at Mudhol. They sued the defendant (the revision petitioner) for mere recovery of possession of the property bearing R S No. 108 at Junnur village of Mudhol Taluk, with costs and mesne profits. In the suit the prayer was confined to one Revenue Survey number specified above.

3. After the pleadings were completed and the suit was posted for evidence, the plaintiffs filed Ex. 76 under O. 23 R. 1 C. P. C., praying for permission to withdraw from the suit and liberty to file a fresh suit. The ground stated therein is that the first plaintiff was a minor on the date of the death of his father and that he was unaware of the real nature of the family properties. It is also stated that the suit related to Walikarki inam land, which was in the possession and enjoyment of his late father. It is further averred by him that he could not instruct his counsel properly in respect of his suit properties and as to the nature of his right therein. According to the plaint in C. S. No. 57/64, the defendant, who is the uncle of the first plaintiff, fraudulently took possession of the inam land in question and secured a mutation of the entries in the Record of Rights on a misrepresentation that he was entitled to succeed to the late holder of the inam land, while the first plaintiff was the real heir entitled to succeed both to the office and the land. It may not be out of place to refer to the second suit filed by the plaintiffs soon after permission for the withdrawal of the suit was accorded to the plaintiffs, a copy of the plaint in which has been made available by Sri H. F. M. Reddy, the learned counsel appearing on behalf of the petitioner. The said suit came to be registered as Civil Suit No. 45 of 1965. It is seen from the plaint in C. S. No. 45 of 1965 that the suit is for partition and possession of not only R S. No. 108, which was the sole subject-matter of the earlier suit, but also several other items of properties, both moveable and immoveable.

4. The first order permitting the withdrawal from the suit was made on 1-4-1965 and it was challenged before this Court in C. R. P. No. 969 of 1965. The said revision petition was allowed on 6th March 1967, principally on the ground that the order had not been made after hearing the defendant. Thus the matter stood remitted to the trial Court once again and the present impugned order came to be passed therein after giving an opportunity to all the parties concerned. The learned Munsiff came to the conclusion that although the application of the plaintiffs for withdrawal did not clearly disclose a formal defect which might result in a failure of the suit, the case clearly fell under clause (b) of sub-rule (2) of rule 1 of Order 21 CPC. Therefore, in his view, the requirement regarding the failure of a suit on account of a formal defect was not condition precedent for the exercise of his jurisdiction under CL (b) of that rule. He, therefore, allowed the application and permitted the withdrawal

from the suit with liberty to file a fresh suit. Aggrieved by this order, the defendant has approached this Court once again with the present petition.

5. Sri H. F. M. Reddy, the learned Counsel appearing on behalf of the petitioner, urges the following two contentions that:

1. The application Ex. 26 made under Order 23, Rule 1 CPC. does not disclose on the face of it, any defect, formal or otherwise, and therefore the exercise of discretion in favour of granting permission sought amounts to material irregularity in the exercise of jurisdiction calling for interference under section 115 C. P. C.

2. The condition precedent for the exercise of jurisdiction under Order 23, Rule 1 (2) (b) C. P. C is the existence of "sufficient grounds" analogous to a 'formal defect' dealt with under clause (a) of that Rule. Hence, in the absence of that condition precedent, permission sought for by the plaintiffs ought not to have been granted.

6. At this stage, it is convenient to dispose of the first of the above contentions of Sri Reddy. It is no doubt true that in the application seeking for the withdrawal from the suit, the nature of the defects in C. S. No. 57 of 1964 have not been particularised in any manner. All is stated therein is that the first plaintiff was entitled to inherit the properties from his late father, and being illiterate, and a minor of 3 or 4 years of age at the time of the death of his father, could not properly instruct his Counsel, during the preparation of the plaint. He also did not know the true nature of the family properties. It is further averred that the suit did not comprise of all the family properties and therefore it was necessary to institute a fresh suit in respect of all of them.

But, as observed earlier, in the statement of facts Sri Reddy, the learned Counsel has produced copies of two plaints in C. S. Nos. 57/64 and 45 of 1965. On a comparison of these two plaints it would be apparent that the suits are substantially different in character. The first of these suits is for the relief of possession and mesne profits in respect of one of the items of the properties only, whereas it is seen from the plaint in the second suit, that it is one for partition and possession in respect of several items of immoveables, in addition to the moveables. It is further to be seen that the first suit was particularly based on his right to inherit the inam land attached to the Walikarki service, in respect of which his late father was the holder. The cause of action was stated to be that as the sole defendant therein had misrepresented before the Authorities and secured possession of that property. In the

latter suit the averment on behalf of the plaintiffs is that the defendant was in possession and enjoyment of the family properties including the inam land as 'Karthā' and manager and as such he would be entitled to claim partition. It is to be observed that reference to these pleadings has become necessary owing to the fact that the petitioner himself has produced these documents and strongly relies on them in support of his case.

7. In the light of these pleadings, if the application filed and the Order made therein by the learned Munsiff are read together, it would be clear that it would not have been easy for the plaintiffs to amend their plaint so as to include the prayer for partition of several properties which are said to belong to the joint family of themselves and to defendant. Any attempt to amend the plaint in that regard would have been met with the objection that it would totally change the nature of the suit. In any event, it would be a matter for doubt whether the plaintiffs would have succeeded in obtaining the necessary permission to amend the plaint. If the real cause of action is as stated in the second plaint (C. S. No. 45/65) it is reasonable to infer that the first suit would have failed on account of these defects. But the question is whether these defects are formal defects or defects analogous to formal defects as contemplated under Order 23 Rule 1, C. P. C.

This is the test that should be applied, if the contention of Sri Reddy on the interpretation of Clause (b) of sub-rule (2) of Rule 1 of Order 23 C. P. C., is well founded. If the interpretation sought to be placed on the relevant Rule by Sri Reddy is to be accepted, the petitioner would be entitled to succeed and this revision petition has to be allowed. At the same time, it is not disputed by Sri Reddy that if the interpretation to be placed on the words "other sufficient grounds" found in clause (b) of sub-rule (2) of Rule 1, Order 23 C. P. C. is that the grounds referred to therein are those other than 'formal defects', or defects analogous to formal defects, the impugned Order is not liable to be disturbed.

8. I shall now proceed to deal with the second of these contentions.

9. For the purpose of the decision of this question, it would be necessary to set out the relevant portions of O. 23, Rule 1 (2) C. P. C. which read thus:

"1. Withdrawal of suit or abandonment of part of claim:

(1)

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or a part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

10. Sri H. F. M. Reddy, in elaboration of his second point, submits that the words "other sufficient grounds" appearing in clause (b) of sub-rule (2) of Rule 1 of Order 21 C. P. C. should be read ejusdem generis with the thing indicated by the words appearing in Cl (a) sub-rule (2) of that Rule, or at any rate, "grounds" referred to should be analogous to the 'formal defects' referred to earlier in the sub-rule. According to him, "grounds" should not be something independent of a formal defect or a defect analogous to such a formal defect. In support of his submission, he relied on several decisions the principal ones of which are these reported in 42 Bom LR 143 : (AIR 1940 Bom 121) (FB) and AIR 1951 All 845 (FB). I shall deal with these cases and others briefly at a later stage, after adverting to the arguments urged on behalf of the respondents.

11. The contention of Sri T. J. Chouta, the learned Counsel appearing on behalf of the respondents plaintiffs, is that Clauses (a) and (b) of sub-rule (2) of Rule 1 of Order 23 C. P. C. should be read independently of each other. So read, there would not be any scope for the application of the principle of ejusdem generis or any other doctrine relating to the interpretation of words when used in association with some other words. To put it simply, his contention is that the meaning to be assigned to the words "other sufficient grounds" occurring in clause (b) of that Rule would not take colour from the meaning to be given to the words "formal defect" occurring in Clause (a), it is, therefore, his contention that the words "other sufficient grounds" would mean in the context any ground which in the opinion of the Court is sufficient to warrant the grant of permission for withdrawal under O. 23, R. 1, C.P.C. and it need not necessarily be a ground referable to a 'formal defect' found in Clause (a) of that Rule. In support of this submission, he relied on a number of decisions, particularly those reported in AIR 1956 Orissa 77, AIR 1957 Mad 207 and AIR 1964 J & K 18.

12. I shall now proceed to deal with these cases briefly. Sir H. F. M. Reddy, the learned Counsel for the petitioner, referred to three decisions reported in AIR 1918 Pat 452, AIR 1934 Cal 59 and

AIR 1953 Bhopal 32, in addition to the two Full Bench Rulings referred to earlier. In my view it is unnecessary to deal with these cases further as the rule in question has not been interpreted in those decisions. Moreover, it seems to me that they are decisions on facts of those cases.

13. In 42 Bom LR 143 : (AIR 1940 Bom 121) (FB) Ramrao Bhagwantrao Inamdar v. Babu Appanna Samage, a Full Bench of the High Court of Bombay was called upon to consider whether the words "other sufficient grounds" mentioned in Clause (b) of sub-rule (2) of Rule 1 of Order 23 C. P. C. must be read ejusdem generis with the ground mentioned in Clause (a) of that Rule. The learned Judges, after a consideration of several decisions on the subject and in the light of the judicial and legislative history of the Rule, came to the conclusion that although the 'grounds' need not be ejusdem generis with the ground mentioned in clause (a) they must be at least 'analogous' to it. The difference between the two grounds is that the ground in clause (a) requires that the suit must fail by reason of some formal defect. Whereas the grounds contemplated in Clause (b) need not necessarily be fatal to the suit. In referring to the legislative history, the learned Judges referred to a decision of the Judicial Committee of the Privy Council reported in (1869-70) 13 M. I. A. 160, (PC) Robert Watson & Co. v. Collector of Zillah Rajshahye.

In the said Privy Council case, the suit was of the year 1856, prior to the enactment of the Code of Civil Procedure 1859. The decision of the Privy Council was rendered in 1869. According to section 97 of the Code of 1859, the Court was empowered to allow the withdrawal of a suit with liberty to file a fresh suit for the same subject matter of claim if the plaintiff at any time before final judgment satisfied the Court that there were sufficient grounds for permitting him to withdraw. While referring to section 373 of the Codes of Civil Procedure, 1877 and 1882, the Full Bench made the following observation at page 158 (of Bom LR) : (at p. 124 of AIR).

"... The obvious object of the addition was to give effect to the ruling of the Privy Council and not to override it as the earlier rulings referred to above though section 97 of the Code of 1859 did..."

14. As regards the interpretation placed on the words "sufficient grounds" it is observed as follows at page 158 (of Bom LR) : (at p. 124 of AIR) of the same report:

"... Although the expression "sufficient grounds" necessarily included the

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

The finding of the Subordinate Judge that the sale-proclamation was not served at the site is a pure finding of fact which cannot be disturbed in revision. If the finding is accepted, clearly there was material irregularity in publishing the sale. There is also no dispute that Opposite Party No. 1 sustained substantial injury on account of sale of a valuable property at a shockingly low price. This injury was caused to him by reason of the irregularity.

On the aforesaid analysis the sale is bound to be set aside under Order 21, Rule 90, C. P. C. even if fraud in publishing the sale is not established. Mr. Rath does not accordingly assail the conclusion of the lower appellate court that the sale is liable to be set aside under Order 21, Rule 90, C. P. C.

3. Under Article 166 of the Limitation Act, 1908 (hereinafter referred to as the Old Act), the period of limitation to set aside a sale in execution of a decree including any such application by a judgment-debtor was thirty days from the date of the sale. The sale having taken place in 1960, Article 166 of the Old Act applied and the application under Order 21, Rule 90, C. P. C. having been filed on 11-4-64, about four years after, is barred by limitation unless time is saved under Section 17 of the New Act

4. Section 17 of the New Act, so far as relevant, runs thus:

17. (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act—

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid

(c) x x x

(d) x x x

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; x x x x

Section 18 of the Old Act has been recast in Section 17 of the New Act on the lines of Section 26 of Limitation Act, 1939 of the United Kingdom. The expression "could with reasonable diligence have discovered it" has been newly introduced in Section 17 which was not a part of Section 18 of the Old Act.

5. To decide whether in the facts and circumstances of this case, opposite party

No. 1 is entitled to the benefits of Section 17 of the New Act, it is necessary to examine the scope and ambit of Section 17. Before an applicant takes advantage of the section, the onus is on him to plead and prove fraud.

Order 6, Rule 4 lays down that in all cases in which the party pleading relies on fraud, particulars with dates and items, if necessary, shall be stated in the pleading. Order 7, Rule 6 requires that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed. The same principle applies to an application. As to the quantum of proof, the Judicial Committee in *Satish Chandra v. Satis Kantha Roy*, AIR 1923 PC 73 laid down thus:

"Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them — proved by established facts or inferences, legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires the every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterious knave would escape".

The same view was taken in *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co Ltd.*, AIR 1940 PC 98 and *Narayanan v. Official Assignee, Rangoon*, AIR 1941 PC 93. Fraud like any other charges of the criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion or conjecture.

Therefore opposite party No. 1 must, in the first instance establish that the petitioner was guilty of fraud in the matter of suppression of the sale-proclamation

6. If fraud is established, then the onus would shift to the petitioner to prove that influence of the fraud has ceased to operate, or that opposite party No 1 could have with reasonable diligence discovered the fraud. In *Rahimbhoy v. C. A. Turner*, (1893) 20 Ind App 1 (PC) their Lordships of the Judicial Committee observed thus:

"Their Lordships consider that when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute fraud, at a time

which is too remote to allow him to bring the suit".

This has been consistently followed in all subsequent Indian decisions. In *Narayan Sahu v. Damodar Das*, 16 Cal WN 894 Sir Lawrence Jenkins made the following observations

"But it was a saying of an early Chancellor, that frost and fraud end in foul; and in this lies the truth of the matter. Fraud at any rate the class of fraud with which we are here concerned, is a continuing influence and until that influence ends, it retains its power of mischief". The fraud referred to in that case was regarding the fraudulent concealment of the sale-proclamation as in this case, and the application under Order 21, Rule 90 had been filed invoking the aid of Section 18 of the Old Act. A Full Bench of the Calcutta High Court in *Biman Chandra v. Promotho Nath*, AIR 1922 Cal 157 (FB), reviewed the entire position and followed the aforesaid view. Their Lordships held that a person who desired to invoke the aid of Section 18 of the Old Act must establish that there was fraud. Once that was established, the burden would shift to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. It is to be emphasised that such knowledge must be clear and definite of the facts constituting the particular fraud. It is not sufficient to show that the applicant under Order 21, Rule 90 had some clues and hints which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of fraud.

If opposite party No. 1 is successful in establishing that the petitioner was guilty of fraud in suppressing the sale-proclamation, the onus would shift to the petitioner not merely to establish that opposite party No 1 had a vague knowledge or opinion of the sale but that he had a full knowledge of all the facts resulting in the sale.

7. It is, therefore, necessary to examine whether opposite party No. 1 has established that the auction-purchaser or her husband were parties to the fraudulent suppression of the sale-proclamation as a result of which opposite party No 1 did not know about the sale. The discussion of the learned Subordinate Judge on this part of the case may be extracted.

"It is peculiarly strange that to bid for such valuable property there was no contesting bidder. The only bidder is the wife of the judgment-debtor No 1 who is a registered clerk of an Advocate of the Local Bar. The witness to the publication of sale notice — Ram Chandra Naik is also a Muharir. The drummer is also not an outsider but is sweeper of the court. The other witness is also the

law agent of the Balasore Municipality. This will show that all these persons, frequenting courts, joined hands, but one of them i.e. the law agent of the Municipality forsook them at last and deposed that while returning from Sri K. M. Das's (Advocate of the Municipality) house, the peon met him on the way and asked him to sign as witness and accordingly he signed in Ext. 5 the proclamation at Ex. 5(a)".

Mr. Rath contends that this finding is not based on evidence, and even if it is accepted, it does not establish suppression of the sale-proclamation at the instance of the petitioner or her husband. The contention is well founded. Mr. Dasgupta was called upon to collate the entire evidence in the case which would establish the association of the auction-purchaser or her husband in the fraudulent suppression of the sale-proclamation. He was constrained to admit that there was no such evidence. The statement of Mr. Dasgupta is correct as would appear from the deposition of opposite party No. 1 himself, which was completely overlooked by the learned Subordinate Judge. He stated thus.

"I do not know anything about the collusive actions of the decree-holder and my brother". There is not a single sentence in the evidence of Radha Kamal Das (P. W. 1) to suggest any part to his elder brother or his wife in the matter of fraudulent suppression of summons, if it was so. Other witnesses examined on his behalf also do not make a single statement that the auction-purchaser or her husband approached either the process-server or the witnesses to the sale proclamation to get it suppressed or to obtain their signature falsely at other places. There is, therefore, no evidence on record that the auction-purchaser or her husband were parties to any fraud. Fraud has not been established at all much less beyond reasonable doubt.

8. In view of the aforesaid conclusion, the second question, whether influence of fraud came to an end, does not arise for consideration. Mr Rath's argument may, however, be noticed. He contends that both in the application under Order 21, Rule 90, C P. C as well as in Court, Opposite Party No. 1 admitted that he had knowledge of the sale when the summons in the criminal case was served on him on 28-2-64. The application under Order 21, Rule 90 was filed on 11-4-64. It is accordingly contended that the application was filed beyond 30 days from the date of the knowledge of fraud, and that unless opposite party No. 1 explains that with reasonable diligence he could not avoid each day of subsequent delay, the application is barred by time. The contention, though ingenious, has no substance and is directly contrary to the

legal position already analysed by me. Knowledge of fraud must not be vague but clear and definite of all facts constituting the fraud. Both in the application under Order 21, Rule 90 and in his deposition, opposite party No 1 stated that he had knowledge of the sale on 28-2-64 from the summons in the criminal case. The summons merely refers to purchase of the disputed property by the petitioner in an auction sale. It does not give any definite knowledge to opposite party No. 1 as to how and when his property was purchased by the petitioner. Necessarily he had to make inquiry. He went to Court and made inspection of the records. In course of so doing about fifteen days more elapsed. There cannot be any escape from the conclusion that after he got vague knowledge of the sale, with due diligence he pursued the inquiry and until he got information by inspection on 18-3-64, the influence of the fraud on him did not come to an end. The second contention of Mr. Rath has therefore no force. If I had held that the petitioner or her husband were guilty of fraudulent suppression of the sale proclamation, I would have held that under Section 17 of the New Act, opposite party No. 1 would have been entitled to the benefit of the entire period and the application under Order 21, Rule 90 C. P. C. would have been in time.

9. The next question for consideration is whether the finding of fraud recorded by the lower appellate Court can be interfered with in revision under Section 115, C. P. C. As has been already stated, there is no evidence that the petitioner or her husband were guilty of fraudulent suppression of the sale-proclamation. Even if all the facts found by the learned Sub-Judge are accepted, they do not lead to the conclusion of fraud. His judgment is therefore contrary to law.

In *Pandurang v. Maruti*, AIR 1966 SC 153 the powers of this Court under Section 115 have been fully analysed. If a subordinate Court itself commits error of law and the said error has relation to the question of jurisdiction of the Court to try the dispute, then the High Court can interfere. It was held therein that a plea of limitation or of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on those pleas in favour of the party which raises them would oust the jurisdiction of the Court. An erroneous decision on these pleas can be said to be concerned with the question of jurisdiction falling within the purview of Section 115, C. P. C.

The learned Subordinate Judge committing an error of law on the question of fraud gave himself a jurisdiction to try the application under Order 21, Rule 90,

C. P. C. which did not vest in him. Interference in civil revision is accordingly justified.

10. In the facts and circumstances of this case a question whether a purchase by the auction-purchaser enures to the benefit of opposite party No. 1 under Section 90 of the Trusts Act would ordinarily arise. But such a question is not germane to an application under Order 21, Rule 90, C. P. C. and is beyond its scope. It is, therefore, unnecessary to have any discussion on that question.

11. In the result, the judgment of the learned Subordinate Judge is set aside and the application under Order 21, Rule 90, C. P. C. is dismissed. The Civil Revision is allowed; but in the circumstances, parties to bear their own costs throughout.

K.S.B.

Application dismissed.

AIR 1969 ORISSA 67 (V 56 C 28)

G. K. MISRA, J.

Bairagi Charan Mohanti, Appellant v. Basanta Priya Devi and others, Respondents.

Second Appeal No 454 of 1964, D/- 6-8-1968 from decision of 2nd Addl. Sub-J., Cuttack, D/- 28-4-1964.

(A) Civil P. C. (1908), Ss. 100-101 — Plea of "benami" — It is mixed question of law and fact — Cannot be raised for first time in second appeal. (Para 3)

(B) Civil P. C. (1908), S. 105 and O. 41, R. 25 — Order of remand illegal — Bar under S. 105(2) does not apply.

No appeal lies against an order of remand under O. 41, R. 25. However, Sub-section (2) of S. 105 is no bar where the order of remand is an irregularity affecting the decision of the case. Such a point can be urged where the decree is appealed from. (Para 5)

(C) Tenancy Laws — Orissa Tenancy Act (13 of 1948) Ss. 228 and 228-A — Civil P. C. (1908), O. 21, Rr. 89 and 90 — Suit to set aside sale—Bar under Rules.

Section 228 of the Act corresponds to Order 21, Rules 89 and 90 C. P. C. Section 228-A more or less corresponds to Order 21, Rule 92, Order 21, Rule 92 sub-rule (3) corresponds to sub-section (4) of Section 228-A. It says that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. A suit to set aside a sale in execution on grounds other than those covered by Rules 89, 90 and 91, is not within the prohibition of sub-rule (3) and is, therefore, not barred by it. If the sale is at-

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tacked on wider grounds of fraud not covered by Rule 90, or is attacked on ground of want of jurisdiction, a suit to set aside such a sale is not barred by this rule. AIR 1953 Mad 683 and AIR 1925 All 146, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1969) AIR 1969 Orissa 63 (V 56)=

Civil Reyn No. 288 of 1966 D/- 23-

7-1968, Smt. Brajabala Das v.

Radhakamal Das

7

(1953) AIR 1953 Mad 683 (V 40)=

ILR (1953) Mad 1143, Vasudeva Kavuri

v. Mani Naicka

6

(1925) AIR 1925 All 146 (V 12)=

ILR 47 All 217, Bhagwan Das v.

Suraj Prasad

6

H. G. Panda, for Appellant; L. K. Dasgupta and P. Mohanty, for Respondents.

JUDGMENT: The suit had been filed in respect of A and B schedule lands and was decreed in respect of A schedule property. No appeal was filed and the matter became final. Only B schedule property constitutes the subject-matter of the second appeal. Facts relating to B schedule are stated hereunder.

Defendant 1 is the recorded tenant of B schedule property with an area of 0.57 acre. On 1-5-46 a rent suit filed by the landlord against defendant 1 in respect of this property was decreed. On 30-9-46 defendant 1 executed an unregistered kabala in respect of this property in favour of the plaintiff. On 31-3-48 B schedule property was sold in court auction in Execution Case No. 1110 of 1947-48 in execution of the decree for rent. Defendant 3 purchased it in court auction. On 1-6-48 plaintiff filed an application under Section 228 of the Orissa Tenancy Act (hereinafter referred to as the Act) for setting aside the auction sale on the ground of material irregularity and fraud in publishing and conducting the sale. Plaintiff filed T. S. No. 44/49 against defendant 1 for specific performance of the unregistered kabala dated 30-9-46 and the suit was decreed on 9-2-51. On 17-12-51 the Court executed the sale deed (Ex. 2) in favour of the plaintiff on behalf of defendant 1 in Execution Case No. 135/51. On 4-8-52 the Executing Court dismissed the application under S. 228 of the Act (Ex. 10). It held that the sale proclamation had not been published in the locality and there was material irregularity in conducting the sale and that the property was undervalued resulting in substantial injury. It, however, dismissed the application on the finding that the plaintiff had no interest in the disputed land till 17-12-51 when the sale deed (Ex. 2) was executed by the Court in her favour. She filed Execution Appeal No. 38 of 1952-53 which was dismissed on 22-12-52 (Ex. 9). The appellate Court recorded many queer findings. It held that the kabala, though

executed on 17-12-51 and registered on 20-12-51, took effect from 30-9-46, the date of execution of the unregistered kabala, and the plaintiff was to be deemed to be the tenant on that date. According to it, the decree for arrears of rent was a money decree and it did not affect plaintiff's interest. It, however, held that the plaintiff ought to have filed an application under Order 21, Rule 90, C. P. C. and not under Section 228 of the Act which did not apply unless the sale was in execution of a rent decree. As the application under Section 228 had been filed beyond thirty days, it dismissed the application as being barred by limitation. Being disappointed plaintiff filed the present suit on 2-11-53 for declaration of title, confirmation of possession and permanent injunction, or in the alternative, for recovery of possession. Defendant 3 alone contested the suit.

The learned Munsif recorded the following findings; (i) Title did not pass to the plaintiff prior to 17-12-51, the date of execution of Ex. 2. Plaintiff's purchase could not prevail against the purchase by defendant 3 in auction sale; and (ii) Plaintiff was in possession but without title. He accordingly dismissed the suit without costs.

In appeal filed by the plaintiff, the only point urged was that the purchase by defendant 3 in court auction was vitiated by fraud and, as such, defendant 3 derived no title. It is to be noted that initially fraud was not pleaded in the plaint and no issue was framed thereon. The learned Sub-Judge entertained this ground, framed an issue on the question of fraud and directed the trial Court to allow the plaintiff to amend the plaint on the question of fraud and to give full opportunity to the parties to lead evidence and then to return a finding. Obviously this power was exercised under Order 41, Rule 25, C. P. C. The appeal was kept pending in the file of the lower appellate Court until the finding on the question of fraud was returned by the trial Court. The trial Court in accordance with the aforesaid direction allowed the plaint to be amended. Para 10 of the plaint mentioned the particulars of fraud and an additional written statement was filed denying fraud. The only additional evidence, after remand, on the question of fraud was that P. W. 1, D. W. 1 and D. W. 3 were recalled and further examined. The trial Court returned a finding that fraud was committed. The lower appellate Court affirmed that finding and passed a decree in favour of the plaintiff in respect of B schedule property. Plaintiff's possession was confirmed and a permanent injunction was issued against defendant 3. Against the appellate decree, the second appeal has been filed by defendant 3.

2. Mr. Panda in support of the appeal raised the following contentions:

(i) The learned Sub-Judge exercised his jurisdiction illegally in framing an issue on the question of fraud which was not in the original plaint and in remanding the case under Order 41, Rule 25, C. P. C., and

(ii) Accepting the entire evidence on record, no fraud has been established. All that the plaintiff purported to have proved was material irregularity and fraud in publishing or conducting the sale. The auction sale cannot be set aside. Section 228-A, sub-section (4) of the Act is a bar to it unless fraud, other than those mentioned in Section 228 of the Act, is established.

Both the contentions require careful examination.

3. Before dealing with Mr. Panda's argument, it would be proper to dispose of an argument of Mr. Dasgupta that the purchase by defendant 3 in Court auction was benami for defendant 1. Such a plea was never canvassed before the Courts below who have recorded no findings thereon. The plea is not a pure question of law but a mixed question of law and fact which cannot be permitted to be raised for the first time in second appeal. It is accordingly rejected.

4. The first contention of Mr. Panda that the learned Sub-Judge exercised jurisdiction illegally in framing an issue on the question of fraud, when there was no pleading, is well founded. All the contentions canvassed before the trial Court were abandoned before the lower appellate Court and a new point on the question of fraud was raised for the first time. There was no justification in framing an issue and directing the trial Court to allow the plaint to be amended and to give full opportunities to the parties to lead evidence on the question of fraud. An altogether new case had to be tried.

This very argument was advanced before the learned Sub-Judge. He rejected it by saying that as defendant 3 did not file any revision against his order remanding the case under Order 41, Rule 25, C. P. C., the point was not maintainable. So far as the Sub-Judge is concerned, his view is correct. After having passed that order, he had subsequently no power to review his own judicial order and take a different view while disposing of the appeal finally. His view is, however, subject to attack in second appeal.

5. Section 105, C. P. C. runs thus—

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any

error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

No appeal lies against an order of remand under Order 41, Rule 25, C. P. C. Sub-section (2) of Section 105 is no bar in this particular case for urging the illegality of the remand order in the second appeal. Here the remand order is an irregularity affecting the decision of the case. Such a point can be urged where the decree is appealed from.

6. Even assuming that the learned Sub-Judge exercised jurisdiction properly in giving opportunity to the plaintiff to plead and prove a case of fraud, he should not have overlooked Section 228-A, sub-section (4) of the Act which lays down that no suit to set aside an order made under this section shall be brought by any person against whom such order is made. The order made under Section 228-A, sub-section (1) is to confirm the sale whereupon the sale shall become absolute where no application is made under sub-section (1) of Section 228 within thirty days from the date of sale or where such application is made and disallowed.

In this case, an application had been made under Section 228 of the Act and it had been disallowed resulting in confirmation of the sale which became absolute. Such a sale cannot be set aside by the plaintiff against whom the order was made under sub-section (4) of Section 228-A.

Section 228 of the Act corresponds to Order 21, Rules 89 and 90, C. P. C. Section 228-A more or less corresponds to Order 21, Rule 92, Order 21, Rule 92 sub-rule (3) corresponds to sub-section (4) of Section 228-A. It says that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. It has been held that a suit to set aside a sale in execution on grounds other than those covered by Rules 89, 90 and 91, is not within the prohibition of sub-rule (3) and is, therefore, not barred by it. If the sale is attacked on wider grounds of fraud not covered by Rule 90, or is attacked on ground of want of jurisdiction, a suit to set aside such a sale is not barred by this rule. *Vasudeva Kavu v. Maninaika*, AIR 1953 Mad 683 and *Bhagwan Das v. Suraj Persad*, AIR 1925 All 146. It is not necessary to multiply authorities. There is hardly any conflict on this point. Mr. Dasgupta rightly did

not dispute the correctness of this proposition.

7. The next question for consideration is whether fraud on grounds wider than those pleaded under S. 228 of the Act has been proved in this case. The following facts in support of fraud are placed by Mr Dasgupta. Defendant 3 is the cousin of D. W 1, the gumasta of the landlord, at whose instance the decree for rent and the execution sale took place. Both of them live in the same house. Their village is two miles away from the land in dispute. From these facts and the fraudulent suppression of sale proclamation, even if accepted as true, a case of fraud on the wider footing has not been established. The fraud in the publication or conduct of sale is not enough to set aside the auction sale by a suit. It has been held by this Court in Smt. Brajabala Das v. Radhakamal Das, Civil Revn. No. 288 of 1966= AIR 1969 Orissa 63 that fraud like any other charges of criminal offence, whether made in Civil or Criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion or conjecture. Even if defendant 3 and D. W. 1 are cousins and remain in the same house, it does not follow that defendant 3 was a party to the fraud resulting in suppression of the sale proclamation. Defendant 3 cannot suffer if the property was sold out by fraudulent suppression of the sale proclamation at the instance of the decreeholder. It must be established that the auction-purchaser (defendant 3) was a party to the entire scheme of fraud and purchased the property in pursuance of that scheme. The fact that the land is at a distance of two miles from the village of defendant 3, without anything more, does not establish any element of fraud. No question was put to defendant 3 as to why he purchased the land at a distance of two miles. He could have offered his own explanation. The judgment of the learned Sub-Judge setting aside the sale on ground of fraud, coming within the purview of O 21, R. 90, C. P. C. or of S 228 of the Act and not on wider ground of fraud, is contrary to law.

8. In the result, the judgment of the lower appellate Court is set aside and the plaintiff's suit is dismissed. The second appeal is allowed. In the circumstances, parties to bear their own costs throughout.

MVJ/D.V.C.

Appeal allowed.

AIR 1969 ORISSA 70 (V 56 C 29)

B. K. PATRA, J.

Anadi Sahu and others, Petitioners v. Narendra Naik, Opposite Party.

Criminal Revn. No 177 of 1967, D/- 13-8-1968, from order of Addl. S. J. Cuttack, D/- 19-12-1966.

(A) Penal Code (1860), S. 379 — Conviction under for cutting and carrying away crops raised by complainant — Defence of bona fide claim of right to land — Mere putting up such a claim not sufficient — Several attempts made either by accused or their predecessor in title to deny that complainant is a bhag tenant of disputed land and to dislodge him therefrom, had failed — Crops found to be raised by complainant — No circumstance shown that accused might have entertained honest belief of still having a right to be in khas possession of disputed land — Held that the act in question was another attempt by accused to forcibly dislodge complainant from his possession of disputed land and cutting of crops was not in bona fide exercise of right to land. Case law discussed. (Paras 5, 8)

(B) Criminal P. C. (1898), S. 439 — Penal Code (1860) S. 379 — Conviction for cutting and carrying away crops raised by complainant — Lower Courts on consideration of evidence finding that the complainant was in possession of land as a bhag chasi and had raised crops — No interference in revision. (Para 4)

Cases Referred: Chronological Paras (1968) AIR 1968 Ker 126 (V 55)=

1968 Cri LJ 625, Pappu v.

Damodaran

6

(1965) AIR 1965 SC 585 (V 52)=

1965 (1) Cri LJ 496, Chandi Kumar

Das Karmakar v. Abanidhar Roy

6

(1965) 31 Cut LT 749, Sita Bewa v.

Bimbadhar Rout

6

K. M. Swain, for Petitioners; P. K. Dhal and S. C. Sahu, for Opposite Party.

ORDER: This application in revision is directed against an appellate order of the Additional Sessions Judge, Cuttack, upholding the conviction of the petitioners under Section 379 I. P. C. and the sentence of fine of Rs 250 imposed on each of them. 14 persons including the petitioners were placed on trial before a Magistrate, First Class, Cuttack, on a charge under Section 379 I. P. C. on the allegation that on 23-11-63 between 7 A. M. and 4 P. M., they being armed with lathis, rifles and tentas carried away paddy crops worth Rs 1300 from plot No. 780 which was in the possession of the opposite party Narendra Naik, and on which the latter had raised paddy crops. All the 14 persons were convicted in the trial court and while each of the

3 petitioners was sentenced to pay a fine of Rs 250 and in default to undergo R. I. for 2 months, the remaining accused persons were sentenced to pay a fine of Rs. 25 each and in default to undergo R. I. for 15 days. On appeal, the Additional Sessions Judge, Cuttack, while confirming the conviction of the petitioners, acquitted the remaining 11 accused persons.

2. Plot No. 780 in mouza Karanji measures 8 acres and it is its northern half of 4 acres which is in dispute in the litigation. This land stood recorded in the settlement papers in the name of one Durga Charan Panda and it is the case of the opposite party Narendra Naik that long ago he got these 4 acres of land on bhag chas basis from Durga Charan. After Durga Charan's death, his two brothers Kanhu Panda and Krushna Prasad Pande jointly inherited the 4 acres of land and on their death it devolved jointly on their widows Janaki Dibya and Nilamani Dibya. In a family settlement between the two widows, the entire 4 acres of land fell to the share of Janaki Dibya. On 22-6-59 Janaki Dibya sold one acre out of this land under the registered sale deed (Ext. 3) in favour of petitioner No 1 Anadi Sahu and 2 acres out of this land under the registered sale deed (Ext. A) in favour of the uncle of Kailash petitioner No. 3. Petitioner No. 2 Ganesh is the son of petitioner No. 1 Anadi. The remaining one acre of land was sold by Janaki to one Jagabandhu Tripathy from whom the respondent Narendra purchased it under the kabala Ext. 1 on 29-4-63.

3. Undoubtedly, therefore, the petitioners have acquired title in respect of 3 acres out of the 4 acres of the disputed land under the kabalas Exts A and B, and it is on the strength of these kabalas that the petitioners now claim to be in khas possession of the 3 acres of land and to have raised paddy crops thereon during the disputed year. Their case is that the opposite party Narendra Naik was neither in possession of the land nor did he raise any crop thereon in 1963.

4. Both the courts below, however arrived at the finding that it is the opposite party Narendra who was the bhag chasi in respect of the disputed land and was in khas possession thereof and had raised the crops on that land in 1963, and that the petitioners had cut and carried away the crops. The contention of the petitioners is that in the facts and circumstances of the case, this finding is not correct and even if it is correct, the petitioners must be deemed to have cut the crops in bona fide exercise of their right to the land. In view of the fact that both the courts below have, on a consideration of the evidence, come to the finding that it is the opposite party who

as bhag chasi was in possession of the land and had raised the crops on the land during the year 1963 and as I find that there is evidence to support the conclusion, I do not find sufficient ground to disturb that finding. The only question for consideration, therefore, is whether the plea of the petitioners that they cut the paddy in bona fide exercise of their right to the property can be sustained.

5. In support of the contention that there was scramble for possession regarding this land, reliance is placed on behalf of the petitioners on several documents filed in this case to show that there was litigation between the parties regarding this land. The first of these documents is Ext. 2 which is an order passed by the O. T. R. Court in a case under Section 14 of the O. T. R. Act instituted by the opposite party Narendra Naik against Durga Prasad Pande, Janaki Dibya and Nilamani Dibya. Section 14 of the O. T. R. Act provides that if in contravention of the provision of the Act a landlord or his agent interferes in any way with the tenant's cultivation of the land, the Collector may, after necessary enquiries, impose on such landlord or his agent a penalty. In that case Narendra Naik (who is opposite party in this case) claimed that he was the bhag tenant in respect of the 4 acres of land appertaining to plot No 780 and complained that the landlords were disturbing his possession. Ext. 2 shows that while Janaki Dibya, opposite party therein, admitted that Narendra was a bhag chasi, opposite parties Nos 1 and 3 disputed the existence of such relationship.

The court held that Narendra Naik was the bhag chasi and that the landlord was Durga Charan alone and that the latter had not interfered with his possession. During the pendency of the aforesaid case, a proceeding under S 145 Cr P C. in respect of this very land appears to have been started by the Sub-divisional Magistrate, Cuttack, against Narendra Naik and Sudarsan Tripathy, the authorised agent of Durga Charan Pande. As against an interlocutory order passed by the Magistrate in that case, Sudarsan Tripathy filed a revision in the High Court (Ext. 3). Ext. 4 a copy of the order sheet of the High Court shows that on 20-12-1946 Mr. Dasgupta, Advocate appearing for Sudarsan Tripathy submitted that the criminal revision had become infructuous and might be dropped and it was urged by the parties that Narendra Naik had actually grown crops on the disputed land, the position of Durga Charan being only that of a landlord and that Narendra might, therefore, harvest the crops. In the year 1960, the bhag tenant Narendra Naik deposited the rent in court payable by him in respect of the

disputed land to the landlord Krushna Chandra Mangaraj (uncle of petitioner No. 3). Ext. 6 shows that Krushna Chandra Mangaraj had raised some objections, but the Court overruled his objections and directed him to accept the rent deposited in court.

It will thus be seen that repeated attempts made by the petitioners or their predecessor-in-interest to deny that the opposite party is a bhag tenant in respect of the disputed land and to dislodge him therefrom had failed. It is nobody's case that since after Ext. 6 there was any reconciliation between the parties or that the opposite party had amicably given up possession of the disputed land. It is argued on behalf of the petitioners that Ext. 1 disproves the opposite party's case that he was a bhag tenant, because it is argued that if the respondent was really a bhag tenant in respect of the 4 acres of land claimed by him, he would not have purchased under the kabala dated 29-4-63 one acre out of the disputed land from Jagabandhu Tripathy who in his turn had purchased it from Janaki Dibya. There is absolutely no force in this contention, because the opposite party although a bhag tenant in respect of that one acre of land, could still purchase the landlord's share from Jagabandhu Tripathy.

6. In support of the petitioners' case that even if it is found that the opposite party had raised the crops, their action in cutting the same should be deemed to be in bona fide exercise of their right to the land, reliance is placed on the decisions reported in *Sita Bewa v. Bimbadhar Rout*, (1965) 31 Cut LT 749; *Chandi Kumar Das Karmarkar v. Abanidhar Roy*, AIR 1965 SC 585 and *Pappu v. Damodaran*, AIR 1968 Ker 126. In *Sita Bewa's case*, (1965) 31 Cut LT 749, Das J. held that to sustain a conviction under Section 379, it is necessary to prove the dishonest intention to take out property out of the possession of another, and removal based upon the assertion of a bona fide claim of right does not constitute theft. The claim of right, however, must be an honest one though it may be unfounded in law or may not stand the test of a Civil Court. If, however, the claim is not made in good faith, but is a mere colourable pretence to obtain or to keep possession of such property, it will not be available as a defence.

Whether a claim is bona fide or not is necessarily to be examined in the background of the facts of each case. Mere putting up such a claim would not be sufficient. In that case it was found that the disputed property was claimed by the accused persons as a part of their ancestral property and it was admitted by one of the prosecution witnesses that the property had not been partitioned. In such circumstances, the court held that the

claim put forward by the accused persons cannot be said to be unfounded and rejected as a mere colourable pretence. In AIR 1965 SC 585 their Lordships held that—

"The ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak. If there be in the prisoner any fair pretence of property or right or if it be brought into doubt, the court will direct an acquittal".

7. That case related to the catching of fish by the accused persons from a tank which the complainant claimed to be in his possession. That tank belonged to the Dutta family under whom the accused persons were recorded as tenants in respect of the property. The complainant's case was that the interest of the Dutta family was sold in a revenue sale and was purchased by Sailesh Chandra Banerjee and that Banerjee had obtained possession of that tank after a decree in a title suit filed by him against Duttas in which the accused persons were also parties and that thereafter the tank was leased out by Sailesh Chandra Banerjee to the complainant for 3 years. The decree which Banerjee obtained was however an ex parte decree and the accused persons filed an application to set aside that ex parte decree and it was set aside.

An application filed by Banerjee in the High Court to revise this order was dismissed. During these proceedings Banerjee had also given an undertaking that he would not cut trees on the bank till the disposal of the case thereby admitting that there was a dispute in respect of the ownership and possession of the tank.

It is in this background that their Lordships held that although by the setting aside of the ex parte decree the possession would not revert without proceedings for restitution, still the circumstances undoubtedly were such that the accused persons might well have thought that their possession to the tank stood restored. There was thus a real dispute between the parties and in the circumstances it was held that it was not improper that after setting aside the ex parte decree and giving an undertaking by Sailesh Chandra Banerjee referred to above, the accused were entitled to as re-

corded tenants to catch fish in the tank. Hence they were ordered to be acquitted. The same principle was reiterated in a different form in the Kerala case referred to above.

8. In the case before me, several attempts were made either by the petitioners or their predecessor-in-title to deny that the opposite party is a bhag tenant in respect of the disputed land and to dislodge him therefrom. These attempts have failed. I find that the opposite party is a bhag tenant and is entitled to remain in possession of the land. No circumstance has been brought to my notice on the basis of which the petitioners might have entertained an honest belief that they have still a right to be in khas possession of the land. It has been found by the courts below that the opposite party raised the crops during the disputed year. It, therefore, appears to me that the present act of the petitioners is yet another attempt on their part to forcibly dislodge the opposite party from his possession of the disputed land.

9. In the result, I find no merit in this petition which is hereby dismissed

LGC/D.V.C.

Petition dismissed.

AIR 1969 ORISSA 73 (V 56 C 30)

S. K. RAY, J.

Sankar Behera and another, Petitioners v. State, Opposite Party.

Criminal Revn. No. 537 of 1966, D/-9-5-1968, from order of S. J. Balasore D/-1-8-1966.

Criminal P. C. (1898), S. 367 — Appreciation of evidence — Duty of Court — Commission of offence after pre-planning — Currents and cross-currents of motives and emotions — Atmosphere of party feud — Test of truth would be mute circumstances — (Evidence Act (1872), S. 3).

In criminal cases of magnitude, like dacoity where the drama of commission of offence and its detection has been played over a wide range of background of pre-planning and preparation followed by perpetration of the crime and lodging of information at the police station and commencement of police investigation culminating in a charge-sheet, and further there are currents and cross-currents of motives and emotions, engulfing the entire drama in an atmosphere of party feud, the sure test of truth would be the mute circumstances which never lie. When, persons accused of these acts are police officers, the character and conduct of police investigation should be subjected to keen judicial scrutiny. If such investigation is proved mala fide as a

result of which some obvious facts have not been proved or brought out which might have given corroboration to the defence case, the duty of the Court is to direct an acquittal. AIR 1956 SC 526, Relied on. (Para 8)

Cases Referred: Chronological Paras

(1956) AIR 1956 SC 526 (V 43)=1956

Cri LJ 930, Santa Singh v. State of Punjab

8

R. Das and P. K. Das, for Petitioners, Standing Counsel, for Opposite Party.

ORDER: The two petitioners were convicted under Section 395, Indian Penal Code, by Sri K. S. Misra, Assistant Sessions Judge, Balasore, in Sessions Trial No. 40/3/6 of 1964-65. Petitioner No. 1 was sentenced to R. I. for two years and petitioner No. 2 to undergo R. I. for four years. On appeal, the conviction and sentence of the petitioners were maintained by Sri G. K. Misra, Sessions Judge, Balasore, in Criminal Appeal No 129/65 by his judgment dated 1-8-66.

2. There were 16 accused persons put on trial of whom only these two petitioners were convicted and sentenced as aforesaid.

3. The prosecution case is that on the night of 18th February 1964, or in the small hours of the morning of 19th February, the two petitioners and a number of others entered the Khamar house of P. W. 1 in their attempt to loot the paddy stocked on the threshing floor. This dacoity was a pre-planned one and P. W. 2, the informant, being aware of this plan which had been decided in a meeting on the evening previous to the day of occurrence, informed the police party and brought them to the place of occurrence in time to prevent the accused persons from successfully committing the offence of dacoity.

The further story of the prosecution is that while the accused persons were actually on the threshing floor of P. W. 1 and were engaged in the act of filling up the gunny bags with paddy, P. W. 2 arrived there suddenly accompanied by the police patrol party consisting of P. W. 13, the Havildar and P. W. 14, an Assistant Sub-Inspector of Police. P. W. 13 who was armed with a gun fired a shot which chopped off a number of fingers of petitioner 1. F. I. R was lodged on 19-2-64 at Bensada police station which is at a distance of about two miles from the place of occurrence. The F. I. R contains only the names of these two petitioners and there was no mention of names of the other accused persons as they could not be identified.

4. The defence case is that there is a swamp near P. W. 1's Khala which is an ideal place for bird snatching and other kinds of hunting. This P. W. 13 on

the alleged date of occurrence was near the swamp for the purpose of hunting. He fired a shot and accidentally injured petitioner 1, and in order to save himself from the consequences of his act, if the truth were known, he with the help of P. W. 1 who is on inimical terms with the petitioners, has foisted this false case.

5. Learned counsel for the petitioners urged before me a number of circumstances appearing in the evidence which have not been considered by the lower appellate court. He also commented that the final court-of-fact has not scanned the evidence of the prosecution witnesses which he should have done, and relying on the evidence of the doctor, P. W. 8, in regard to matters which fall properly within the province of the ballistic expert (P. W. 4), and which was in conflict with the evidence of the latter, assessed the evidence of other prosecution witnesses and discarded the evidence of the two defence witnesses without discussing it on merit.

He has also pointed out some errors of record committed by the lower appellate court, one of such errors being that while the evidence on record showed that P. W. 1 was very much in the vortex of the party faction in the village, the learned Sessions Judge says that there is no evidence of P. W. 1 being involved in any such party faction, and in this respect, he relied upon the evidence of P. Ws. 2, 10, and the I. O., P. W. 17.

6. There are also many telling circumstances appearing in the case which have not been considered and their probative value and significance weighed; and their impact on the assessment of the prosecution evidence and its story has not been judged by the lower appellate court. Some of those circumstances are that the blood-stained earth was seized from the paddy field five cubits away to the south of the Khala and no place in the Khala itself was stained with blood. This is a statement of the I. O. himself. If that is so, the evidence of the prosecution witnesses as to the place of occurrence where the shooting took place has to be scanned in the light of this.

The other circumstance which falls for consideration is that when P. W. 2's story of his knowledge of the pre-planned conspiracy to commit the dacoity is disbelieved, then the other part of his story that he timely informed the police party so as to lead them to the place of occurrence in time, considered in the light of his evidence would be untrue. It is also admitted in the prosecution evidence that there is a swamp near the threshing floor of P. W. 1 which is a place ideal for shooting as would appear from the evidence of P. W. 2 and others. This is a circum-

stance which has considerable bearing on the defence story.

7. The gun used in the case is a Police rifle and the doctor's evidence is that the injuries on petitioner 1 were possible if the shot was fired within a range of 5' and not possible if the range was beyond ten feet. This evidence has been used in corroboration of the prosecution case that the shooting took place in the khala while petitioner No. 1 was in the act of committing dacoity. This evidence, if true would certainly discredit the defence story of accidental shooting while P. W. 13 was on a hunting trip at the swamp and it runs counter to the evidence of P. W. 4 who says that the effective range of the gun is 75 yards and its extreme range is 120 yards and beyond that the speed will be zero.

In view of this evidence of the ballistic expert the doctor's evidence referred to above cannot be explained except that he has exposed his ignorance in such matters. This fact of the evidence of the doctor is not one which appertains to his subject in regard to which he is considered to be an expert. The apparent conflict between the evidence of P. W. 4, the ballistic expert and P. W. 8 the doctor, has been missed by the lower appellate Court, because of the misconstruction and misreading of the evidence of the former. The lower appellate court holds P. W. 4 as saying that the bullet would be effective between 75 to 120 yards which in fact is not so.

The other pregnant circumstances which have been disclosed in the evidence are that there were no rice bags in the khala. The dagger which is said to have been held by petitioner 1 when he was fired upon and which must have dropped on the threshing floor where shooting took place was not seized and no explanation is given for its non-seizure. It is also in evidence that the blood-stained earth which was seized was not sent for chemical examination.

One other circumstance on which stress was laid is the time of examination of petitioner No. 1 by the doctor. The doctor's certificate, Ext. 5 bears the time to be 9-20 P. M. whereas in his deposition he says that he examined the injured at 9.20 a.m. A lot of argument was made on this in pressing forward the defence point of view that the entire case is a concocted one to save the skin of P. W. 13, the Havildar.

8. On a perusal of the judgment of the lower appellate court the first impression gained is that it is unsatisfactory and superficial, and I cannot, understand how so many glaring factors in the case failed to attract his notice and were omitted from his judicial consideration and how the errors of record were committed by him. The misreading of the evi-

dence of the ballistic expert and non-consideration of the many glaring circumstances appearing in the case as detailed above, each one of which has a crucial bearing on the prosecution case or the defence story, are proofs enough of the superficial dealing of the case by the lower appellate court.

In criminal cases of such magnitude, where the drama of commission of offence and its detection has been played over a wide range of background of pre-planning and preparation of one evening followed by perpetration of the crime during same night or the early hours of the next day and lodging of information at the police station about two miles away and commencement of police investigation on the subsequent morning culminating in a charge-sheet, and is packed with currents and cross-currents of motives and emotions, and engulfing the entire drama in an atmosphere of party feud, the sure test of truth would be the mute circumstances which never lie. When, as in this case, accused persons are police officers, the character and conduct of police investigation should be subjected to keen judicial scrutiny. If such investigation is proved mala fide, as a result of which some obvious facts have not been proved or brought out which might have given corroboration to the defence case, the duty of the Court is to direct an acquittal. If any authority is required, it is to be found in AIR 1956 SC 526.

9. In the circumstances, it is impossible to maintain the judgment of the appellate court which must accordingly be set aside and the case sent back to him for rehearing of the appeal. The appellate court will bear in mind all the circumstances enumerated above and consider their impact both on the prosecution case and the defence version. He must read the evidence carefully and must utilise his common sense and not swallow the evidence of the doctor who says that a rifle can cause injury from a distance of five feet and not from a distance of 10 feet.

The Revision is accordingly allowed, the judgment of the conviction and sentence of the lower appellate court is set aside and he is directed to rehear the appeal keeping in mind the observations made above.

HGP/D.V.C.

Revision allowed.

AIR 1969 ORISSA 75 (V 56 C 31)

S. ACHARYA, J.

Anama Rout and others, Petitioners v. Trilochan Das, Opposite Party.

Criminal Revn. No. 600 of 1966, D/- 17-9-1968 from order of Addl. S. J., Cuttack, D/- 17-9-1966.

JL/LL/E949/68

(A) Criminal P. C. (1898), Ss. 423, 367 — Innocence of accused — Presumption as to — Appreciation of evidence — Duty of Court of appeal.

The cardinal principle to be observed in the trial of a criminal case is that the accused should always be considered to be an innocent person till the criminal acts alleged against him are affirmatively and satisfactorily proved. This presumption of innocence continues all throughout the trial and till the disposal of the case in the final Court of appeal. The approach of the Court of appeal should therefore be to assess the entire evidence and the materials before him to see if the case against the accused has been affirmatively proved beyond all reasonable doubts, without being obsessed by the finding of conviction and the sentence passed by the trial Court. On such appreciation of evidence and materials he has to examine the propriety or otherwise of the conviction and the sentence passed by the trial Court.

(Para 4)

(B) Criminal P. C. (1898), S. 367 — Conviction or sentence — Operative portion of judgment — Duty of Courts.

The Courts in the operative portion of their judgments, with regard to conviction or sentence against accused persons under different heads, should state the conviction and sentence in a specific and clear manner, and should bestow some amount of care and attention to see that no ambiguity creeps into their judgments in this regard.

(Para 7)

Cases Referred: Chronological Paras (1943) AIR 1943 Cal 465 (V 30)=45

Cri LJ 71, Abdul Gani v. Emperor 4

(1934) AIR 1934 All 842 (V 21)=35

Cri LJ 1229, Emperor v. Nur

Ahmad

4

Sk. Rahenoma and S. P. Acharya, for Petitioners

ORDER: This revision is against the appellate judgment of the Additional Sessions Judge, Cuttack in Criminal Appeal No 22 C of 1965 confirming the convictions and sentences of the petitioners under Sections 379 and 426 I. P. C., while setting aside their conviction and sentence under Section 504 I. P. C. passed by a Magistrate 1st Class, Cuttack.

2. The prosecution case, in short, is that on 26-6-1964, at about 8 A. M. the petitioners cut the green fence standing on the eastern boundary of the complainant's plot No. 31 in Khata No. 1 of mouza Dhusal. Thereafter, they carried away some cowdung stored on the complainant's land and also removed some Alu and Olua from the said land.

3. The petitioners in pleading not guilty to the charges urged that there was no fence in between the complainant's land and the paddy land of the petitioner No. 1, and that on the date of oc-

currence, the petitioner No. 1 was cutting the branch of a Chakunda tree standing on his own land, but as he did not cut the branches which extended towards the land of the complainant, there was an altercation between the parties, and out of grudge, the complainant filed this false case against them.

4. Mr. Rahenoma, the learned counsel for the petitioners contended, by drawing my attention to paragraph No. 4 of the judgment, that the appellate court made a wrong approach to the case in proceeding to decide the matter on the presumption that the accused (petitioners) persons were guilty of the offences alleged against them. Paragraph No. 4 is as follows:

"It is now to be seen how far the convictions and sentences awarded by the trial court are supported by evidence on record."

On this, it was argued that the appellate Judge proceeded under the assumption that it was his duty only to see if the convictions and sentences passed against the petitioners could be supported on the evidence on record. In support of his above contention, he cited two decisions, namely, *Emperor v. Nur Ahmad* AIR 1934 All 842 and *Abdul Gani v. Emperor*, AIR 1943 Cal 465. It has been held by their Lordships of the Allahabad High Court that:

"The duty of the appellate Court is to review the entire evidence to make up its mind upon that evidence and to reverse the decision of the lower Court if it be satisfied upon a consideration of the evidence that the decision is unjustified. The presumption of innocence with which the accused starts continues right through until he is held to be guilty by the final Court of appeal. If he is acquitted by the Court of first instance the presumption of innocence of course remains. The presumption of innocence is absolute. It is not strengthened by an acquittal nor weakened by a conviction in the trial Court".

Their Lordships of the Calcutta High Court in the above mentioned case held as follows:

"In a criminal appeal it is for the Crown to establish that the judgment of the trial Court is right. The appellate Court must remember that the presumption of the innocence of the accused still persists and that the appellate Court has to satisfy itself that the judgment of the Magistrate was right".

The cardinal principle to be observed in the trial of a criminal case is that the accused should always be considered to be innocent person till the criminal acts alleged against him are affirmatively and satisfactorily proved. This presumption of innocence continues all throughout the

trial and till the disposal of the case in the final Court of appeal. The approach of the Court of appeal should therefore be to assess the entire evidence and the materials before him to see if the case against the accused has been affirmatively proved beyond all reasonable doubts, without being obsessed by the finding of conviction and the sentence passed by the trial Court. On such appreciation of evidence and materials he has to examine the propriety or otherwise of the conviction and the sentence passed by the trial Court.

5. As the learned counsel commented on the appellate Courts' judgment in the manner aforesaid, I considered it desirable to scan the evidence on record apart from going through the judgments of both the Courts below. The prosecution in this case examined only three witnesses, and the appellate Court while discussing the evidence of P. W. 3, committed a mistake in finding that the name of this witness was not mentioned in the complaint petition. P. W. 3, who is named as Tahal Naik in the heading of his deposition in the trial Court, has signed the deposition as "Tahal Kumar Naik" and this name appears as witness No. 4 in the complaint petition filed in this case. He is a disinterested witness and nothing has been elicited from him to show why he should not be believed. The trial Court's opinion regarding this witness is that he "is neither inimically disposed towards the accused nor friendly attached to the complainant" and at another place the trial Court has found that the prosecution witnesses are highly disinterested and defence has failed to impeach their credibility. The appellate Court likewise is of the opinion that the evidence of this witness (P. W. 3) inspires confidence and that he appears to be a disinterested witness. Against P. W. 2 it was alleged that he is a co-sharer but I find that he is just a co-sharer of the entire property in Khata No. 1 without having any interest in the complainant's above-mentioned plot. Having made an independent assessment of the evidence on record, I am satisfied that the offences of mischief and theft alleged against the petitioners have been proved beyond all reasonable doubts. Mr. Rahenoma also has not been able to suggest any satisfactory or compelling reasons for not accepting the evidence of the three prosecution witnesses. As such the convictions under both the sections, namely, Sections 379 and 426 I. P. C. being well-founded are to be maintained.

6. Mr. Rahenoma at last contended that in any view of the matter, the sentence passed against each of the petitioners has been extremely excessive.

7. I find that both the courts below have acted negligently in stating in their

judgments the fine awarded under Section 426 I. P. C. Moreover, there is inconsistency between the statements in the judgment and in the order sheet of the trial Court regarding the imprisonment awarded in default of payment of fine under Section 379 I. P. C. This is an unfortunate state of affair. The Courts below, in the operative portion of their judgments, with regard to conviction or sentence against accused persons under different heads, should state the conviction and sentence in a specific and clear manner, and should bestow some amount of care and attention to see that no ambiguity creeps into their judgments in this regard.

From the order sheet of the trial Court it could be ascertained by me that each of the petitioners has been sentenced to pay a fine of Rs. 80 under Section 379 I. P. C., and Rs. 10 under Section 426 I. P. C. As alleged in paragraphs 3 and 4 of the complaint petition, the complainant in all, has sustained a wrongful loss to the tune of Rs. 50 on account of the removal of cowdung, Alu and Olua from his land, and Rs. 20 on account of the destruction of the eastern fence. Of course, the amount of damage caused to the complainant should not be the only consideration for the sentence to be passed against the accused persons. But in this case considering the facts and circumstances I am of the view that the ends of justice would be served by sentencing each of the petitioners to pay a fine of Rs. 30 (instead of Rs. 80) under Section 379 I. P. C., and in default of payment of this fine to undergo rigorous imprisonment for fifteen days. The sentence passed by the trial Court under Section 426 I. P. C. against each of the petitioners as mentioned above is maintained.

8. With this reduction in the sentence of the petitioners as mentioned above, the revision is dismissed.

SSG/D.V.C.

Petition dismissed.

AIR 1969 ORISSA 77 (V 56 C 32)

G. K. MISRA, J.

Madan Naikani, Petitioner v. Ranjit Mahakur and others, Opposite Parties.

Civil Revn. No. 134 of 1967, D/- 8-10-1968, from order of Sub J., Bargarh D/- 9-2-1967.

(A) Civil P. C. (1908), O. 9, R. 13 — Sufficient cause — That a woman defendant gave birth to a child 6 days before date of hearing was sufficient cause for her absence in Court — Assuming she gave birth to the child 6 days after the date of hearing would make no difference in existence of sufficient cause —

JL/LL/E955/68

Whichever version was true she would be unable to attend Court on date of hearing. (Para 2)

(B) Civil P. C. (1908), O. 9 R. 13, Proviso — Several defendants — Decree in favour of some — Ex parte against others — Setting aside of ex parte decree — Effect — Proviso will not apply.

If a decree is passed in favour of the plaintiff against some of the defendants on contest and against other defendants ex parte and if an application under Order 9, Rule 13 C. P. C. is made by the defendants against whom the ex parte decree has been passed, then the court has ample discretion to set aside the decree against all the defendants. Ordinarily the decree against all the defendants is to be set aside:

(1) Where the decree is joint and indivisible;

(2) Where the decree proceeds on a ground common to all the defendants;

(3) Where the relief to which the applicant is entitled cannot effectively be given except by setting aside the decree against the other defendants also;

(4) When the suit would result in two inconsistent decrees if the ex parte decree is not set aside against the other defendants. (Para 3)

But the word "against" in R. 13 emphasises that the court has jurisdiction to set aside a decree passed against the other defendants and not the decree passed on contest in favour of some of the defendants. Therefore even though there was possibility of two inconsistent decrees being passed, the decree passed in favour of some of defendants cannot be set aside by operation of the proviso. The decree passed against ex parte defendant only remains set aside. AIR 1954 Assam 183 (FB), Rel. on. (Para 5)

Cases Referred: Chronological Paras (1954) AIR 1954 Assam 183 (V 41)=

ILR (1954) 6 Assam 303 (FB),
Khagesh Chandra v. Chandra
Kantal

5

B. Naik, for Petitioner; B. Mohapatra and R. K. Mohapatra, for Opposite Parties.

ORDER: Deceased Gangadhar, father of defendant No. 3, and Dibakar (defendant No. 1) were brothers. Plaintiff No. 1 purchased the A schedule lands for Rs. 400 and plaintiff No. 2 purchased the B schedule lands for Rs. 500 by two registered sale deeds on 30-12-64 from defendant No. 3. The case of the plaintiffs is that Gangadhar died in a separated status from defendant No. 1 and after his death his sole heir defendant No. 3 was in possession of the property. They accordingly prayed for declaration of their title and eviction of defendants 1 and 2 who were interfering with their possession. In the alternative there was

a prayer that a decree for refund of consideration of Rs. 900 with interest is to be passed against defendant No. 3.

Defendant No. 3 filed written statement fully supporting the case of the plaintiffs. Defendants 1 and 2 contested the suit alleging that Gangadhar died in a joint status with defendant No. 1 and the entire joint family property devolved on defendant No. 1 by survivorship. On 14-10-56 defendant No. 1 executed a mortgage bond in favour of defendant No. 2 who was in possession and ultimately he transferred the disputed lands to defendant No. 2 by a registered sale deed on 6-1-65. The case was posted to 23-6-66 for hearing. Defendant No. 3 did not appear and take any steps for adjournment of the case. She was accordingly set ex parte. Plaintiffs and defendants 1 and 2 appeared and gave evidence.

On 27-6-66 the judgment was delivered. The suit was dismissed on contest against defendants 1 and 2 and (decree?) ex parte against defendant No. 3 with a direction that she would refund the consideration of Rs. 900 only.

On 28-7-66 defendant No. 3 filed an application for restoration of the suit. In that application she averred that she gave birth to a daughter 6 days before 23-6-66 when the case was heard and and that she had sufficient cause for non-appearance. The courts below have concurrently found that there was no sufficient cause and accordingly the application for restoration under Order 9, Rule 13 C. P. C. was dismissed. Defendant No. 3 has filed this Civil Revision against the confirming judgment of the lower appellate court.

2. Mr Naik contended that the courts below exercised their jurisdiction with material irregularity in ignoring the important fact that defendant No. 1 himself admitted in his evidence that the petitioner gave birth to a daughter 6 days after the hearing though their original case was that the delivery was long after the hearing. In my view both the courts below exercised their jurisdiction with material irregularity in not properly appreciating the true scope of the case of defendant No. 3. In cross-examination defendant No. 3 (P. W. 1) replied thus:

"It is not a fact I gave birth to the child long after the hearing of the suit". This shows that even by 17-9-60 when the misc. case was heard defendants 1 and 2 were not clear in their mind as to when defendant No. 3 gave birth to a child. Defendant No. 3 is supported by O. P. W. 2 that she gave birth to a child 6 days before the date of hearing. Defendant No. 1 (O. P. W. 1) admitted in examination-in-chief that defendant No. 3 gave birth to a child 6 to 7 days after the date

of hearing. If really defendant No. 3 gave birth to a child 6 days after the date of hearing there was no reason for her to make a false statement that she gave birth to a child 6 days before the date of hearing. I am inclined to accept her version and hold that there was sufficient cause for her absence on 23-6-66.

But even assuming that she gave birth to a child 6 days after the date of hearing it makes no difference so far as the existence of the sufficient cause is concerned. Whether she gave birth to a child 6 days before or 6 days after hardly makes any difference and whichever version is true she would be unable to attend court on the date of hearing. The application under Order 9, Rule 13 C. P. C. must accordingly be allowed and the decree passed against her in favour of the plaintiffs to the effect that she would refund the consideration of Rs. 900 with costs is hereby set aside. The suit must be restored to file to determine the question whether she is liable to refund the consideration money.

3. The next question for consideration is whether the decree passed in favour of defendants 1 and 2 on contest is to be set aside. This necessitates examination of the scope of Order 9, Rule 13 C. P. C. So far as relevant and as amended in Orissa it runs thus:

"In any case in which a decree is passed ex parte against the defendant, he may apply to the court by which the decree was passed for an order to set it aside, and if he satisfies the court that the summons was not duly served or that there was sufficient cause for his failure to appear when the suit was called on for hearing the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also".

I have already said that there was sufficient cause for the failure of defendant No. 3 to appear on the date of hearing and accordingly the decree passed in favour of the plaintiffs against her is to be set aside.

The more difficult question for answer is whether the decree passed in favour of defendants 1 and 2 dismissing the suit of the plaintiffs is to be set aside. The proviso says that if the decree is of such a nature that it cannot be set aside only against the defendant making the application under Order 9, Rule 13 C. P. C., the court has discretion to set aside the decree against all or any of the other defendants.

There is no controversy that if a decree is passed in favour of the plaintiff against some of the defendants on contest and against other defendants ex parte and if an application under Order 9, Rule 13 C. P. C. is made by one of the defendants against whom the ex parte decree has been passed, then the court has ample discretion to set aside the decree against all the defendants. Ordinarily the decree against all the defendants is to be set aside in the following cases:

(1) Where the decree is joint and indivisible;

(2) Where the decree proceeds on a ground common to all the defendants;

(3) Where the relief to which the applicant is entitled cannot effectively be given except by setting aside the decree against the other defendants also;

(4) When the suit would result in two inconsistent decrees if the ex parte decree is not set aside against the other defendants.

4. In this case if the decree passed in favour of defendants 1 and 2 is not set aside, there is possibility of two inconsistent decrees being passed in course of the same litigation and it might not also be possible to give the full relief to defendant No. 3 effectively. It is to be remembered that defendant No. 3 took the stand that the disputed lands belonged to her father who died in a separated status from defendant No. 1. If she establishes this case then she passed a valid title in favour of the plaintiffs and is not liable to refund the consideration of Rs. 900 decreed against her. If the decree passed in favour of defendants 1 and 2 is not set aside, there is likelihood of two inconsistent decrees being passed in the same suit with two different findings. The finding that Gangadhar died in a joint status with defendant No. 1 has already been recorded in favour of defendants 1 and 2. In the suit to be restored when defendant No. 3 would contest, there is possibility of a finding that Gangadhar died in a separated status from defendant No. 1. If the plaintiffs' suit would have been decreed on contest against defendants 1 & 2 and ex parte against defendant No. 3, on the restoration of the application under Order 9, Rule 13 C. P. C. the decree against defendants 1 and 2 must be set aside on the aforesaid analysis.

5. The further question for consideration is that even though one of the conditions is satisfied, namely, that there was possibility of two inconsistent decrees being passed, whether the proviso has any application to a case where the decree has been passed in favour of some of the defendants on contest and ex parte against the other defendants. On this point there is conflict of authority. The matter was examined in *Khagesh Chandra v. Chandra Kanta*, AIR 1954 Assam 183

(FB). The majority of the Full Bench were of opinion that by the plain language of the proviso it has no application to such a case. The minority took a different view. The entire law on the point had been fully discussed and all relevant authorities were reviewed. I am inclined to accept the majority view. The learned Chief Justice observed thus:

"But the rule or the proviso, in my opinion, does not confer any jurisdiction upon the court to reverse a decree dismissing the suit of the plaintiff as against some of the defendants imperilling thereby the interest of those defendants also by reopening the whole suit. This rule confers a privilege upon the defendants against whom an adverse decree has been passed ex parte and does not impose a disability on them, and that also at the instance of a co-defendant. In the absence of any appeal by the plaintiff to whose prejudice the decree has been passed on merits and under which the successful defendant has acquired a valuable right, I cannot hold that in a collateral proceeding at the instance of a co-defendant, the decree can be set aside."

It is to be remembered that the proviso uses the expression "the decree is 'against' all or any of the other defendants". The underlined (here in ' ') word emphasises the fact that the court has jurisdiction to set aside a decree passed against the other defendants. The proviso does not deal with a case where a decree is passed on contest in favour of some of the defendants. It is not necessary to refer to other decisions which have been examined fully in the Assam Case. On the aforesaid reasoning the decree passed in favour of defendants 1 & 2 cannot be set aside by operation of the proviso though there is likelihood of two inconsistent decrees being passed in course of the same litigation. The decree passed against defendant No. 3 only is set aside.

6. In the result, the orders of the courts below are modified to the extent that the ex parte decree passed against defendant No. 3 is set aside and the suit is restored to file so far as defendant No. 3 is concerned. The suit would not be restored as against defendants 1 and 2. The Civil Revision is allowed in part against opposite parties 1 and 2 and dismissed against opposite parties 3 and 4 as indicated above. In the circumstances parties to bear their own costs throughout.

HGP/D.V.C.

Order accordingly.

AIR 1969 ORISSA 80 (V 56 C 33)

S. BARMAN, C. J. AND S. ACHARYA, J.

Abodha Kumar Mohapatra and others.
Petitioners v. State of Orissa and others,
Opposite Parties.

O. J. C. Nos 814 to 816, 819 to 826, 833
to 839, 846, 855 and 856 of 1968 D/- 6-9-
1968

(A) Constitution of India, Art. 226 —
— Parties — Non-joinder — Writ petition
challenging selection of candidates
for admission to Government Medical
Colleges in State — List of Candidates
published expressly stating that candidates
were 'provisionally admitted' and
in case of their failure to report for medical
examination and admission by a certain
date their names would be struck
off — Writ petition by non-selected
candidates is not unmaintainable for non-joinder
of selected candidates as opposite
parties especially when Court has made
it clear that their selection will not be
disturbed. (Para 10)

(B) Constitution of India, Art. 14 —
Territorial classification — Admission to
Medical Colleges in State — Government
directive specifying merit-cum-region-
wise classification as basis of selection —
Violates Art. 14.

The Orissa Government letter dated 14-
8-68 containing a directive that students
securing 50 per cent and above marks in
the medical group subjects should be selected
according to merit from the respective
regions tagged to the individual
Government Medical Colleges and the remaining
seats will be filled up by meritorious
students from other regions violates
the equality clause of the Constitution
and is hit by Art. 14 and is struck
down. Such selection results in discrimination
and there is no nexus between territorial
distribution and the object to be
achieved, namely, admission of the best
talent on the basis of the merit judged
by marks obtained by candidates in the
Science subjects (medical group) AIR
1968 SC 1012, Foll (Paras 11 to 13)

(C) Constitution of India, Arts. 226 and
15(1) — Counter affidavits — Allegation
in writ petition that impugned Government
directive involves discrimination
solely on ground of place of birth not
controverted in counter-affidavit by Government
opposite party — Allegation
must be held to have been admitted and
as such violative of Art. 15(1) — (Civil
P. C. (1908), O. 8, R. 5). (Para 15)

(D) Constitution of India, Arts. 226, 14
15 — Admission to educational institution
— Inviting of applications for admission
to Medical Colleges in State on
certain representation with regard to selection
of candidates — Candidates applying

for admission acting on that representation — Government directive to
selection Board changing abruptly basis
of selection to detriment of candidates —
Legality — Principle of equitable estoppel
— Applicability — Power of High
Court to grant appropriate relief in such
cases — (Evidence Act (1872), S. 115).

In pursuance of a notice published in
the Orissa Gazette inviting applications
for admissions into Medical Colleges in
Orissa, the petitioners' students applied
for admission on the basis of representation
contained in the notice that the selection
of candidates will be done by a
selection Board on the basis of merit determined
by the marks obtained by them
in the Science subjects (Medical group
only) in the qualifying examination i.e.
I. Sc or Pre-professional or other equivalent
examination. It was also represented
that additional weightage of marks
will be given to B Sc students
and students having certain other qualifications
specified. No reservation of
seats for lady students was made. On
14-8-1968 when the selection Board was
to meet for selection of candidates, the
Orissa Government issued a directive letter
to the concerned authorities purporting
to change the entire basis of selection
by providing that no application of student
securing less than 50 per cent of marks
in the Pre-professional examination should
be entertained for admission into the
medical Colleges. It was also directed
that 15 per cent of the seats should be
reserved for lady students. In pursuance
of this the Board made a selection and
published a provisional list of selected
candidates in which the names of the
petitioners could not find a place due
to alteration in the basis of selection
even though they stood high chances of
selection according to the representation
in the original notice. The petitioners
therefore challenged the directive letter
of the Government as being unconstitutional
and illegal and also prayed for fresh
selection in accordance with the original
notice.

Held that the impugned Government
letter dated August 14, 1968, was invalid
as violative of the provisions of Arts 14
& 15(1) of the Constitution and otherwise
illegal, and the list of candidates provisionally
selected in pursuance of the impugned
Government letter was void and inoperative.
The concerned authorities ought to make
the selections and allotment of seats strictly
in accordance with the original Notice as
interpreted in the manner indicated. (Para 30)

The claim of the petitioners was appropriately
founded upon the equity which arose in
their favour as a result of the representations
made on behalf of the Government in the
Notice and the action taken by the petitioners
acting upon the

said representations under the belief that the concerned authorities would carry out the representations made by them or on their behalf. The principle of legal or equitable estoppel was applicable in the circumstances of the case and the Govt. and the authorities concerned were estopped from issuing the impugned letter which rules of equity and good conscience prevent them from using against the candidates including the petitioners. The Government was not exempt from liability to carry out the representations in the Notice as to the basis of merit on marks for selection and they could not on some undefined and undisclosed ground of necessity or expediency fail to carry out the said representations made in the Notice nor claim to be the sole judge of their own implied commitment or obligation to the candidates on an ex parte appraisal of the circumstances in which the claim of the petitioners founded upon the equity had arisen. Therefore, leaving aside the allegation of mala fide which it was not the practice of the High Court to investigate unless a strong case was made out there was sufficient justification for interference by the High Court. AIR 1968 SC 718 and AIR 1959 Andh Pra 493, Rel. on. (Paras 18 to 24)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1012 (V 55)=

Writ Petns. Nos 194, 196 and 202 of 1967. D/- 17-1-1968, P. Rajendran v. State of Madras 11
(1968) AIR 1968 SC 718 (V 55)=
(1968) 2 SCR 366, Union of India v. Anglo Afgan Agencies 23
(1965) AIR 1965 SC 1293 (V 52)=(1965) 1 SCR 360, Channabasaviah v State of Mysore 34
(1959) AIR 1959 Andh Pra 493 (V 46)=
(1959) 1 Andh WR 116, Kumari Akhtar v. Principal Osmania Medical College 23
C V. Murty, S. S. B. Deo and S K. Mohapatra (in Nos. 815 & 825); P Palit and K. C. Panda (in No. 814); R. Mohanty, B. Roy and P. C. Misra (in No. 816); D. Sahu, S F. Ahmad and K C. J. Roy (in Nos 819 & 820); D. Sahu and S. F. Ahmad (in No 821); R. N. Misra and H. Mohapatra, (in No. 822); R. Mohanty and R K. Kar (in Nos 823 and 824); C. V. Murty (in Nos 826 & 836); L. Rath (in No. 833); P. Palit (in Nos 834 & 837); P. Kar, (in Nos. 835, 839 & 848); K. C. Panda (in No 838); and C V. Murty and S S B Deo (in Nos. 855 and 856), for Petitioners, Advocate General and Govt Advocate, for Respondents (in all petitions)

BARMAN, C. J.: In these writ petitions analogously heard some student candidates including two lady students — as applicants for admission during the Medical Colleges in Orissa during the 1969 Ori./6 IV G—34

year 1968 relying on a Notice dated June 22, 1968 issued by the Principal, S. C. B. Medical College, Cuttack and published in the Orissa Gazette dated June 28, 1968, fixing the criteria for determination of merit of candidates eligible for selection and inviting applications for admission to the Medical Colleges—challenge the legality of the letter dated August 14, 1968 issued by the Government of Orissa in the Department of Health and Family Planning. It is said that by this impugned letter the Government issued certain executive instructions which had the effect of eliminating many otherwise qualified candidates by a process of unreasonable discrimination, regionwise selection of candidates, and making special provisions for lady students retrospectively thereby altering, to the detriment of the candidates who had already applied, the very basis of selection as originally represented in the Notice inviting applications for admission, issued by the Principal, S. C. B. Medical College, Cuttack, on June 22, 1968. This letter of August 14, 1968 is challenged by the petitioners as unconstitutional, as affecting their fundamental rights and also otherwise illegal. For brevity, the Notice of June 22, 1968 is hereinafter referred to as "the notice" and the letter of Government dated August 14, 1968 as "the impugned Government letter".

2. As in the previous years, during the present year (1968) the Principal, S. C. B. Medical College, Cuttack, as chairman of Selection Board for selection of candidates for admission into the Medical Colleges issued the Notice inviting applications for admission to the Medical Colleges in the State—S. C. B. Medical College, Cuttack, Burla Medical College and Medical College, Berhampur—all run by the Government of Orissa. The Notice specified the conditions for eligibility including the basis of merit as determined by the marks in science subjects, reservation of a limited number of seats for scheduled castes and scheduled tribes, the nominees of the Government of India and other State Governments; the minimum educational qualification required was a pass in the science subjects Physics, Chemistry and Biology (Botany and Zoology) in the qualifying examination i.e. I. Sc. or Pre-Professional examination or in examination recognised, as equivalent thereto.

In paragraph 16 hereinafter quoted read with paragraph 2 it was clearly represented that the selection of candidates will be made on the basis of merit determined by marks in the Science subjects (Medical group only) in the qualifying examination. It was also represented that additional weightage of marks would be given for candidates who have passed B. Sc.,

the rate of percentage of weightage varying according to the Class (First Class, Second Class, Distinction or Pass as the case may be), provision was also made for deduction of marks for each previous failure in the qualifying examination—all as fully stated in paragraph 16 of the Notice. The last date for receipt of the applications in the office of the Principal, S C B Medical College, Cuttack, was fixed as July 10, 1968 as stated in paragraph 15 of the Notice. The last date for application was later on extended to July 20 1968. The Index Register of the candidates prepared by the concerned authorities shows that 1497 students applied for admission.

3. Relying on the representation made

in paragraph 16 of the Notice that selection will be made in the order of merit determined on the basis of marks obtained in the Science subjects (Medical group only) in the qualifying examination (L. Sc. or Pre-Professional or its equivalent examination), the petitioners including some student candidates with admittedly high marks in the Medical group as appears from the Index Register, applied for admission. For appreciation of the merit of the petitioners (including the two lady students) as determined by marks, in the Science subjects (Medical group) a few instances with the marks and the Index numbers as tabulated in the Index Register produced by the Advocate General are given below:

Number of the Writ petition.	Total per- centage of marks.	Index Number
O J. C. No 825/68	65.66	1180
O J. C. No 822/68	63.66	1273
O J. C. No 836/68	63.33	1355
O. J. C No 819/68	62.66	1148
O. J C No 815/68	61.66	1318
O J C No 823/68 (lady student)	61.33	883
O J. C No. 839/68 (lady student)	58.66	1050

In spite of higher marks than those obtained by the provisionally selected candidates, the petitioners are stated to have been wrongfully eliminated as herein-after fully discussed

4. On August 14, 1968, that is the day on which the Selection Board was to meet, the Government by their impugned letter issued a directive to the concerned authorities purporting to alter the entire basis of selection based on merit in contravention of paragraph 16 of the Notice in which it was represented that the marks obtained by the candidates in the Science subjects Physics, Chemistry and Biology (Botany and Zoology) Medical group only, would be the determining factor. It is this directive or instruction of the Government as contained in the impugned Government letter which is being challenged in these writ petitions as unconstitutional and otherwise illegal.

5. The Impugned Government letter dated August 14, 1968 is quoted below:
18732 IMMEDIATE

GOVERNMENT OF ORISSA
HEALTH AND FAMILY PLANNING
DEPARTMENT

No. _____/H

From

Sri K. S Samantarai, B A., O A. S.,
Under Secretary to Government.

To

The Director of Health Services, Orissa,
Dated the August, 1968.

Subject: Admission of students into the
Medical Colleges during 1968.
Sir,

In continuation of Government letter No. 13042, dated 15-6-68, I am directed to say that Government have been pleased to decide that no student securing less than 50 per cent of marks in the Pre-Professional Examination should be entertained for admission into the medical colleges and from amongst the rest, the students securing 50 per cent and above marks in the group subjects, viz. Physics, Chemistry and Biology should be selected according to merit from the respective regions tagged to the individual colleges and the remaining seats will be filled up by the meritorious students from the other regions.

2. Spot selection will be made by the Principal according to merit.

3. It is also decided that 15 per cent of the total number of seats will be reserved for lady students.

4. The Principals of the Colleges are being informed of the above decision.

Yours faithfully,
Sd/-

Under Secretary to Government.
S. P./148.

IMMEDIATE

Memo No. 17146(3)/H, dated 14th Aug.
1968

Copy forwarded to the Principals of the 3 Medical Colleges for information and immediate necessary action.

Sd/-

Under Secretary to Government'..

6. In pursuance of the directive contained in the impugned Government letter, candidates who had obtained much lower marks than the petitioners were provisionally selected as appears from the lists published by the Principal, S. C. B. Medical College, Cuttack, and which appeared in the issue of the Samaj dated August 17, 1968, for admission into the First Year M. B. B. S. course of the three Medical Colleges of the State. This is clear from a scrutiny of the Index Register; for instance, the candidate bearing Index number 271 who was selected obtained only 49.66 per cent whereas, as already shown, the candidate petitioner in O. J. C. No. 825/68 (Index No. 1180) who obtained 65.66 per cent on the basis of the determination of merit made according to paragraph 16 of the Notice, has been eliminated.

7. The points argued on behalf of the petitioners challenging the impugned Government letter are in substance these: The authority vested in the State and its officers who issued the Notice, though executive in character, is from its very nature an authority required to deal with the matter, namely selection of candidates, in a manner consonant with the basic concept of justice, equity and fair-play; the State and its officers are bound to act in accordance with the said Notice already issued as early as in June about two months before the selection in August; if there is failure on the part of the State or its officers to so act in accordance with the Notice or if their action is to the detriment of the citizen and in violation of the representations made in the Notice, then such action by or on behalf of the Government is open to scrutiny and rectification by this Court. Relying on the representations made in the Notice the candidates applied, they believed that the Government would carry out the said representations holding out a promise that the applications would be considered on the basis of merit to be determined by the marks obtained in the Science subjects (Medical group only) in the qualifying examination as aforesaid. In such a case the State has no power to alter the very basis of selection in the manner they have done by the issue of the impugned Government letter; on the other hand, the State was bound to honour the representations. The impugned Government letter and the action taken in pursuance of that letter were arbitrary and had introduced discrimination. It was further submitted that the conditions for admission as laid down in the Notice had the force of law.

8. It was further submitted on behalf of the petitioners that the impugned Government letter, though stated to have been issued for the purpose of providing guidance to the Selection Board, in fact only made provisions for different categories of unreasonable discrimination in the matter of Selection. Firstly, it laid down a process of elimination of students who obtained less than 50 per cent marks (in the aggregate) including subjects outside the Medical group in the qualifying examination (I. Sc. or Pre-professional examination or its equivalent). It also involves unreasonable classification in that candidates with high marks in the Medical group only in the qualifying examination (I. Sc. or Pre-professional or its equivalent) — merely because they may have obtained less than 50% in the aggregate — would be outright eliminated from being considered, while candidate with more than 50 per cent marks in humanities or Arts subjects (which have nothing to do with Medical group) but with marks less than 50 per cent in the Medical group of subjects would be preferred, such classification has no reasonable relationship with the object of selection for admission into Medical Colleges, namely that it must be beneficial to the Medical profession; in order to attain that object, the marks obtained in the subjects constituting the medical group only should be considered as provided in paragraph 16 of the Notice. This impugned process of elimination of students who obtained high percentage of marks in the medical group of the subjects because they obtained less than 50 per cent marks in the aggregate in the qualifying examination is unreasonably discriminatory; such outright elimination is unreasonable because such students, if they also possess B. Sc. degree although given additional weightage in marks as provided in paragraph 16 of the Notice are still eliminated. The instructions in the impugned Government letter to shut out in one sweep all candidates securing below 50 per cent in the aggregate in the qualifying examination without giving any consideration to the marks obtained by them in the subjects under the medical group, has thus resulted in gross discrimination. Secondly, the impugned Government letter provides for discrimination on a regional basis, which is violative of the Constitution as offending Article 14. Thirdly, the provision in the impugned letter making reservation of 15 per cent of the total number of seats for lady candidates — not originally provided for in the Notice — could not be made subsequently so as to retrospectively affect the chances of otherwise qualified male candidates who applied on the basis of the representation in paragraph 16 of the Notice that selection would be made on the basis of merit

as determined only by the marks and additional weightage as stated therein from among the eligible qualified candidates placed in order of merit irrespective of sex — male or female. In any event, such special reservation could not be made retrospectively so as to affect the rights of the better qualified male candidates.

9. It was also submitted that the Selection Board acted under pressure of a directive issued by the Government; in other words, the Selection Board as quasi judicial body was not free to act according to the procedure laid down in paragraph 16 of the Notice. It was stated that the selection was mala fide having been made on extraneous considerations and in pursuit of some illegitimate aim. But in the view that we have taken on the other points raised in these writ petitions, we do not think it necessary to express any opinion on the question of mala fide.

10. A preliminary objection was taken — though faintly — on behalf of the opposite parties, that the writ petitions are not maintainable by reason of the selected students not having been impleaded as opposite parties. In our opinion, the objection is not tenable. The notice in the Samaj publishing the lists of candidates selected states that the candidates were "provisionally selected" for admission into the First Year Class of the M. B. B. S. course of the Medical Colleges of the State. It also states that the candidates should report themselves before the Principals of the Colleges for which they are selected on or before August 24, 1968 for medical examination and admission and if they failed to get themselves admitted by the stipulated period, their names would be expunged from the selection list. The selection being thus only provisional, the candidates in the provisional list cannot claim admission as of right. That apart, in the course of hearing we made it clear that the candidates who had already been admitted — as brought to our notice — would not be disturbed. That apart, in the view that we have taken of the scope of these writ petitions and the grant by us of declaratory relief there is no substance in the point questioning the maintainability of the petitions for non-joinder of parties.

11. Coming now to the merits, the impugned regionwise classification in the Government letter is in these terms:

XX XX

the students securing 50 per cent and above marks in the group subjects viz., Physics, Chemistry and Biology should be selected according to merit from the respective regions tagged to the indi-

vidual colleges and the remaining seats will be filled up by meritorious students from other regions."

In our opinion, this provision for regionwise classification is directly hit by Article 14 of the Constitution. In the latest decision of the Supreme Court in *P. Rajendran v. State of Madras*, Writ Petn. Nos. 194, 196 and 202 of 1967 decided on January 17, 1968=(AIR 1968 SC 1012) a similar provision made in the Rules for admission to the Medical Colleges in Madras State providing for districtwise distribution of seats was struck down as violative of Article 14 of the Constitution. Their Lordships accepted the argument made on behalf of the petitioners that districtwise distribution violates Article 14 because it denies equality before the law or equal protection of the laws, inasmuch as such allocation of seats may result in candidates of inferior calibre being selected in one district while candidates of superior calibre cannot be selected in another district.

12. The reasoning on which their Lordships of the Supreme Court took the said view in the aforesaid case is in substance this: The question whether districtwise allocation is violative of Article 14 will depend on what is the object to be achieved in the matter of admission to Medical Colleges. Considering the fact that there is a larger number of candidates than seats available, selection has got to be made. The object of the selection must be to secure the best possible talent so that the country may have the best possible doctors. If that is the object, it must necessarily follow that that object would be defeated if seats are allocated district by district. It is true that Article 14 does not forbid classification, but the classification has to be justified on the basis of nexus between the classification and the object to be achieved, even assuming that territorial classification may be a reasonable classification. Their Lordships also made it clear that the mere fact that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved. Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, allocation of seats districtwise has no reasonable relation with the object to be achieved, if anything, such classification will result in many cases in the object being destroyed, and if that is so, the classification, even if reasonable, would result in discrimination, inasmuch as better qualified candidates from one district may be rejected while less qualified candidates from other districts may be admitted.

13. We are satisfied that the opposite parties including the State of Orissa have made out no case for regionwise selection of students in the Medical Colleges. We are also satisfied that such selection results in discrimination and there is no nexus between territorial distribution and the object to be achieved, namely, admission of the best talent on the basis of the merit judged by marks obtained by candidates in the Science subjects (medical group) already indicated. We are accordingly of opinion that selection of candidates on regionwise basis is violative of Article 14 and no justification worth the name in support of the classification has been made out.

14. The said provision in the impugned Government letter relating to regionwise classification is also attacked as violative of Article 15(1) of the Constitution in so far as it makes a discrimination solely on the basis of place of birth as contended in paragraph 25(j) of O. J. C. No. 823 of 1968 filed on August 20, 1968. Neither in counter-affidavit dated August 26, 1968 filed therein by the Under Secretary to the Government of Orissa, Health Department, nor in any of the four successive counter-affidavits in O. J. C. No. 815 of 1968 (which were adopted as counters to the other writ petitions, all analogously heard) filed on behalf of the opposite parties on August 22, 23, 26 and 29, 1968, the specific averment that the impugned Government letter creates discrimination solely on the basis of place of birth made in the aforesaid paragraph 25(j) of the petition in O. J. C. No. 823 of 1968 was denied or refuted. Thus, there having been no denial of the allegation made in paragraph 25(j) of the petition in O. J. C. No. 823 of 1968 that the discrimination has been made solely on the basis of place of birth, that allegation must be taken to have been admitted by the opposite parties.

15. In our opinion, there is a good deal of force in the argument that the aforesaid provision in the impugned Government letter is also violative of Article 15(1). This our view gains support from the fact that in the Index Register of candidates who applied for admission there are 5 columns, namely (1) Index No. (2) Name and address for correspondence of the student (3) Home district (4) Percentage and (5) Remark. Column 3 headed "Home district" is not without significance. Column 3 ("Home District") — as distinct from column 2 "Name and address for correspondence of the student" — should be read with the relevant provision in the impugned Government letter directing that candidates should be selected according to merit "from the respective regions". The phrase "from the respective regions" read with column 3 "Home District" of the Index Register

and the specific averment in paragraph 25(j) of the writ petition O. J. C. No. 823/68 not denied by the opposite parties is sufficiently indicative — and indeed conclusive — that the discrimination involved in the provision was solely on the ground of place of birth. In any case, the contention that the discrimination was solely on the basis of place of birth not having been controverted by the opposite parties in any of their several successive counter-affidavits, must be held to have been admitted; such discrimination is clearly violative of Article 15(1) also.

16. The next attack is on that part of the directive contained in the impugned Government letter laying down that:

"No student securing less than 50 per cent of marks in the Pre-professional examination should be entertained for admission into the medical colleges".

The implication of this directive is that by this the Government totally eliminated a large number of candidates who were otherwise better qualified by reason of their having obtained higher marks in the Science subjects (medical group) with additional weightage for B Sc. candidates, all in accordance with the principles for determination of merit as represented in the Notice. Paragraph 16 of the Notice which contains the representation that selection would be made on the basis of merit as fully stated therein, is quoted below:

"16. The selection of candidates will be done by a Selection Board consisting of the Principals of the three Medical Colleges. The selection will be made on the basis of merit determined by the marks obtained by them in the Science subjects (Medical group only i.e. Physics, Chemistry and Biology (Botany and Zoology)) in the qualifying examination, i.e., I. Sc. or Pre-professional examination or an examination recognised as equivalent thereto. Additional weightage in the following manner may be given, provided that the total weightage for all items does not exceed 15 per cent in the case of a 1st Class B. Sc. (Hons) candidate and 10 per cent in all other cases.

(a) B. Sc. 1st Class (Hons)	10 Per cent
B. Sc. 2nd Class (Hons)	8 Per cent
B. Sc. (Distinction)	6 per cent
B. Sc. (Pass)	5 per cent

(b) Participation in the inter-University/State sports recognised by the Government of Orissa and certified by the principals of the Institutions last attended 5 per cent

(c) Children of the defence service personnel recruited during the emergency, i.e. from 26th October, 1962 to 9th January, 1968 who have rendered approved military service as defined in the Politi-

cal & Services Department Circular No. 6225(88) General dated the 2nd May, 1963

(d) Holders of 'B' Class certificate in N. C. C.	5 per cent
Holders of 'C' Class Certificate in N. C. C.	2 per cent
	3 per cent

(certificates issued by the Group headquarters or by the Director, N. C. C. will only be taken into consideration).

N B — Qualifications & Sports, N. C. C. certificates submitted at the time of application will only be considered.

(e) 5 marks will be deducted from the marks secured in the qualifying examination i.e. I. Sc. and Pre-professional for each failure.

The list of selected candidates will be notified in the College and published in the local dailies. Individuals will also be intimated in the address given by them to take admission".

17. It was argued on behalf of the opposite parties that the power of the Government to change the rules for admission cannot be restricted on the ground that the representation held out by Government in the Notice had not been carried out, that the Government is the sole judge of the validity of its actions, and that the candidates who acted on the representations made in the Notice, have no right except what the Government choose to recognise or accept. This exalted claim about the nature of the authority claimed by the Government requires examination.

18. The question is: Once the candidates have acted on the said representation made in the Notice and relying on the same had made applications for admission on the basis thereof, can the Government later on abruptly to the detriment of the candidates give a directive to the Selection Board purporting to eliminate the better qualified candidates who have secured high marks in the Science subjects (Medical group) with additional weightage for B. Sc. candidates? In our opinion, the Government cannot so change the rules abruptly in the manner done. The reasons are these: It is not the case of the Government that the representations made in the Notice were subject to any condition that Government would not be bound to admit students on the basis of merit as determined by marks obtained in the Medical group of Science subjects, if the Government deem it inexpedient to make admissions on that basis. We are unable to accept the argument that the Government is not bound to honour the said representation, relying on which the candidates acted to their detriment. In our opinion, assuming that the power of the Government in issuing the directives to the concerned authorities is executive in character, even so

when it was represented by Government in the Notice that selection for admission will be made on the basis of merit as determined by marks obtained in the Science subjects (Medical group only) in the qualifying examination, the Court has the power to direct the concerned authorities to honour the said representation made to the candidates who had acted on such representation and have been denied the consideration which was due to them on the basis of marks obtained by them in the Medical group of Science subjects. If the Government had acted arbitrarily in issuing their directive in their impugned letter, it is open to judicial review. Where the candidates have acted to their prejudice upon a representation made in the Notice, their claim to be considered on the basis of marks obtained by them in the medical group of subjects cannot be arbitrarily rejected.

19. In such a case, the Court is competent to grant relief in appropriate cases if, contrary to the representation made in the Notice, the concerned authorities decline to consider the applications on the basis of that representation. Therefore, even assuming that the representations in the Notice offering inducement to the prospective medical students are in character executive, the Government and its officers are, on the authorities of the Supreme Court, not entitled at their mere whim to ignore the said representations made in the Notice. We cannot therefore accept the argument that the Government is the sole judge in such matters and that the Courts are powerless to grant relief if due consideration is not given to the applications of the petitioners who acted to their prejudice relying on the representations in the Notice. To concede to the concerned authorities that power is to strike at the very root of the rule of law. The authority of the concerned authorities even though executive in character, was from its nature an authority to deal with the matter in manner consonant with the basic concept of justice and fairplay, if they made an order subsequently which was not consonant with the basic concept of justice and fairplay, their action is open to scrutiny and rectification by the courts.

20. While taking this view, we must make it clear that the petitioners are not seeking to enforce any contractual right; they are only seeking to enforce compliance with the representations made in the Notice. We are of the view that even if the power of the concerned authorities is executive in character, the petitioners are entitled to resort to the Court and claim that the said representations in the Notice be ordered to be honoured.

21. Thus, the claim of the petitioners is appropriately founded upon the equity which arises in their favour as a result

of the representations made on behalf of the Government in the Notice and the action taken by the petitioners acting upon the said representations under the belief that the concerned authorities would carry out the representations made by them or on their behalf. On the facts proved in this case, no ground has been suggested before us for exempting the Government or the concerned authorities from the equity arising out of acts done by the petitioners to their prejudice relying upon the representations. The Government and the authorities concerned are thus estopped from issuing the impugned letter which rules of equity and good conscience prevent them from using against the candidates including the petitioners. The Government is not exempt from liability to carry out the representations in the Notice as to the basis of merit on marks for selection and they cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the said representations made in the Notice nor claim to be the sole judge of their own implied commitment or obligation to the candidates on an ex parte appraisalment of the circumstances in which the claim of the petitioners founded upon the equity has arisen.

22. So, having made the representation that if a candidate satisfied the standard or criteria set up for selection of candidates as stated in paragraph 16 of the Notice, it is not open to the concerned authorities to retract from the same — as they purported to do here — by the issue of the impugned Government letter. By the representations in the Notice the petitioners were led into the belief that they had good chance of being selected, having obtained a reasonably high percentage of marks in the Science subjects (Medical group only) in the qualifying examination with additional weightage in the case of B. Sc. candidates all as represented in the Notice. It is not denied that some of the petitioners did obtain a high percentage of marks in the Science subjects medical group in the qualifying examination as recorded in the Index Register. But for the assurance or representation made in the Notice, they would have applied to other Colleges and, in all probability, might have secured admission. In these circumstances, we feel that the principle of legal or equitable estoppel would apply to this case.

23. This our view is fully supported by the principles underlying the decision of the Supreme Court in *Union of India v. Anglo Afghan Agencies*, AIR 1968 SC 718 and also a Division Bench decision of the Andhra Pradesh High Court in *Kumari Akhtar v. Principal, Osmania Medical College*, AIR 1959 Andh Pra 493.

24. The petitioners also attack the Government directive in the impugned letter which makes a special provision for lady students and lays down that

"it was also decided that 15 per cent of the total number of seats will be reserved for lady students"

In the Notice there was no special provision for reservation of seats for lady candidates. The Notice only provided for selection on the basis of merit determined by marks as laid down in paragraph 16, the only reservation made was for candidates belonging to scheduled castes and scheduled tribes and a few nominees of the Government of India, and the other State Governments against a limited number of reserved seats. Under the scheme of the Notice, lady candidates have to take their chances along with other candidates in open competition on merit on the basis of marks as provided therein. In fact, having regard to the high marks obtained by the lady students as appears from the Index Register inasmuch as a large number of lady students obtained more than 60 per cent the highest marks obtained by a lady student being 76 per cent, whereas the highest marks obtained by a male student is 79.55 per cent, — there appears to be no compelling necessity for making a special provision for lady students. Even in spite of this position if the Government had still contemplated making a special provision for lady candidates for admission into the Medical Colleges, they could have done so when they issued the Notice on June 22, 1968. It is not open to the Government now to make any such special reservation as they purport to do in the impugned Government letter because in that event, in open competition on merit it will affect the chance of candidates in general who would otherwise have been selected strictly on merit on the basis of marks as laid down in paragraph 16 of the Notice, without any special consideration or weightage being given to women candidates as such. Therefore, as in the case of other impugned provisions the principle of legal or equitable estoppel must, for the same reasons, equally apply to the provision in the impugned letter purporting to reserve a certain percentage of seats for lady students. In any event, such a provision for reservation, even if otherwise justified as reasonable, cannot, in the circumstances of the present case, be permitted to retrospectively affect the chances of selection of candidates who, along with women applicants, had already applied on the basis of the representations made in paragraph 16 of the Notice.

25. There is no doubt that the directives contained in the impugned Government letter — on the basis of which the selections have been made — have, on

account of the various processes of discrimination as indicated above, operated to the detriment of the petitioners affecting not only their chances of selection but also perhaps their ranking in order of merit. Therefore leaving aside the allegation of mala fide which it is not the practice of this Court to investigate unless a strong case is made out — there is sufficient justification for interference by this Court.

26. Ultimately, the position comes to this: The impugned Government letter dated August 14, 1968, as violative of the provisions of the Constitution and as otherwise illegal, is struck down and has to be ignored. The concerned authorities are to make selection of candidates for

- (a) Balasore, New Capital, Cuttack, Keonjhar and Mayurbhanj
- (b) Bolangir, Dhenkanal, Kalahandi, Sambalpur and Sundergarh
- (c) Ganjam, Koraput, Phulbani, Puri (excluding New Capital)

Remaining meritorious students of the aforesaid districts who cannot be admitted in the Medical Colleges as noted above, will be directed to take admission in other Colleges where there may be vacancies".

It was stated by the learned Government Advocate that 400 students are to be admitted in the three Medical Colleges this year, the respective quotas for the three colleges being 150 students for the S. C. B. Medical College, Cuttack; 150 for the Burla Medical College; and 100 for the Medical College, Berhampur.

27. Paragraph 9 of the Notice in terms and read with paragraph 2, contemplates that only one list of candidates — selected strictly in order of merit as provided in paragraph 16 — has to be prepared without making any distinction between male and female candidates. This is apparent from the condition that the first twenty students selected in order of merit have the option to join any of the three colleges; unless such a single common list is prepared, selection of the first twenty meritorious students will not be possible. After taking out these twenty candidates from the list for the purpose mentioned above, the paragraph proceeds to provide for the admission of the "rest of the candidates". The "rest of the candidates" in the context would obviously mean the others left out in the said single list prepared on the basis of merit, who have to be allotted, for the purpose of admission, in order of merit, in the various colleges as mentioned in the said paragraph. That this is the intention is also clear from the use of

admission into the First Year M. B. B. S. course of the three Medical Colleges during this year (1968) on the basis of merit according to the provisions contained in paragraph 16 of the Notice. In this context, for the guidance of the concerned authorities, paragraph 9 of the Notice needs some clarification. That paragraph reads as follows:

"9. Subject to the condition that the 1st twenty students in order of merit will be given the option to apply and join any of the three medical colleges, the rest of the candidates belonging to the undermentioned districts and places shall be selected for admission to the colleges as noted against each.

S. C. B. Medical College, Cuttack.

Burla Medical College.

Medical College, Berhampur.

the expression "remaining meritorious students" occurring in the last sub-paragraph of paragraph 9. The word "remaining" in the context can only mean those candidates left out, in the single list prepared on the basis of merit. The scheme underlying paragraph 9, therefore, is that out of a single list prepared of all selected candidates, in order of merit, the first twenty should be given the choice to join any of the colleges they liked; for the remaining seats, allotment will be made from out of the remaining candidates in order of merit in the same list, to the various colleges in the manner indicated in paragraph 9; and if after that some more seats still remain to be filled up, allotment will be made again from the same list, strictly in order of merit, to the Medical Colleges at the discretion of the authorities.

28. It is clear therefore from a reading of paragraph 9 of the Notice that the concerned authorities have to take steps to prepare only one single list of candidates, selected in order of merit in accordance with the provisions of paragraph 16 and after giving the option to the first twenty candidates to choose any of the colleges, the remaining selected candidates in the said list are to be allotted in order of merit to the three Medical Colleges in the manner indicated therein and as clarified above. If the selection of candidates is itself made on a territorial basis — districtwise or regionwise — that will be open to objection as violating the Constitution for reasons already discussed, but once selection is made strictly on the basis of

Where a candidate asks for the materials proposed to be used in support of the charges against him, but without supplying such materials penalty is imposed on him using those materials, the principles of natural justice are violated and the penalty imposed cannot be sustained.

(Paras 5 and 6)

Enquiries by Universities or other educational authorities in exercise of their disciplinary jurisdiction are quasi-judicial. AIR 1966 SC 875, Foll.

(Para 3)

Though the expression "principles of natural justice" cannot be precisely defined broadly it includes that a party should know the accusation against him, the material on which such accusation is proposed to be supported; that he should have reasonable and adequate opportunity of adducing all relevant evidence on which he proposes to rely and that no material should be used against him without his being given an opportunity of explaining them.

(Para 4)

Thus, when a candidate asks for the materials proposed to be used in support of the charges against him but without supplying such materials a penalty is imposed on him using those materials, he is not given the opportunity of explaining them and the principles of natural justice are violated. The penalty cannot thus be sustained.

(Paras 5 and 6)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 875 (V 53)=
(1963) 3 SCR 767, Board of High
School and Intermediate Education
U. P. Allahabad v. Bagleshwar
Prasad

3

Ranjit Mohanty and N. Patra, for Petitioner; G. Rath, R. K. Patra and V. N. Tiwaniwalla, for Opposite Parties.

A. MISRA, J.: The petitioner appeared at the LL. B. Part I examination held between 19th and 24th June, 1967. On 24-6-67, while answering paper No. VI (Jurisprudence), feeling some urge to answer call of nature, he left the examination hall with the permission of the Centre Superintendent about an hour after the commencement of examination and proceeded to the toilet situate about 100 yards from the examination hall. In the toilet, some torn and full sheets of printed papers were lying scattered. While he was in the toilet, the Centre Superintendent entered and accused him of being in possession of printed papers. He denied this accusation and replied that while urinating he was simply looking at the papers which were lying scattered on the floor. The Centre Superintendent took a statement from him more or less on the lines stated above.

Subsequently, by a letter the Deputy Registrar of the Utkal University on the basis of the report from the Centre Superintendent communicated two specific charges to the effect that he had violated Rule 4 of the Rules prescribed by the University

and secondly, he had copied from the incriminating material in his possession while answering questions and directed him to show cause why disciplinary action should not be taken against him. Petitioner in his reply denied to have been in possession of any printed papers or to have contravened Rule 4 mentioned above and also requested for an opportunity to see the seven printed pages alleged to have been found in his possession as well as answer papers to enable him furnish his explanation fully as otherwise it was not possible for him to give his explanation to charge No. 2. Without affording necessary opportunity and facility requested for by the petitioner, the Utkal University by a notification under item 146 dated 21-9-67 ordered cancellation of the result of the petitioner in the LL. B. Part I examination of June, 1967 and debarred him from appearing at any examination prior to part I examination of December, 1968.

In the present writ application, petitioner has prayed for quashing the aforesaid notification on the following grounds: (1) that the syndicate has no power or jurisdiction under the provisions contained in the statute, statutory rules or orders governing the University to impose any punishment on an examinee for indulging in mal practices and misconduct at an examination; (2) that the Deputy Registrar was not competent to issue the notice to the petitioner directing him to show cause, and as such, the said notice is invalid; (3) that the toilet where according to the report of the Centre Superintendent petitioner was alleged to have been found in possession of certain printed papers, not being a part and parcel of the examination hall, there is no violation of Rule 4 which only prohibits candidates from being in possession of any such extraneous material while entering or sitting within the examination hall for answering question papers, (4) that the syndicate has not applied its mind before issue of the show-cause notice to the petitioner, and as such, the entire proceeding is vitiated; and (5) that there was failure to observe principles of natural justice in conducting the enquiry before imposing the penalties on the petitioner.

2. Though at the inception learned counsel for petitioner proposed and to some extent proceeded with arguments on the different grounds stated above, in the course of arguments, he stated that in the present case he does not press the first four grounds mentioned above, and therefore, we do not propose to decide the merits and demerits of each of those grounds. Thus, the only ground impugning the order of the University which arises for consideration is whether there was failure of observance of principles of natural justice in conducting the enquiry. Learned counsel for petitioner urges that there was failure of observance of principles of natural justice in holding

the enquiry firstly because petitioner was not given the right and opportunity of cross-examining the Centre Superintendent on whose report action has been taken; secondly petitioner was not allowed inspection of the materials utilised against him in the enquiry in spite of a specific request made by him; thirdly, he was not furnished with a copy of the report of the Centre Superintendent on the basis of which the enquiry was started and lastly, the enquiry should have been conducted in the presence of petitioner.

3. It is well settled that enquiries by Universities or other educational authorities in exercise of their disciplinary jurisdiction are quasi-judicial in nature. In the case reported in Board of High School and Intermediate Education, U. P. Allahabad v. Bagleshwar Prasad, AIR 1966 SC 875 while observing that it would not be reasonable to import into such enquiries all considerations which govern criminal trials in ordinary courts of law the Supreme Court have clearly laid down the law defining the ambit and extent of jurisdiction of the High Court in exercise of its powers under Article 226 of the Constitution to interfere with such orders as follows:

"Enquiries held by domestic tribunals in such cases must, no doubt, be fair and the students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the tribunals must scrupulously follow rules of natural justice."

4. No doubt, expression "principles of natural justice" does not admit of a precise definition, yet broadly speaking, it includes that a party should know the accusation or accusations against him, the material on which such accusations are proposed to be supported; that he should have reasonable and adequate opportunity of adducing all relevant evidence on which he proposes to rely and that no material should be used against him without his being given an opportunity of explaining them.

5. In the present case, the undisputed facts clearly disclose and it is not seriously controverted by learned Government Advocate appearing for opposite parties that it cannot be said that principles of natural justice have been scrupulously observed in conducting the enquiry before imposing the penalties on the petitioner. The two charges communicated to him on the basis of a report by the Centre Superintendent were (1) that he was found in possession of certain papers in contravention of Rule 4 of the Rules and (2) that he copied from the said incriminating material while answering questions.

In reply, petitioner denied the first charge in toto, though he stated that certain papers were lying scattered in the urinal which he visited with the permission of the Centre Superintendent. So far as the second charge

is concerned, he requested to be shown the seven printed papers alleged to have been found in his possession as well as his answer papers to enable him to furnish his explanation to the accusation of having copied from the incriminating material. He was not supplied with this material in spite of his request nor with the report of the Centre Superintendent which formed the basis of the charge, but the same have been utilised against him in finding him guilty of the charges and imposing the penalties. This shows that he was not furnished with the materials which were proposed to be relied upon in support of the charges, though the said materials have been used against him without his being given an opportunity of explaining the same. In such circumstances, we have no hesitation in holding that there has been failure to observe principles of natural justice in conducting the enquiry resulting in the punishments.

6. Hence, we allow the application and direct that the notification of the Utkal University issued under item no. 146 dated 21-9-67 be quashed. In the circumstances, there will be no order as to costs.

7. PATRA, J.: I agree.

[RM/D.V.C.]

Petition allowed.

AIR 1969 ORISSA 91 (V 56 C 35)

B. K. PATRA, J.

M/s. Straw Products Ltd., Petitioners v. Registrar of Companies, Orissa, Opp Party.

Company Act Case No. 6 of 1967, D/- 80-10-1968.

(A) Companies Act (1956), Ss. 17 (1) (a) and 293 (1) (e) — Alteration in Memorandum — Amendment enabling Company to make contributions towards national or political objects or political party — Not contrary to law — Court not to refuse confirmation merely because it may conflict with proposed legislation.

A special resolution of a Company proposing amendment of a clause in its Memorandum of association so as to enable it "to contribute to or otherwise aid, benevolent, charitable, political, national and other institutions or objects of a public, national or political character" is not contrary to law. The expression 'other funds' in S. 293(1)(e) is wide enough to enable contributions of such kinds. Apart from the implied sanction afforded by Section 293 (1) (e) of the Companies Act, the proposed step can also be justified on the basis of Section 17(1)(a) which is of very wide import and it can be said that the Company by contributing to the funds to political parties would be carrying on business more efficiently. Though the Court has a discretion to confirm or not to confirm an alteration even if the conditions laid down in Section 17

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are satisfied, yet it has to be borne in mind that it is primarily for the Company to decide whether it is for its good that it should make such contributions and it is not for the Court to tell the Company as to how it is to carry on its business. If, therefore, the share holders of the Company after considering their own interests have agreed that the funds of the Company may be utilised for contribution to the funds of a political party, it is not for the Court to take a view different from the view of the share holders when that view is not only not opposed to law, but falls within the provisions of the Companies Act itself. AIR 1957 Cal 234 and AIR 1960 Mad 257, Ref. to. (Para 9)

The Court would not refuse to confirm such alteration merely because it is in conflict with the proposed legislation in Parliament banning contributions to political parties by Companies. (Para 10)

(B) Companies Act (1956), Section 17 — Alteration of Memorandum of Association — Alteration in objects to enable Company to carry on new business — Extent of power — Confirmation by Court — Matters to be considered.

The language of Section 17 (1) (d) of the Companies Act permits the alterations in the Memorandum of Association of a Company to enable it to carry on a business which is entirely a new departure from the business already carried on provided (a) that such business is one which can conveniently or advantageously be combined with the existing business of the company and (b) that this must be so under the existing circumstances and not under hypothetical circumstances. The additional business need not be even akin to the existing business but it must not be destructive of or inconsistent with and detrimental to the existing business. It must leave the existing business substantially what it was before.

The question whether any additional business is one which may be conveniently or advantageously combined with the business of the Company carried on at the time when the special resolution is passed, is essentially a business proposition and must be determined by the persons engaged in the business of the Company.

The Court can confirm the alteration either wholly or in part subject to such terms and conditions as it may deem fit on being satisfied that the alterations sought to be confirmed, are not beyond the scope of Section 17 (1) and do not adversely affect the rights and interests of the members of the Company and/or of its creditors. No hard and fast rule can be laid down as to the quantum of evidence necessary for the satisfaction of the Court. The fact that the Company is in a sound financial position and that the share-holders unanimously or by majority decision seek alterations of the memorandum is a factum in favour of

confirmation thereof. AIR 1957 Cal 593 and AIR 1965 Cal 16 and AIR 1965 Mad 76 and AIR 1967 Punj 15 and AIR 1968 All 417 and (1963) 33 Com Cas 535 (Punj), Rel. on; (1963) 33 Com Cas 811 (Punj), Dist. (Para 12)

The petitioner Company engaged in the manufacture of writing and printing paper and straw board etc. by a special resolution passed unanimously proposed to amend a clause in its Memorandum of Association with a view to undertake certain new business and applied for confirmation of the alteration under Section 17 of the Act.

Held that although in some respects they appear to be ambitious it cannot at all be said that any of the proposed activities is either inconsistent with the existing business or would be destructive of the same. The Directors who are in charge of the day to day administration of the affairs of the Company are of the view that the proposed activities can be efficiently and conveniently combined with the existing business and how this would be so has been explained in the submissions made by the Company which prima facie appear to be acceptable. Therefore the application should be allowed. (Paras 15, 16)

Cases Referred:	Chronological	Paras
(1967) AIR 1967 Punj 15 (V 54) =		
37 Com Cas 331 (Punj), In re,		
New Asiatic Insurance Co. Ltd.		11
(1966) AIR 1966 All 417 (V 53) =		
(1966) 1 Com LJ 292, Juggi Lal		
Kamlapat Jute Mills Co. Ltd. v.		
Registrar of Companies		11
(1965) AIR 1965 Cal 16 (V 52), In		
re, Standard General Assurance		
Co. Ltd.		11
(1965) AIR 1965 Mad 76 (V 52) =		
ILR (1965) 1 Mad 668, In re, Dal-		
mia Cement (Bharat) Ltd.		11
(1963) 33 Com Cas 535 (Punj), In re,		
Ambala Electric Supply Co. Ltd.		11
(1963) 33 Com Cas 811 (Punj), Pun-		
jab Distilling Industries Ltd. v.		
Registrar of Companies		11
(1960) AIR 1960 Mad 257 (V 47) =		
30 Com Cas 54, Natesar Spinning		
and Weaving Mills (P.) Ltd. In re		9
(1957) AIR 1957 Cal 234 (V 44) =		
27 Com Cas 361, Indian Iron and		
Steel Co. Ltd. In re		9
(1957) AIR 1957 Cal 593 (V 44) =		
61 Cal WN 374, In re, Bhutoria		
Brothers (P.) Ltd.		10

B. K. Mohanty, for Petitioners; R. K. Ghosh, for Opp. Party.

ORDER: This is a petition under Section 17 of the Indian Companies Act (Act I of 1953) filed on behalf of M/s Straw Products Limited (hereinafter called the Company) having its registered office at Jayhampur, Rayagada in the district of Koraput for confirmation of the alterations in the Memorandum of Association of the Company.

2. The petitioner-Company was registered on the 6th August, 1938 under the provisions of the Companies Act, 1913 as a Company Limited by shares. It is engaged in the manufacture of writing and printing paper and straw board etc. The authorised capital of the Company is Rs. 5,00,00,000 divided into 2,00,000 7% Cumulative Redeemable Preference Shares of Rs. 100 each and 30,00,000 ordinary shares of Rs. 10 each. The objects for which the Company was formed are set out in Clause 3 of its Memorandum of Association annexed to the petition as Annexure 'A'. The principal objects in brief are as under:—

(1) To erect, purchase or take on lease or otherwise acquire any mills, works, machinery and other moveable and immoveable properties appertaining to goodwill of and any interests in, the business of manufacturing or dealing in straw board, card boards, mill board and/or paste board, vegetable oil, vegetable ghee, sugar, matches, cement, lime and artificial leather of all descriptions, and to acquire, purchase or hire forest or lands to grow and cultivate for the purpose of pulps and to acquire, establish and maintain other centres for production of pulp and other incidental raw materials and fibrous substances.

(2) To purchase or otherwise acquire at Bhopal or other parts of India or elsewhere land or to accept lease thereof, and on such lands to erect buildings for the works and purpose of the Company.

(3) To carry on all or any of the business following namely, to manufacture pulps from straw of all description, wood, bamboo, rags, waste material of all description, and raw material of all other description, straw boards, card boards, paste boards mill boards and boxes from them such as cigarette packets, hosiery boxes, toilet boxes, shoe boxes, packing boxes, cloth boxes, fancy boxes and all other kinds of boxes, and to manufacture artificial leather and to manufacture crom in suit cases, hand bags, attache cases, hat boxes, holdalls dressing boxes, fancy boxes and all kinds of cases and boxes to manufacture, sugar, matches, cement, lime, vegetable oil, vegetable ghee, to bleach and dye, and make vitriol, bleaching and dyeing materials and to do designing and printing of all kinds and description by one or all methods of printing by printing machines or otherwise to carry on or be interested in the business of flour mill proprietors, pressing and ginning mill proprietors, sugar mill proprietors, match factory proprietors, cement factory proprietors, lime factory proprietors, vegetable oil factory proprietors, vegetable ghee factory proprietors and oil mill proprietors, paper mill and/or board mill proprietors and ice manufacturers in all their branches.

(4) To carry on the business of cultivating, growing, buying, selling or otherwise and generally dealing in Kapas cotton (includ-

ing ginning, pressing and baling), pulps and chemicals required into processes, and seeds and other country produce of all kinds and also all other merchandise of every description.

(5) To carry on the business of cultivators, growers, buyers, manufacturers, dealers in sugarcane, sugar or sugar products and other vegetable products or other products of the soil whatsoever manufacturers and dealers in vegetable oils, oil seeds and oil cakes, refiners, fruit growers and preservers in all the branches of such business and to purchase, sell, dispose of, deal in and act as merchants and agents for or in connection with all or any such products or produce or the products and produce of such business, or any of them.

(6) To establish and support or aid in the establishment and support of associations, institutions, funds, trusts, and conveniences calculated to benefit employees or ex-employees of the Company (or its predecessors in business) or the dependents or connections of such persons and to grant pensions and allowances, and to make payments towards insurance, and to give such aid generally as the Company shall think fit. To subscribe to or otherwise aid benevolent, charitable, national and other institution or objects of a public character, or which may have any moral or other claims to support or aid by the Company by reasons of the locality of its operations or otherwise.

3. Shortly after its incorporation the Company commenced business and has been carrying on its business all over the country. By a special resolution of the Company (Annexure-B) duly passed in accordance with sub-section (2) of Section 189 of the Companies Act, 1956 at the 27th Annual General Meeting of the members held on the 21st July 1966 at its registered office after due notice dated 18th June, 1966 (Annexure 'C') sent to the members of the Company as provided under the Act, it was resolved unanimously to amend Cl. 3 (10) (VIII) of the Company's Memorandum of Association by incorporating there in the words and terms 'political' and 'national and political'. The resolution provided for substitution of the following in place of Clause 3 (10) (VIII):—

"3 (10) (VIII) To establish and support or aid in the establishment and support of Association, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the Company (or its predecessors in business) or the dependents or connections of such persons and to grant pensions and allowances and to make payments towards insurance and to give such aid generally as the Company shall think fit; to subscribe to or otherwise aid, benevolent, charitable, political, national and other institutions or objects of a public, national and political character or which

may have any moral or other claims to support or aid by the Company by reason of the locality of its operations or otherwise."

4. Subsequently by another resolution of the Company (Annexure 'D') duly passed in accordance with sub-section (2) of Section 189 of the Act at an extraordinary general meeting of the members held on the 6th December 1967 at the registered office of the Company, after due notice dated 2nd November, 1967 (Annexure 'E') sent to the members of the Company as provided in the Act. It was resolved unanimously to alter Clause 3 of the Company's Memorandum of Association in the manner indicated below:—

The existing sub-clause (10) of Clause 3 shall be renumbered as sub-clause (18) and 8 more sub-clauses (10) to (17) were to be inserted after sub-clause (9). These are indicated in para. 10 of the petition. The proposed sub-clauses cover several items of activities which the Company proposed to take up.

Mr. R. K. Ghosh appearing for the Registrar of Companies vehemently opposed the incorporation of several items in the objects of the Company on grounds to be hereinafter referred to. The relevancy need and justification for each of the proposed items was therefore thoroughly discussed at the time of hearing of this application. As a result thereof Mr. B. K. Mohanty, the learned Advocate appearing for the Company filed on 12-9-68 a memo to recast para 10 of the petition in the manner indicated in the memo. What has been done is that he abandoned some of the proposed additions to the objects of the Company. Consequently, the resolution as it would stand after this alteration would be as under:

"Resolved that subject to the confirmation by the High Court, Clause III of the Memorandum of Association of the Company be altered as follows:—

(i) That the existing sub-clause (10) be renumbered as sub-clause (18).

(u) That the following sub-clauses (10) to (17) be inserted after sub-clause (9).

10 (a) To carry on the business of processors, producers, importers, exporters, buyers, suppliers, stockists, agents, merchants, distributors and concessionaries of and dealers in general merchandise goods.

(10) (b) To carry on the business of manufacturers, fabricators, processors, producers, growers, makers, importers, exporters, buyers, sellers, suppliers, stockists, agents, merchants, distributors and concessionaries of and dealers in commodities of all or any of the following:

(i) Office equipments of all descriptions, machinery parts, computers, articles, parts, components, apparatus, instruments, gadgets, devices, contraptions, tools, stores, spare parts, utensils, things, appliances of all description and materials pertaining to the aforesaid.

(ii) Synthetic yarn, clothes and materials, rubber and elastomers, synthetic resins, carbon black, rubber latex, plastics, laterex, and formulations, thereof including reclaimed rubber and other kinds of resins, rubber and plastic products, starch and other sizing materials, textile intermediates and compounds.

(iii) All types of chemical caustic soda, disinfectants and of electrical, photographic apparatus and materials of paper, board plastic rubber and elastomer base.

(iv) Oils, colours, paints, varnishes, lacquers, pigments, enamels, dyestuffs, fertilizers, pesticides, insecticides, surface active agents and glycerine.

(v) Carbons, inks, paper and stationery goods.

(vi) Petrochemicals and other synthetics, chemical and other substances of all kinds, basic intermediate or otherwise.

(vii) Nitrogen, oxygen and other industrial and domestic gases."

(11) To carry on business as timber merchants, saw mill proprietors and timber growers and to buy, sell, grow, prepare for market, manipulate, import, export and deal in timber and wood of all kinds and to manufacture and deal in veneers, veneer products, veneer for tea-chests, packing cases and commercial boards, decorative veneers, lamin boards, block boards, composite boards, compressed boards, pressed boards, hard boards, ship boards, bent wood, moulded wood and articles of all kinds in the manufacture of which timber or wood is used.

(12) To cultivate, press, prepare, process, buy, sell, distribute, trade, stock, barter, exchange, pledge, make advances upon, speculate, enter into forward transactions or otherwise deal in seeds, rubber, foodgrains, forests, agricultural and natural produce of all kinds; and to manufacture and deal in oils and other products obtained from such produce and to develop farms and plantations for any of the above items and commodities or any other commodity or products.

(13) To carry on (either in connection with the aforesaid business or as distinct or separate business) the business of transporters, engineers, chemists, printers, carriers, mechanics, researchers, technicians, designers, planners, advisors, consultants, purchasers, sellers, erectors, managers, superintendents, managers and to develop, acquire, supply plans, drawings, estimates, project reports and know-how for industries, business, companies and public bodies and Governments.

(14) To work or promote or acquire electrical and other undertakings for generating electricity or other energy for running the Company's mills, factories etc., or otherwise and to supply it to others and to work or establish as electrical contractors, engineers, etc. and to take and execute contracts for

the erection and distribution of transmission lines and sub-stations.

(15) To act as stockists, commission agents, manufacturers' representatives or agents, selling and purchasing agents, dealers, suppliers, distributors, brokers, trustees, attorneys and to transact all kinds of agency business.

(16) To guarantee the payment of money unsecured or secured by or payable under or in respect of bonds, debentures, debenture stock, contracts, mortgages, charges, obligations and other securities of any Company or of any authority, Central, State, Municipal, Local or otherwise, or of any person whomsoever, whether incorporated or not and generally to transact all kinds of guarantee business to guarantee the issue of or the payment of interest on the shares, debentures and debenture-stock or other security or obligations of any company or association and to pay or provide for brokerage, commission and underwriting in respect of any such issue, and to further transact all kinds of trust and agency business.

(17) To issue on commission, subscribe for, purchase or otherwise acquire and sell, dispose of, exchange, hold and deal in shares, stocks, bonds, debentures, debenture stock, public securities or other securities issued by any authority, Central, State, Municipal or local.

(iii) That the existing sub-clause (10) (v) herein renumbered as sub-clause (18) (v) be substituted by the following sub-clause:—

(18) (v) To amalgamate, enter into partnership or into any arrangement for sharing profits, union of interests, co-operation, joint venture or reciprocal concession, or for limiting competition with any person, firm or body corporate whether in India or outside carrying on or engaged in, or about to carry on or engage in any business or transaction which the Company is authorised to carry on or engage in or which can be carried on in conjunction therewith or which is capable of being conducted so as directly or indirectly to benefit the Company and further to enter into any arrangement or contract with any person, association or body corporate whether in India or outside for technical collaboration, technical know-how or for such other purpose that may seem calculated (sic.) beneficial and conducive to the objects of the Company.

(iv) That the existing sub-cl. (10) (xvii) herein renumbered as sub-clause (18) (xvii) be substituted by the following sub-clause:

(18) (xvii) To lease, let out on hire, mortgage, pledge, hypothecate, sell or otherwise dispose of the whole or any part or parts of the undertaking of the Company or any land, business, property, rights or assets of any kind of the company or any share or interest therein respectively in such manner and for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other body

corporate having objects altogether or in part similar to those of the Company.

5. It may also be stated that by the memo referred to above it was also proposed to delete from the proposed clause 3 (10) (VIII) the word "political" as it occurs for the first time.

6. It is averred in the petition that the Company is in a good financial position and has sufficient working capital, that its assets amount to Rs. 7,91,84,224 and deducting therefrom the liabilities amounting to Rs. 2,84,37,163 the net assets come to Rs. 5,07,47,061. It is reflected in the annual report for the year 1966 of the Company (Annexure 'F').

7. The Registrar of Companies, Orissa objects to the proposed alterations in the objects of the Company on several grounds. Regarding the proposed alterations to Clause 3 (10) (VIII) of the memo it is contended that this step is in conflict with the proposed legislation in Parliament banning contributions to political parties by Companies. Regarding the proposed alterations covered by the resolution dated 2nd November, 1967 it is contended that the proposed alterations are neither necessary nor required to enable the Company's business to be carried on more economically or more efficiently and that they are inconsistent with the existing business of the Company and if allowed, they would not leave the existing business substantially as it was before. The proposed alterations do not come within the concept of "some business which under existing circumstances, may conveniently or advantageously be combined with the business of the Company. It is true that although the main business of the Company is the manufacture of straw boards and paper, it has certain subsidiary and ancillary powers, but they are in essence associated objects and related purposes. The name of the Company as "Straw Products Limited" would be illogical and misleading to the world dealing with the petitioner company if they are permitted to carry on business in the proposed items which cannot by any means be called business which under the existing circumstances may conveniently or advantageously be combined with the business of the Company. Although apparently the Company is in a good financial position the excess of assets over liabilities being above 5,00,00,000 00, a scrutiny of the balance sheet Annexure 'F' shows that major portion of the capital of the petitioner-company is locked up in fixed assets and there is no proper scope and finance for the additional business, which the petitioner-company proposes to undertake. The Registrar has also annexed to the affidavit a copy of the letter received from one Sri B. A. Ojha of Hyderabad, a shareholder of the Company addressed to the Company Law Board objecting to the additional new business on the ground that there would be no advantage from it to the

shareholders as the profits of the Company would be ploughed back into the business thereby depriving the shareholders of their dividends. The Registrar finally prays that in the best interest of all concerned and for the protection of the interests of the shareholders against directors embarking on spurious and doubtful business and squandering company's trading funds under the cover of vague and ambiguous object clause in the memorandum, the Court should not confirm its resolutions.

8. Section 17 of the Companies Act deals with the special resolution for alteration of the memorandum of a Company and its confirmation by the Court. Sub-sections (1) and (2) of that Section read as under:-

"(1) A Company may, by special resolution alter the provisions of its memorandum so as to change the place of its registered office from one State to another, or with respect to the objects of the Company so far as may be required to enable it—

(a) to carry on its business more economically or more efficiently;

(b) to attain its main purpose by new or improved means;

(c) to enlarge or change the local area of its operations;

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;

(e) to restrict or abandon any of the objects specified in the memorandum,

(f) to sell or dispose of the whole, or any part, of the undertaking, or of any of the undertaking, of the company; or

(g) to amalgamate with any other company or body of persons

(2) The alteration shall not take effect until, and except in so far as, it is confirmed by the Court on petition."

9. Mr. B. K. Mohanty for the petitioner states that the proposed alterations fall within the purview of the Clauses (a) and (d) of sub-section (1). I would first take up the special resolution passed unanimously at the annual general meeting of the shareholders of the Company held on the 21st July, 1966 and which essentially relates to contributions to be made by the Company to funds of political parties. In this connection a reference may be made to Section 293 (1) (e) of the Indian Companies Act which runs as follows —

"(1) The Board of Directors of a public company, or of a private company which is a subsidiary of a public company, shall not, except with the consent of such public company or subsidiary in general meeting—

x x x x x
(e) contribute, after the commencement of this Act, to charitable and other funds not directly relating to the business of the company or the welfare of its employees, any amounts the aggregate of which will, in any financial year, exceed twenty-five

thousand rupees, or five per cent of its average net profits as determined in accordance with the provisions of sections 349 and 350 during the three financial years immediately preceding, whichever is greater." The expression "other funds" in S 293(1)(e) is wide enough to enable contributions of the kinds specified in the special resolution to be made by the Company. It cannot therefore be stated that the proposal is contrary to law. Indeed what an individual can lawfully do, can be done by a Company and there being nothing to prevent any individual from making any contributions to the political funds of a party, a Company cannot in law be prevented from doing so. Apart from the implied sanction afforded by S. 293 (1) (e) of the Companies Act, the proposed step can also be justified on the basis of Section 17 (1) (a) which is of very wide import and it can be said that the Company by contributing to the funds to political parties would be carrying on business more efficiently. True it is that the Court has a discretion to confirm or not to confirm an alteration even if the conditions laid down in Section 17 are satisfied. But it has to be borne in mind that it is primarily for the Company to decide whether it is for its good that it should make such contributions and it is not for the Court to tell the Company as to how it is to carry on its business. If therefore the shareholders of the Company after considering their own interests have agreed that the funds of the Company may be utilised for contribution to the funds of a political party, it is not for the Court to take a view different from the view of the shareholders when that view is not only not opposed to law, but falls within the provisions of the Companies Act itself.

The learned Advocate for the Registrar has not brought to my notice any decision in which a contrary view has been taken. Although in the case of Indian Iron and Steel Company Ltd., 27 Com Cas 361 = (AIR 1957 Cal 234) P. B. Mukharji, J. of the Calcutta High Court while recognising that the wide powers of the amendment given by Section 17 (1) (a) to amend the objects in order to enable a company to carry on its business more economically or more efficiently are large enough to permit a company to contribute to the political funds of political parties as a measure of efficient business management, thought it fit to impose certain conditions mainly aimed at giving full publicity to the quantum of contribution to be made to the funds of political parties and directed that the sanction would remain effective initially for a period of six years, to be extended on further application.

Ramaswami, J of the Madras High Court in Natesar Spinning and Weaving Mills (P) Ltd., 30 Com Cas 54 = (AIR 1960 Mad 257) referring to the aforesaid decision of

Rule 13. His case was that the appellant in Miscellaneous Appeal No. 105 of 1964 had entered appearance in the suit and, thereafter deliberately left doing pairvi in the suit and, as such her application was not maintainable. The further case of respondent No. 1 was that the applicants in both the appeals were jointly doing pairvi through their relation and had knowledge about the suit and sufficient opportunity to appear before the Court.

6. The records of the money suit disclose that the appellant in Miscellaneous Appeal No. 105 of 1964 filed vakalatnama and written statement in the suit on the 1st February and the 10th April 1963 respectively. The records of the money suit further disclose that on the application of respondent No. 1 the Court passed an order for substituted service, as the appellants were avoiding summons. The order of the Court below dated the 28th February 1963 goes to indicate that the same had already been duly published in the Calcutta Gazette.

7. In order to prove her case, the appellant in Miscellaneous Appeal No. 105 of 1964 examined seven witnesses including herself. Respondent No. 1 examined three witnesses. The learned Subordinate Judge, on a consideration of the evidence on record, has found that her plea that

"Description of Application.	Period of Limitation.
By a defendant for an order to set aside a decree passed <i>ex parte</i> .	Thirty days.

On the findings arrived at by the Court below the appellant had knowledge about the suit and the *ex parte* decree passed therein. Learned counsel for the appellant has, however, contended that the period of limitation should be counted from the date of knowledge of the *ex parte* decree which, according to the appellant, was the 1st July 1963. I am unable to accept this submission of learned counsel as the date of knowledge put forth by the appellant has not been accepted by the Court below for cogent reasons. The starting point of the period of limitation must, therefore, be held to be the date of the *ex parte* decree, namely, the 15th May 1963. Therefore, the application filed by this appellant, as has been rightly held by the Court below is barred by limitation.

9. Miscellaneous Appeal No. 104 of 1964 has been filed by the sons of the appellant in Miscellaneous Appeal No. 105 of 1964. The record of the money suit does not disclose that either of the two appellants had entered appearance in the suit at any stage. The learned Subordinate Judge however, has arrived at a clear finding that the appellants had

her case was looked after by her karpardaz who died on the 2nd May 1963 has not been established. He had also found that she had full knowledge of the date on which it was decreed *ex parte*. Accordingly, her application under Order IX, Rule 13 was held to be barred by limitation.

8. Mr. Rajgarhia on behalf of the appellant, has challenged with his usual vehemence the findings arrived at by the Court below but in my opinion the decision of the learned Subordinate Judge proceeded on a proper assessment of the evidence on record and nothing substantial has been pointed out by learned counsel to discredit the evidence of the witnesses examined on behalf of the respondent No. 1. As already stated, the appellant had entered appearance in the suit and filed her written statement. Her written statement and vakalatnama are on record. Therefore the oral evidence adduced on behalf of respondent No. 1 is in conformity with the documentary evidence on record. The Court below has rightly held that the application was barred by limitation. Article 164 of the old Limitation Act, which is applicable to the facts of the present case, runs as follows:—

Time from which period begins to run.
The date of the decree or where summons was not duly served when the applicant has knowledge of the decree."

knowledge of the suit along with their mother and of the date fixed for its hearing and, as such their application under Order IX Rule 13 was barred by limitation.

Thus finding of the Court below is also based on a consideration of the evidence on record and the facts and circumstances of the case. Mr. Rajgarhia, for the appellant, has contended that the finding is not justified on the state of evidence on record, but to my mind, the finding arrived at by the Court below on this point cannot be successfully challenged. It will, however, be not necessary to refer to the arguments advanced by Mr. Rajgarhia in view of the order passed by the Court for substituted service on the appellants under Order V, Rule 20 of the Code of Civil Procedure in the suit. Sub-rules (1) and (2) of rule 20 of Order V run as follows:—

"(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way the Court shall order the summons to be served by affixing a copy thereof in some conspi-

cuous place in the Court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally."

It is well settled that the words "shall be as effectual as if it had been made on the defendant personally" do not necessarily mean that the summons had been duly served but only that such service is as effectual as personal service for the purpose of going on with the proceedings in Court, and in spite of such service, it is open to the defendants to show that he had no knowledge of the claim.

Mr. Rajgarhia has, however, contended that substituted service can only be due service in the eye of law when the conditions laid down in sub-rule (1) were fulfilled. In support of his submission he has placed reliance on *Shanmukhi v. Venkatarami Reddi*, AIR 1957 Andh Pra 1 (FB). This Full Bench decision of Andhra Pradesh High Court supports the contention of learned counsel that substituted service can be only effective if the conditions laid down in sub-rule (1) were established and that it is open to a defendant to establish that he never avoided service and that, in any case, notice of the claim had not been brought home to him. I respectively agree with the view of their Lordships in the aforesaid case but so far as the present case is concerned the appellants, in their application under Order IX, Rule 13, did not allege that the conditions laid down in sub-rule (1) had not been fulfilled or that in spite of the substituted service, they had no knowledge of the claim. As a matter of fact in their application under Order IX, Rule 13, no mention whatsoever had been made of the substituted service.

It has, therefore, to be held that the substituted service was duly effected on the appellants and the (sic) to be regarded as effectual as if it had been made on them personally. The starting point of limitation will therefore, be the 15th May 1963, on which date the ex parte decree was passed. The application filed by these appellants on the 13th July 1963 under Order IX, Rule 13 was also barred by time.

10. For the reasons stated above, there is no merit in either of these appeals which are, accordingly, dismissed but without costs.

11. **K. B. N. SINGH, J.** :— I agree.
JRM/D.V.C. Appeals dismissed.

AIR 1969 PATNA 114 (V 56 C 32)

**ANWAR AHMAD AND
SHAMBHU PRASAD SINGH, JJ.**

Bahadur Singh, Appellant v. Fuleshwar Singh and others, Respondents.

A. F. O. O. No. 110 of 1965, D/- 12-7-1968, from order of Sub. J., Madhipura, D/- 3-3-1965.

(A) Limitation Act (1908), Art. 158 — Date of service of notice — It means informal notice and not only intimation.

Article 158 of the Limitation Act lays down that an application under the Arbitration Act to set aside an award or to get an award remitted for reconsideration must be filed within thirty days from "the date of service of the notice of filing of the award."

(Para 5)

There is no ground to construe the expression 'date of service of notice' in column 3 of Article 158 to mean only a notice in writing served in a formal manner. When the Legislature used the word 'notice' it must be presumed to have borne in mind that it means not only an intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. AIR 1962 SC 666, Applied; AIR 1960 Pat 201, Disting.

(Para 5)

(B) Arbitration Act (1940), S. 30 — Registration Act (1908), S. 23 — Award made — Award copied on stamped paper next day — Award is not invalid.

Section 23 of the Registration Act, lays down that a copy of the decree or order may be presented within four months from the date on which the decree or order was made. The award is an order of the Arbitrators and, according to this section, a copy of it may be prepared if it is to be registered. Therefore where an award is made and copied out on a stamped paper only on the next day for registration the award is not rendered invalid. AIR 1941 Pat 215, Dist.

(Para 7)

(C) Contract Act (1872), S. 29 — Reference for arbitration — Vagueness in agreement — (Arbitration Act (1940), S. 2 (a)).

A comparison of the two illustrations of S. 29 makes it manifest that, in cases where, from the surrounding circumstances, the meaning of the agreement is capable of being made certain, the agreement is not void but can be enforced.

(Para 9)

Therefore, where it was clear that the dispute which was referred for arbitration was a dispute relating to a shop owned by the partnership and from the discussion in the judgment of the Court it also appeared that the parties appeared before the arbitrators and never chal-

lenged their jurisdiction to proceed with the arbitration the agreement for reference cannot be said to be vague.

(Para 9)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 666 (V 49)=
 (1962) 2 SCR 551, Nilkantha Sid-
 ramappa v. Kashinath Somanna 5
 (1960) AIR 1960 Pat 201 (V 47)=
 1959 BLJR 723, Deep Narain Singh
 v. Mt. Dhaneshwari 5, 7, 8
 (1957) AIR 1957 All 406 (V 44),
 Radha Kishan v. Sapattar Singh 9
 (1957) AIR 1957 Pat 417 (V 44) =
 ILR 36 Pat 35, Basant Lal v.
 Surendra Prasad 6
 (1956) AIR 1956 Cal 321 (V 43)=
 60 Cal WN 471 (FB), Saha & Co.
 v. Ishar Singh Kripal Singh & Co. 6
 (1950) AIR 1950 Pat 445 (V 37),
 Jai Govind Singh v. Bagal Lal
 Singh 8
 (1946) AIR 1946 PC 72 (V 33)=ILR
 (1946) All 193, Chhabba Lal v.
 Kallu Lal 6
 (1941) AIR 1941 Pat 215 (V 28)=
 7 BR 864, Chhati Lal v. Ram-
 chariter 7

R. S. Chatterji, Ramdev Sinha and
 H. R. Das, for Appellant; Gorakh Nath
 Singh and B. N. Mandal, for Respondents.

SHAMBHU PRASAD SINGH, J. :—

This appeal by the plaintiff arises out of an application dated the 5th May 1962 for making an award on a reference made outside the Court a rule of the Court, which was registered as a title suit.

2. According to the plaintiff's case, he and defendant no. 1 entered into a partnership business in which the plaintiff was to supply the capital and to have eleven annas share and defendant no. 1 was to have five annas share. In August 1959, they started a shop of stationery goods in the town of Saharsa. In November 1961, there was a dispute between them and, on the 5th December 1961, they entered into an agreement to refer the matter for arbitration by four arbitrators who were made defendants 2 to 5 to the suit. One of them, Manzar Alam, according to the plaintiff, was to act as the umpire. They executed two documents, Exhibits 1 and 1(a), separately showing that they agreed to refer the case for arbitration. It appears that on the 3rd April 1962, the arbitrators pronounced the award and signed it. It was re-written on stamped paper on the 4th April, 1962 and was registered on the 5th April, 1962. A notice of the award was served on the plaintiff on the 7th April, 1962. Two more persons were made parties to the suit as defendants 6 and 7 who, according to the plaintiff, were merely his benamidars and had nothing to do with the business.

3. After the notice was served upon him, defendant no. 1 appeared in court on the 16th June 1962. The award was actually filed in Court on the 11th May 1963. On the 12th June 1963, defendant no. 1 filed an application before the Court below that the award had been filed and kept in safe custody and that he wanted to inspect it. On the 11th January 1964, he filed his objection, alleging inter alia, that there was no valid reference inasmuch as he was made to sign the agreement for reference under undue influence and coercion, that the award was invalid for the arbitrators had mis-conducted themselves, that defendants 6 and 7 had interest in the partnership and were not mere benamidars of the plaintiff and, as they were no party to the reference, the award could not be enforced, that the reference was void as it was vague, that the reference was also bad because it was in respect only of a part of the partnership business and not in respect of the canteen business owned by the partners in Sour Bazar in Saharsa and that the arbitration was bad because no umpire was, in fact, appointed. He alleged various misconducts on the part of the arbitrators which need not be referred to except three items, namely, that the arbitrators did not take into account the damaged articles of the shop and did not assess any value with respect to them, that they fixed the valuation of the other articles with the help of outsiders and that they re-wrote the award on the 4th April, 1962 after they had pronounced and signed it a day earlier.

4. The Court below has found in favour of the plaintiff on all points except on the questions of vagueness of the reference and three misconducts stated above. It has held that the reference was vague and the arbitrators did commit the aforesaid three misconducts and, accordingly, set aside the award and refused to pass a decree in terms thereof.

5. Mr R. S. Chatterji, appearing for the appellant, has argued that, as the objection of defendant no. 1 (respondent no. 1 before this Court and to be referred to as the respondent hereafter) was filed beyond thirty days of the filing of the award it was time barred and that this fact should have been taken into consideration by the Court below and it should have passed a decree in terms of the award. There can be no doubt that the respondent came to know of the filing of the award on the 12th June 1963 when he filed an application for its inspection and his objection was obviously beyond thirty days from that date. Article 153 of the Indian Limitation Act (Act IX of 1908) lays down that an application under the Arbitration Act (Act 10 of 1940) to set aside an award or to get an award remitted for reconsideration must be

filed within thirty days from "the date of service of the notice of filing of the award." It was contended by learned counsel for the respondent that, as no notice was served on the respondent in this case, there could be no question of limitation, and reliance was placed on a Bench decision of this court in *Deep Narain Singh v. Mt. Dhaneshwari*, AIR 1960 Pat 201, where it has been held that, if the required notice is not served, the question of limitation under Article 158 does not arise. In *Nilkantha Sidramappa v. Kashinath Somanna*, AIR 1962 SC 666, it was observed:—

"We see no ground to construe the expression 'date of service of notice' in column 3 of Article 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the Legislature used the word 'notice' it must be presumed to have borne in mind that it means not only an intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words 'notice' and 'service' it would have said so explicitly. It has not done so here. Moreover to construe the expression as meaning only a written notice served formally on the party to be effected, will leave the door open to that party even though with full knowledge of the filing of the award he has taken part in the subsequent proceedings, to challenge the decree based upon the award at any time upon the ground that for want of a proper notice his right to object to the filing of the award had not even accrued. Such a result would stultify the whole object which underlies the process of arbitration—the speedy decision of a dispute by a tribunal chosen by the parties."

In view of these observations of their Lordships of the Supreme Court, on the facts of this case, it has to be held that the starting point of limitation for filing an objection to the award by the respondent would be the 12th June 1963. The observations of this Court in *Deep Narain Singh's case*, AIR 1960 Pat 201 which were made on a reference to the special facts of that case have got no application here.

6. It was next contended by Mr. Gorakh Nath Singh for the respondent that the question of limitation would arise only in respect of two misconducts, namely, that the arbitrators did not take into account the damaged articles of the shop and that they fixed the valuation of the other articles with the help of outsiders, but the plea that the award was invalid because of the vagueness of the reference and that it was re-written

were beyond the scope of Section 30 of the Arbitration Act and could not be held to have been barred by limitation. Reliance was placed on a Bench decision of this Court in *Basant Lal v. Surendra Prasad*, AIR 1957 Pat 417 and a decision of their Lordships of the Judicial Committee in *Chhabba Lal v. Kallu Lal*, AIR 1946 P. C. 72 that the expression "otherwise invalid" in Sec. 30 of the Indian Arbitration Act and paragraph 15 of Schedule II to the Code of Civil Procedure does not include objections challenging the existence or validity of an arbitration agreement. A contrary view was taken in *Saha & Co. v. Ishar Singh Kripal Singh & Co.*, AIR 1956 Cal 321 (FB) by the majority of a Full Bench of the Calcutta High Court; but that decision was dissented from by a Bench of this Court in *Basant Lal's case*, AIR 1957 Pat 417 and, as the latter decision is binding on us, it is not proposed to examine the correctness of the proposition in detail.

7. In support of his contention that the award was bad because it was re-written, Mr. Singh relied on a Bench decision of this Court in *Chhati Lal v. Ramchariter*, AIR 1941 Pat 215 and also the decision in *Deep Narain Singh's case*, AIR 1960 Pat 201 already referred to. In *Deep Narain Singh's case*, AIR 1960 Pat 201 additions had been made to the award already pronounced by way of interpolation and, in those circumstances it was held that it was invalid. In the present case, there is no question of any variation, or addition, or alteration in the award. In *Chhati Lal's case*, AIR 1941 Pat 215 the award was published on the 28th March, 1936 but it was re-written on the 6th August 1937 and registered on the 14th of the same month. As the award was not presented for registration within four months from the date on which it was made, it was held that the re-written award could not be looked into as a valid award. Section 23 of the Indian Registration Act 1908, lays down that a copy of the decree or order may be presented within four months from the date on which the decree or order was made. The award is an order of the Arbitrators and, according to this section, a copy of it may be prepared if it is to be registered. In the instant case, therefore, when the award was registered only two days after the making of the award on the 3rd April 1962, it cannot be said on the authority of *Chhati Lal's case*, AIR 1941 Pat 215 that it was rendered invalid because it was copied out on stamped paper on the 4th April 1962. I have not been able to understand the judgment of the Court below on this point.

8. Mr. Singh, however, has contended that the order of the court below has to be upheld inasmuch as it has held

that the agreement for reference was vague. I am not satisfied with the finding of the court below that the agreement for reference is vague. The two documents, Exhibits 1 and 1(a), which contain the terms of reference agreed upon, state that the appellant and the respondent entered into a partnership business and that the business owns a shop known as "Variety House" in the town of Saharsa, in which the respondent owns five annas share and the rest is owned by the appellant. The document then proceeds and states that, as there was a dispute between the two, it is referred to the four arbitrators named therein and their decision shall be binding on them. It is manifest from these documents that the dispute between the parties was with regard to the Variety House which was owned by them as partners and that the dispute was referred for arbitration. Thus, the meaning of the agreement between the parties was certain or, at least, capable of being made certain. In support of this part of his contention also, Mr. Singh relied on the decision in Deep Narain Singh's case, AIR 1960 Pat 201. The properties to which the dispute related in that case, as mentioned in the agreement for reference, were held to be interpolations and, in the circumstances it was held that a reference in respect of all matters of dispute relating to properties not specified in the agreement was extremely vague. Mr. Singh then relied on another Bench decision of this Court in Jai Govind Singh v. Bagal Lal Singh, AIR 1950 Pat 445.

In that case, the plaintiff entered into a compromise with the defendant and agreed to give twenty bighas of paddy land out of sardari Jagir properties to the defendant. In the compromise petition which was filed, it was further mentioned that five gentlemen would decide "all matters" relating to the movable and immovable properties of the parties and the twenty bighas of land which were to be given to the defendants to which none of the parties would be competent to make any plea or raise any objection. The award which was filed later on did not settle all the disputes between the parties with regard to their movable and immovable properties, and a question arose before the District Judge as to whether the reference was in respect of Sardari Jagir land only or in respect of other properties as well. The District Judge as well as this Court held that the compromise was ambiguous on this question and its terms were not clear as to whether it related only to Sardari Jagir land or other properties of the parties as well. In these circumstances, the compromise was not recorded on the ground that the agreement between the parties was vague. Both these deci-

sions are distinguishable from the present case.

9. Section 29 of the Contract Act runs as follows:—

"Agreements, the meaning of which is not certain, or capable of being made certain, are void."

Two of the illustrations to the section, namely, illustrations (a) and (c), may be fully quoted to see what the framers of the Act intended. They are as follows:—

"(a) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty."

"(c) A, who is a dealer in coconut oil only, agrees to sell B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil." A comparison of these two illustrations makes it manifest that, in cases where, from the surrounding circumstances, the meaning of the agreement is capable of being made certain, the agreement is not void but can be enforced. In the case before us, from Exhibits 1 and 1(a), it is clear that the dispute which was referred for arbitration was a dispute relating to the Variety House, a shop owned by the partnership. From the discussions in the judgment of the Court below, it also appears that the parties appeared before the arbitrators and never challenged their jurisdiction to proceed with the arbitration. In Radha Kishan v. Sapattar Singh, AIR 1957 All 406, it was observed by a Bench of the Allahabad High Court:

"In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate when necessary, their disputes before the arbitrators and seek their decisions on those points of differences. The arbitration agreement in this case cannot be said to be so vague or uncertain as to be unenforceable. Sec. 29 of the Contract Act says that:

'Agreement, the meaning of which is not certain, or capable of being made certain, are void.'"

In my opinion, the law on the point has been correctly stated in this decision, and I respectfully agree with what their Lordships have observed and which has been quoted above. Applying that test to the facts of the present case, the award of the arbitrators in the case before us cannot be set aside on the ground of vagueness in the reference for arbitration.

10. For the reasons stated above, the order of the court below must be set aside. The appeal is, accordingly allowed with costs to the plaintiff-appellant of this court as well as the court below. The award is accepted as valid and it is direct-

ed that a decree be prepared in terms of the award.

11. ANWAR AHMAD, J. :— I agree.
MVJ/D.V.C. Order accordingly.

AIR 1969 PATNA 118 (V 56 C 33)

S. N. P. SINGH AND
KANHAIYAJI, JJ.

Pandit Saligram Acharya, Appellant v.
Pandit Raghavacharya and others, Res-
pondents

A. F. O. No. 382 of 1965, D/- 18-7-
1968, against order of IInd Addl. Dist. J.,
Bhagalpur, D/- 13-12-1965.

(A) Bihar Hindu Religious Trusts Act
1950 (1 of 1951), Ss. 48 & 72—Civil P. C.
(1908), S. 141 & O. 40, R. 1—Proceedings
under S. 48 — They are of kind contem-
plated by S. 141 — Receiver can be ap-
pointed pending appointment of new she-
bait under O. 40, R. 1 — Art. 26 of Con-
stitution is no bar.

A proceeding under S. 48 of the Bihar
Act is a proceeding of the kind contem-
plated by S. 141 of the Civil P. C. and as
such the Additional District Judge while
acting under that section has the power
to appoint a receiver under O. 40, R. 1 of
the Civil P. C. pending the appointment
of a new shebait. (Para 9)

The principles relating to appointment
of a receiver can be deduced as fol-
lows—

(a) That a receiver can be appointed
even in proceedings other than a suit.

(b) That such proceedings must be in
a Court of Civil jurisdiction.

(c) That the provisions of section 141
of the Code of Civil Procedure are ap-
plicable only in respect of proceedings to
a Court of Civil jurisdiction. The pro-
ceedings under Section 48 of the Act
are proceedings of civil jurisdiction in
the Court of the District Judge and as
such the provisions of section 141 of the
Code of Civil Procedure are applicable.

(Para 16)

The fact that under Order 40, Rule 1
of the Code of Civil Procedure a receiver
may be appointed who may or may not
belong to a particular denomination it
could not be contended that in view of
Article 26 of the Constitution no receiver
can be appointed under Order 40, Rule 1
in a case of religious denomination.

(Para 17)

(B) Bihar Hindu Religious Trusts Act
1950 (1 of 1951), S. 48 — Shebait follow-
ing particular cult appointed under deed
of endowment — Shebait committing
various acts of dishonesty in the manage-
ment of temple and its properties —
Order of his removal from shebaitship
passed by Additional District Judge —
Order ultimately upheld by Supreme

Court — Held, that Shebait could not
have interest left as trustee of the temple
and its properties. (Para 6)

Cases Referred: Chronological Paras
(1953) AIR 1953 SC 298 (V 40)=
1953 SCR 691, Ebrahim Abooba-
ker v. Tek Chand Dolwani 10, 13
(1946) AIR 1946 Pat 70 (V 33)=
ILR 24 Pat 616, Nagarchand v.
Surendranath 13a, 15
(1945) AIR 1945 All 261 (V 32)=
ILR (1945) All 818 (FB), Moham-
mad Ali Khan v. Ahmad Ali
Khan 13a, 14
(1944) AIR 1944 Cal 157 (V 31)=
76 Cal LJ 363, Amode Lal Burman
v. Giriya Sankar Chaudhury 13a
(1927) AIR 1927 Sind 237 (V 14)=
22 Sind LR 146, Assardas Manghu-
mal v. Mt. Thakurbai 10, 12
(1924) AIR 1924 All 376 (V 11)=
ILR 46 All 372, Kanhaiya v.
Kanhaiya Lal 10, 11
(1901) 8 Cal WN 404, Gyanananda
Asram v. Kristo Chandra Mukher-
ji 10

Sudhir Chandra Ghose and Mahendra
Prasad Pandey, for Appellant; Thakur
Prasad and Brajeshwar Mullick, for Res-
pondents.

S. N. P. SINGH, J. :— This appeal is
directed against the order dated the 13th
of December, 1965, passed by the 2nd
Additional District Judge, Bhagalpur, in
Miscellaneous Case No 37 of 1952. By
the aforesaid order the learned 2nd Addi-
tional District Judge made an ad interim
order of injunction restraining the pre-
sent appellant from making disposal of
the properties belonging to the temple
of Sri Biharijee absolute. He further
passed an order for the appointment of
a receiver for the temple of Sri Bihari-
jee and its properties pending the ap-
pointment of a new Shebait.

2. The order under appeal has been
passed by the learned Additional District
Judge in the following circumstances On
the 15th of September, 1952, the three
respondents to this appeal filed an appli-
cation in the court of the District Judge
of Bhagalpur under Section 48 of the
Bihar Hindu Religious Trusts Act, 1950
(Bihar Act I of 1951), hereinafter refer-
red to as "the Act", for the removal of
the appellant from shebaitship for rendi-
tion of accounts by him and for appoint-
ment of a new Shebait in his place on the
ground of mismanagement of the trust
properties, misappropriation of the trust
funds, unauthorised transfers and mala
fide acquisition by the appellant of prop-
erties in the Benami name of others
with the income of the temple properties.
That petition gave rise to Miscellaneous
Case No 37 of 1952. The appellant denied
the allegations made by the respondents
in their application and further urged

that the Act was ultra vires and unconstitutional. Mr. Brahmadeva Narain, the then Additional District Judge of Bhagalpur, heard the case and by his order dated the 23rd February, 1957, found the appellant guilty of misfeasance. He held, inter alia, that the appellant wrongly diverted a part of the temple fund to finance a new Vidyalaya started by him; that his natural relations had all along received subsistence and help from the temple fund; that he pawned the ornaments of the deity and in order to cover his fault he instituted a false criminal case alleging theft of the ornaments and that he maintained no accounts for the years 1941 to 1947 and wrongly claimed some of the properties belonging to the deity as his personal properties. The learned Additional District Judge arrived at the conclusion that the appellant had acted in a manner prejudicial to the interest of the deity and took the view that in the interest of the trust, he should not continue as shebait of the temple in question. The learned Additional District Judge further held that the temple was a private temple but it came within the purview of the Act as the endowment created for the worship of the deity in the temple in question was a religious trust. On the constitutionality of Section 48 of the Act, he expressed the opinion that it was void and inoperative and accordingly he stated a case under Section 113 of the Code of Civil Procedure for the opinion of the High Court on the question whether the provision of Section 48 of the Act was void and inoperative and pending the decision of the High Court he reserved his findings on the questions whether the application under Section 48 of the Act was maintainable and whether the Act was ultra vires the Bihar Legislature.

3. The reference (Civil Reference No. 1 of 1957) made by the learned Additional District Judge was disposed of by the High Court on the 21st of October, 1959, and it was held that the provisions of Section 48 of the Act were constitutionally valid and operative. The opinion of the Court was forwarded to the Additional District Judge and the records were sent back to him for disposal in accordance with law. Thereafter the case was heard by Mr. Rash Bihari Prasad Sinha, another Additional District Judge of Bhagalpur, who, in the meantime, succeeded Mr. Brahmadeva Narain. The learned Additional District Judge by his order dated the 8th of December, 1959, allowed the miscellaneous case and directed the appellant to be removed from Shebaitship. He further gave a direction that the appellant would render accounts. Regarding the appointment of a new Shebait, the learned Additional District Judge passed the following order:

"A new shebayat will have to be appointed in place of the opposite party who has been ordered to be removed; this new appointment will take place as per direction contained in the deed of trust."

The appellant then filed a writ application under Article 226 of the Constitution of India being M. J. C. No. 910 of 1959. That application was dismissed by the judgment and order of this Court dated the 14th of December, 1960. The appellant then preferred an appeal (Civil Appeal No. 645 of 1964) to the Supreme Court. It appears that during the pendency of the appeal, their Lordships of the Supreme Court stayed further proceedings in Miscellaneous Case No. 37 of 1952, in the Court of the Additional District Judge, Bhagalpur, on the following terms:—

"An inventory of the property shall be made and the ornaments of the Idol shall be kept in the bank to be taken out for ceremonial use if necessary, with the permission of the court of the District Judge, Bhagalpur. The appellant undertakes not to alienate or dispose of any property pending decision in this appeal, and to keep regular accounts of his dealings with regard to the estate of temple and offerings and to submit the accounts once every two months to the Court of the District Judge, Bhagalpur. Liberty to the respondents to inspect the accounts so submitted once every two months. The appellant will be at liberty to keep Rs. 500/- (in cash) in hand for the expenditure of the temple, the excess amount shall be deposited in the bank. If the appellant needs to withdraw any amount in excess of the amount allowed, he can do that with the permission of the court. Hearing of the appeal is "expedited."

The appeal in the Supreme Court was dismissed with costs on the 4th of November, 1965, and the judgment of the High Court was upheld.

4. Thereafter on the 12th of November, 1965, respondents 1 and 2 filed a petition in the court of the Additional District Judge for appointment of a Commissioner for taking accounts, for making local inspections and for submitting reports regarding crops. They further prayed that an ad interim order may be passed for preservation of the properties pending disposal of the matter and the appellant be enjoined and restrained from making any disposal of the properties pending delivery of possession. The learned Additional District Judge passed an order of ad interim injunction restraining the appellant from harvesting the crop and also damaging or disposing of the properties of the trust in any other way till the final disposal of the application. On the 15th of November, 1965, the learned Additional District Judge appointed an advocate as Commissioner for

holding local inspection and reporting as to what crops were standing in what portion of the land and directed that he should submit his report by the 22nd of November, 1965. On the 15th of November, 1965, respondents 1 and 2 filed another application in the court of the Additional District Judge in which they made a prayer for the appointment of a receiver for the temple and its properties. The appellant filed a rejoinder to the two applications which had been filed by respondents 1 and 2. The matter was ultimately heard and disposed of by the learned Additional District Judge by the order under appeal dated the 13th of December, 1965. As I have already stated, the learned Additional District Judge made the ad interim order of injunction restraining the present appellant from making disposal of the properties of the temple absolute and further passed an order for the appointment of a receiver for the temple and its properties pending the appointment of a new Shebait.

5. Mr. S. C. Ghose, learned counsel appearing for the appellant, did not challenge the legality or propriety of the order of injunction restraining the appellant from making disposal of the properties of the temple Sri Biharijee. He confined his argument only on the question of the appointment of a receiver for the temple and its properties pending the appointment of a new Shebait and challenged the propriety and legality of this part of the order passed by the learned Additional District Judge. Learned counsel raised the following contentions:

(1) That the appellant, in spite of the order of removal from the shebaitship, has got interest in the temple and its properties till a Shebait of Ramanuj Sampradaya takes over charge of the temple and its properties;

(2) That there are inadequate materials before the Court for the appointment of a receiver and as such it is not just and convenient to appoint a receiver;

(3) That the learned Additional District Judge while acting under Sec. 48 of the Act had no power to order the appointment of a receiver; and

(4) That the provisions of Order 41, Rule 1 of the Code of Civil Procedure will not apply in a case of religious denomination in view of clause (b) of Article 26 of the Constitution of India.

6. Mr. Ghose founded his first contention on some of the recitals in the deed of endowment of Swami Ramprapannacharya to Sri Thakur Biharijee dated the 28th of June, 1940. There is a recital in the deed that the executant came to Bhagalpur to deliver sermon on Vaishnavism and desired to set up a Thakurbari of Vaishnav Sampradaya of Ramanuj and to install a Thakurjee therein. Paragraph

3 of the deed of endowment reads as follows:

"I the executant considered it advisable that I should dedicate the properties mentioned in schedule No. 5 to Sri Sri Thakur Sri Beharijee, so that this Kirti (renowned act) may remain intact for ever. Now, I, the executant of my own accord and free will, without pressure, coercion and illegal inducement and in sound state of body and mind wanted to dedicate the property mentioned in Sch. 5 to Sri Sri Thakur Biharijee and to appoint an able Sebait in my lifetime. But I do not find any able Birakt Shri Vaishnava amongst my disciples. Therefore, I, the executant of my own accord and free will, without pressure, coercion and inducement dedicated the properties mentioned in Schedule 5 to Sri Sri Thakur Biharijee installed in Thakurbari Sri Radha Raman Kunj Bhawan Divyadesh, situate in Mahalla Malchak, Chunihartoli lane within Bhagalpur town and I, the executant shall remain shebait of Shri Thakur Biharijee aforesaid so long I am alive, and I appointed Sriman Pandit Saligramacharya Sastrijee son of Rishikesh Pandey deceased, resident of Bhawanipur, District Bhagalpur, at present residing at Tripura Bhairvi Sri Laxmi Banktesh Temple No. 5/37 in the town of Kashi, by caste Kankubj Saryuparin Brahmin, by occupation a servant etc of God and Bhagwat to become my successor shebait of Shri Thakur Biharijee aforesaid after my death. He will during my lifetime, perform Nitya Aradhan, Naimittik Aradhan, Tadiya Aradhan monthly and annual celebration etc. as prescribed by me according to the practice in vogue and will continue to do them accordingly after my death. He will be competent to effect improvement according to my desire to the temple and Radha Raman Pathshala by giving meals to the students and others, and after the death of me the executant shall enter into upon possession of all the properties of Shri Thakur Sri Biharijee aforesaid and apply the proceeds thereof in meeting the cost of ragbhog pujapath service to the guests and pathshala etc. and he should get the names of Sri Thakur Biharijee recorded in land records office. In short, whatever rights and interest I, the executant had till today, has been acquired by Shri Thakur Biharijee aforesaid."

In paragraph 6 of the deed of endowment provisions have been made for the nomination of a new Shebait Mahant by the appellant. The qualifications of the Shebait Mahant to be nominated by the appellant have also been laid down, one of the qualifications being that he should be a follower of the Ramanuj Srivaishnav Sampradaya. Mr. Ghose submitted that Swami Ramprapannacharya appointed the appellant a She-

bait of Sri Thakur Biharijee not only for the purpose of looking after the management of the temple and its properties but to propagate the cult of Ramanuj in this part of the country and to initiate disciples to that cult and as such as long as another trustee of Ramanuj cult is not appointed, the appellant has an interest in the trust property. The contention raised by learned counsel appears to be ill-founded. The appellant might have interest as a disciple of Swami Ramprannacharya and as a follower of the Ramanuj Srivaishnav Sampradaya in the temple and the properties of the trust as any other disciple of the Swamiji and a follower of the said cult has. After the order of his removal from the shebaitship passed by the learned Additional District Judge, which has been ultimately upheld by the Supreme Court, he has no interest left as a trustee of the temple and its properties. There is, therefore, no substance in the above contention raised by learned counsel.

7. According to Mr. Ghose, in the petition filed on the 15th of November, 1965 for the appointment of a receiver respondents nos. 1 and 2 simply made the allegation that in view of the disposal of the appeal by the Supreme Court it was likely that the entire Agham and Kartika paddy crops standing on the land of the temple were likely to be lost to the temple if the appellant or his men, relations and underlings were allowed to harvest the paddy crops and that allegation was specifically denied by the appellant in paragraph 6 of his rejoinder petition. Learned counsel submitted that the Supreme Court passed the order of stay on certain terms as far back as on the 18th of February, 1961, and in absence of any complaint that the appellant had violated the order of the Supreme Court, the learned Additional District Judge should have rejected the prayer of respondents nos. 1 and 2 for the appointment of a receiver and should have allowed the appellant to manage the temple and its properties till the appointment of a new Shebait. This contention is also without substance. As an appeal arising from the order of the learned Additional District Judge removing the appellant from the Shebaitship was pending in the Supreme Court, their Lordships of the Supreme Court pending that appeal stayed further proceedings in Miscellaneous Case No. 37 of 1952 and permitted the appellant to be in charge of the temple and its properties after imposing certain stringent conditions. After the disposal of the appeal by the Supreme Court, the order of stay passed by the Supreme Court stood automatically vacated. In view of the fact that the order of removal had been passed by the learned Additional District Judge on his finding that

the appellant had committed various acts of dishonesty in the management of the temple and its properties, the learned Additional District Judge could not have allowed him to remain in possession of the properties of the temple for the matter became final on the dismissal of the appeal of the appellant in the Supreme Court. As pointed out by the learned Additional District Judge, the appointment of a new Shebait is likely to take sometime as the same has to be done in accordance with the directions contained in the deed of endowment. In view of the past conduct of the appellant in the matter of the management of the temple and its properties, the learned Additional District Judge was justified in holding that it was not desirable that the appellant should remain in possession of the properties any longer. On the facts stated above, the learned Additional District Judge has arrived at a correct conclusion that it is just and convenient that a receiver be appointed.

8. It appears from paragraph 15 of the order under appeal that a contention was raised on behalf of the appellant to the effect that a receiver cannot take up the duties of a Shebait as his duties among other things include the duty of performing Puja. The learned Additional District Judge overruled the contention and observed as follows:

"... But I do not think there is any point in the objection. It is true that a receiver will not be able to perform the pujas himself. But he can certainly get the puja done by the proper person. There must be some pujaries performing the pujas. He may get the pujas done through them or through such other person as he considered proper, but certainly according to the directions if any contained in the trust deed and the religious usage."

In this Court learned counsel appearing for the appellant submitted that Pujas are performed in the temple of Sri Biharijee by the Pujaries and not by the appellant himself. The appointment of a receiver, therefore, will not in any way affect the performance of Puja in the temple by Pujaris who are at present performing the Pujas.

9. I will now consider the point whether the learned Additional District Judge, while acting under section 48 of the Act, had the power to order the appointment of a receiver or not. Mr. Ghose submitted that Section 48 of the Act does not specifically confer power on the District Judge to appoint a receiver as does Section 72 of the Act and as such the Additional District Judge while acting under Section 48 of the Act had no power to order the appointment of a receiver. I am not inclined to agree with the above submission of learned counsel

appearing for the appellant. Section 141 of the Code of Civil Procedure lays down as follows:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction."

Chapter IX of the Act in which section 48 occurs is headed "Judicial Proceedings." Section 48 of the Act reads as follows:

"48 Power of District Judge to remove trustee or appoint trustee.—(1) The Board, or with the previous sanction of the Board, any person interested in a religious trust, may make an application to the District Judge for an order —

(a) removing the trustee of such religious trust, if such trustee —

(i) acts in a manner prejudicial to the interest of the said trust, or

(ii) defaults on three or more occasions in the payment of any amount payable under any law for the time being in force in respect of the property or income of the said trust or any other statutory charge on such property or income; or

(iii) defaults on three or more occasions in the payment of any sum payable to any beneficiary under the said trust, or in discharging any other duty imposed upon him under it; or

(iv) is guilty of a breach of trust.

(b) appointing a new trustee;

(c) vesting any property in a trustee;

(d) directing accounts and inquiries;

or

(e) granting such further or other relief as the nature of the case may require.

(2) The order of the District Judge under sub-section (1) shall be final."

The above provisions of Section 48 of the Act make it abundantly clear that a proceeding under that section is of civil jurisdiction. No procedure is prescribed in the Act itself in respect of a proceeding under Section 48 of the Act. Apart from the restriction regarding appeal as contained in sub-section (2) of Sec. 48 of the Act, no other restriction has been imposed anywhere regarding the applicability of the Code of Civil Procedure in a proceeding under section 48 of the Act. I am, therefore, of the opinion that a proceeding under Section 48 of the Act is a proceeding of the kind contemplated by Section 141 of the Code of Civil Procedure and as such the Additional District Judge while acting under that section had the power to appoint a receiver under Order 40, Rule 1 of the Code of Civil Procedure pending the appointment of a new Shebait.

10. In support of his contention that the learned Additional District Judge while acting under Section 48 of the

Act had no power to appoint a receiver, learned counsel appearing for the appellant referred to the decisions in *Gyanananda Asram v. Kristo Chandra Mukherji*, (1901) 8 Cal WN 404; *Kanhaya v. Kanhaiyalal*, AIR 1924 All 376, *Assardas Manghumal v. Mt. Thakurbai*, AIR 1927 Sind 237 and *Ebrahim Aboobaker v. Tek Chand Dolwani*, AIR 1953 SC 298. In the case of (1901) 8 Cal WN 404 it was held that in a suit brought under the Religious Endowments Act (XX of 1863), a Civil Court has no power to appoint a receiver or manager of debutter properties except under Section 5 of the same Act. On the basis of the above decision, Mr. Ghose submitted that Section 72 of the Act corresponds to section 5 of the Religious Endowments Act and as such in a suit filed under Section 72 of the Act only a receiver can be appointed by the Court and not otherwise. In that case Maclean, C. J. had further observed as follows:

"If the plaintiff wished to have a Receiver appointed and to have the trust property administered under the directions of the Court, his proper course would have been to have proceeded under section 539 of the Code of Civil Procedure, which he could not do without the previous sanction of the Advocate-General."

Section 92 of the present Code of Civil Procedure corresponds to section 539 of the old Civil Procedure Code. As provided under section 4(5) of the Act, Section 92 of the Code of Civil Procedure has been made inapplicable to a Hindu religious trust in the State of Bihar. Most of the reliefs which could have been granted in a properly constituted suit under section 92 of the Code of Civil Procedure can be granted in a proceeding under Section 48 of the Act. That being the position, the decision in the case, referred to above, does not support the contention of learned counsel that no receiver can be appointed in a proceeding under Section 48 of the Act.

11. In the case of AIR 1924 All 376, the point for consideration was whether the provisions of Section 141 of the Code of Civil Procedure were applicable to proceedings under Succession Certificate Act. The learned Judges came to the conclusion after examining the provisions of the Succession Certificate Act that the provisions of section 141 of the Code of Civil Procedure were not applicable to that Act. As the provisions contained in the Act are not similar to the provisions contained in the Succession Certificate Act, the decision in the Allahabad case cannot be an authority for the proposition that the provisions of Section 141 of the Code of Civil Procedure are not applicable to proceedings under Section 48 of the Act.

12. In the case of AIR 1927 Sind 237 it was held that a Court cannot appoint a receiver in a proceeding under Section 74 of the Trusts Act for the removal of a trustee and the appointment of a new trustee. It was observed in that case that Section 74 of the Trusts Act affords only an alternative summary remedy for removal of a trustee and that it is open to the beneficiaries or to the co-trustees, if any, to file a regular suit for the removal and for recovery of property if they apprehend that the trust property is likely to disappear and to get a receiver appointed in that suit on payment of proper court-fees. The provisions of Section 48 of the Act are not analogous to section 74 of the Trusts Act. Apart from that, the question whether the provisions of Section 141 of the Code of Civil Procedure are applicable or not in a proceeding under section 74 of the Trusts Act was not considered and decided in that case. In that view of the matter, the Sind case is absolutely of no assistance in deciding the point under consideration.

13. In the case of AIR 1953 SC 298 their Lordships of the Supreme Court held that a Custodian of evacuee property is not a Court although the proceedings before him are of a quasi-judicial nature. It was further held that the provisions of Section 141 of the Code of Civil Procedure are not applicable in proceedings before the Custodian of evacuee property. There is no similarity between the provisions of the Administration of Evacuee Property Act 1950 and the provisions of the Act. On the authority of the decision in the Supreme Court it cannot, therefore, be held that the provisions of section 141 of the Code of Civil Procedure are inapplicable to proceedings under Section 48 of the Act.

13a. Mr. Thakur Prasad, learned counsel appearing for respondents nos. 1 and 2, in course of his argument referred to the decisions in *Amode Lal Burman v. Girija Sankar Chaudhury* AIR 1944 Cal 157; *Mohammad Ali Khan v. Ahmad Ali Khan*, AIR 1945 All 261 (FB) and *Nagarchand v. Surendranath*, ILR 24 Pat 616=(AIR 1946 Pat 70) In the case of AIR 1944 Cal 157 a suit had been brought by some of the interested persons for the removal of the Shebait and for possession of the Debutter properties alienated by him. The suit was decreed. In the second appeal, which was preferred in the High Court, the learned single Judge, who heard the appeal, directed that a receiver should be appointed to take possession of the disputed properties pending the appointment of another Shebait. Defendant no 1 of that suit filed an appeal under clause 15 of the Letters Patent which was heard by a Division Bench. One of the points mooted out in the ap-

peal under the Letters Patent was that the order of the learned single Judge directing the appointment of a receiver of the disputed property pending the appointment of a Shebait was bad in law. The learned Judges who heard the appeal rejected the contention and observed as follows:

"..... in view of the events that have happened in the present case, we are not prepared to say that the learned Judge was wrong in appointing a receiver of the disputed properties pending the appointment of another Shebait."

The decision in the above-mentioned case no doubt supports the contention of learned counsel on the question of propriety of the appointment of a receiver in the present case but it is of no assistance in deciding the point under consideration.

14. In the case of AIR 1945 All 261 it was held by the Full Bench that the District Judge as a principal Civil Court of original jurisdiction in exercise of his powers as a Kazi has no power in a summary proceeding, that is by means of a mere application, to remove a Mutwalli for misconduct or breach of trust and appoint a new Mutwalli in his place. The Mutwalli can only be removed by means of a suit properly instituted in the Civil Court. Two of the learned Judges further held that jurisdiction to protect property pending the ascertainment of rights was inherent in any Court which once had cognizance in any form of a dispute involving the execution of a trust or the administration of assets and the Court had not merely jurisdiction but a duty to safeguard them. Wali Ullah, J. after considering a number of decisions held that the Court had ample power for making an appointment of receiver under Section 94 read with Order 40 of the Civil Procedure Code, or, in the alternative, under Section 151 of the Code of Civil Procedure. The above decision fully supports the contention of learned counsel for respondents 1 and 2 that a receiver can be appointed in proceedings other than suits.

15. In the case of ILR 24 Pat 616=(AIR 1946 Pat 70) the point for consideration was whether the Court has the power of appointing a receiver in a proceeding under the Arbitration Act, 1940, when an application is made under section 20 of the Act, though notices of the application have not been served on all the parties and the actual arbitration has not commenced. A Division Bench of this Court held that the Court has the power of appointing a receiver in such circumstances viz before the service of notice on the parties and before the commencement of the actual arbitration proceeding. In my opinion, the point for consideration in that case was quite different

from the point which is under consideration in the instant case and as such that decision is of no assistance in deciding the point under consideration.

16. From the various decisions which have been cited at the bar the following principles are deducible—

(a) That a receiver can be appointed even in proceedings other than a suit

(b) That such proceedings must be in a Court of Civil jurisdiction.

(c) That the provisions of Section 141 of the Code of Civil Procedure are applicable only in respect of proceedings to a Court of Civil jurisdiction

I have already given my reasons for holding that the proceedings under Section 48 of the Act are proceedings of Civil jurisdiction in the Court of the District Judge and as such the provisions of Section 141 of the Code of Civil Procedure are applicable. In my considered opinion, therefore, the learned Additional District Judge had the power to appoint a receiver while acting under section 48 of the Act.

17. Now remains to consider the last contention of learned counsel appearing for the appellant. Mr. Ghose submitted that under the Constitution of India every religious denomination or any section thereof has been given the freedom to manage its own affairs in matters of religion and certain other freedoms. He referred to Article 26 of the Constitution which reads as follows:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes.

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law."

Learned counsel submitted that under Order 40, Rule 1 of the Code of Civil Procedure a receiver may be appointed who may or may not belong to a particular denomination and as such in view of Article 26 of the Constitution no receiver can be appointed under Order 40, Rule 1 in a case of religious denomination. I find it difficult to appreciate the argument of learned counsel. We are informed by the parties that one Sri Kamleshwari Sahay has been appointed a receiver by the subsequent order of the learned Additional District Judge. We are not concerned in the present appeal about the propriety of the appointment of Sri Kamleshwari Sahay and we have been given to understand by the parties that no appeal has been preferred by either party against the order of the learned Additional District Judge ap-

pointing Sri Kamleshwari Sahay as the receiver. It was open to the appellant to have objected to the appointment of Sri Kamleshwari Sahay on the ground that he does not belong to the particular denomination. It is, however, difficult to accept the contention of learned counsel that in a case of religious denomination no receiver can be appointed under Order 40, Rule 1 of the Code of Civil Procedure. I, therefore, do not find any substance even in the last contention which has been raised by learned counsel appearing for the appellant.

18. As all the contentions raised on behalf of the appellant fail, this appeal is dismissed with costs. The order of stay passed by this Court stands automatically vacated. It is desirable that the learned Additional District Judge will expedite the appointment of a new Shebait of the temple and its properties.

19. KANHAIYAJI, J. :— I agree.
MVJ/D.V.C. Order accordingly.

AIR 1969 PATNA 124 (V 56 C 34)

S. N. P. SINGH AND
KANHAIYAJI, JJ.

Union of India, Appellant v. Messrs. Ranjan Brothers, Respondent.

A. F. O. O. No. 339 of 1965, D/- 17-7-1968, from order of Sub. J., 1st Court, Muzaffarpur, D/- 16-8-1965.

(A) Arbitration Act (1940), Ss. 30, 13 — Award — Mere omission to give reasons does not vitiate award. AIR 1967 SC 378 & AIR 1967 SC 1030, Foll. (Para 5)

(B) Arbitration Act (1940), Ss. 30, 13 — Proceeding before arbitrator — Notice to parties to file documents — Parties and their lawyers heard at length — Substantial compliance with principles of natural justice.

Where it was clear from the records of the proceedings before the arbitrator that he gave notice to the parties to file documents and ultimately he heard the parties and their lawyers at length, it could not be said that the arbitrator had not followed the principles of natural justice. The principles of natural justice demand that the arbitrator should follow such a procedure which a reasonable man would follow in deciding a dispute impartially in the absence of any special procedure agreed or consented to by the parties. The proceedings before arbitrator need not be conducted with such meticulous care as is required in ordinary Civil Courts so long as there is substantial compliance with the principles of natural justice. AIR 1954 Ori 234, Rel. on. (Para 7)

JL/LL/E587/68

(C) Arbitration Act (1940), S. 30 — Award — Failure of arbitrator to maintain order sheet — There being no provision in the Act requiring arbitrator to maintain order sheet in arbitration proceedings, award cannot be said to be vitiated. (Para 7)

(D) Arbitration Act (1940), Ss. 30, 14(1) — Award — Validity of — Object of notice under S. 14(1).

The validity of the award does not depend upon the notice of the same being given to the parties. The object of giving notice under sub-section (1) of section 14 is to give opportunity to the parties to file objection to the validity of the award. Where an objection to the validity of the award was filed by a party before the award was actually received in the Court, it goes to show that the party had notice of giving of the award and as such no prejudice was caused to it even if no notice was actually issued to it by the arbitrator. (Para 8)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 378 (V 54) =

(1967) 1 SCR 633, Bungo Steel Furniture (Pvt.) Ltd. v. Union of India 5

(1967) AIR 1967 SC 1030 (V 54) =

(1967) 1 SCR 105, Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore 5

(1954) AIR 1954 Ori 234 (V 41) =

21 Cut LT 347, Gurumurthy Raju v. Narasimha Raju 7

(1932) AIR 1932 Bom 68 (V 19) =

33 Bom LR 1357, Pratap Singh v. Kishan Prasad and Co Ltd. 7

S. Sarwar Ali (Addl. Govt Pleader) and Shashi Kumar Sinha, for Appellant; Tribeni Prasad Sinha, for Respondent.

S. N. P. SINGH, J. :— This appeal under Section 39(6) of the Arbitration Act by the Union of India is directed against the order dated the 16th of August, 1965, passed by the 1st Subordinate Judge, Muzaffarpur, in Title Suit No. 134 of 1961. By the impugned order the learned Subordinate Judge has set aside an award dated the 4th of July, 1962, given by Mr. O. P. Mittal, the Superintending Engineer (Aviation) Ministry of Works, Housing and Supply, New Delhi, in a dispute between the Union of India and Messrs. S. Ranjan and Brothers.

2. The following facts, which appear from the order under appeal, are not in dispute. Messrs S Ranjan and Brothers entered into a contract on the 8th of September, 1958, with the Executive Engineer, Aviation Division Central P.W.D., Muzaffarpur, in regard to the development of aerodrome at Muzaffarpur. Messrs. S. Ranjan and Brothers preferred a claim of Rs. 76,000/- relating to

some items of work on the 20th of September, 1960, to the arbitrator, Mr. O. P. Mittal, according to clause 25 of the agreement. The arbitrator did not submit the award on the ground that four months had expired and directed the parties to get the time to give the award extended by a Court of competent jurisdiction. A petition under Section 20 of the Arbitration Act was filed on the 5th of October, 1961, by Messrs S. Ranjan and Brothers in which a prayer was made to issue notice to the Union of India (the defendant) to show cause why the agreement for referring the matter to arbitration should not be filed in court.

The defendant filed a petition on the 19th of March, 1962, in which the defendant made it clear that it had no objection in filing the agreement and in fact it filed the agreement along with the petition and prayed that the arbitration be ratified and time be extended for submission of the award by the arbitrator. The learned Subordinate Judge by his order dated the 19th of April, 1962, directed the agreement to be sent to the arbitrator as prayed for. He further gave a direction to the arbitrator to submit the award by the 19th of July, 1962. The arbitrator subsequently applied for extension of time which was allowed. It appears that on the 31st of August, 1962, the plaintiff (S. Ranjan and Brothers) filed an objection to the award though the award itself had not been received in the Court. The award was ultimately received on the 1st of December, 1962. On the 7th of February, 1963, the defendant filed a petition by way of reply to the objections filed by the plaintiff against the award. It appears that on the prayer of the defendant, Sri O. P. Mittal, the arbitrator, was subsequently examined on commission by means of interrogatories. The Pleader Commissioner submitted his report on the 12th of May 1964. Thereafter the objection filed by the plaintiff was heard by the learned Subordinate Judge.

3. The arbitration proceedings and the award were challenged in the objection petition on several grounds. One of the grounds taken was that the arbitrator was not absolutely disinterested and impartial as he had connection with the defendant being its employee. The learned Subordinate Judge overruled that objection. While considering the question, however, the learned Subordinate Judge observed as follows:

"It is of common knowledge that Government servants are careerists."

To say the least, as a judicial officer, the learned Subordinate Judge should not have made that uncalled for sweeping observation. Simply because the arbitrator had connection with the engineering department of the Govt. of India he

could not be characterised as an interested and partial person. It is not necessary to further go into the question as the objection was overruled by the learned Subordinate Judge on other grounds. The learned Subordinate Judge further overruled the objection that the award was collusive.

A contention was raised that notice of the making of the award was not given and as such the award was vitiated. The learned Subordinate Judge overruled that contention also on the ground that the plaintiff filed objection even before the actual receipt of the award by the Court which proved that the plaintiff had notice of giving of the award and no prejudice was caused to him even if no notice was issued to him by the arbitrator. Certain other objections were also overruled as it appears from paragraph 11 of the order under appeal. The learned Subordinate Judge set aside the award mainly on two grounds, namely, (1) that the arbitrator did not maintain an order-sheet to show as to how the proceeding was conducted and what was done from day to day and how and when the parties were noticed and (2) that the award filed by the arbitrator was very laconic and the arbitrator had not given any reason in support of his award and as such the award appeared to be arbitrary. The learned Subordinate Judge further observed as follows:

"There is nothing to indicate as to what evidences were adduced before him and what matters weighed with the arbitrator for giving the aforesaid award."

The concluding portion of his order reads as follows:

"Though the arbitrator has said in his reply to the interrogatories that notice was given to the parties and they were heard, there is nothing on record to show that this was done. As mentioned before the award submitted by him appears to be too brief and there is absolutely no material to judge if proper and full justice or even if substantial justice was done to the parties. The award, appears to be very perfunctory and the arbitrator has not, I regret to say, displayed slightest attempt of doing natural justice to the parties. The award is, therefore, set aside."

4. Mr. Sarwar Ali, learned Additional Government Pleader, appearing for the Union of India in this appeal submitted, in the first place, that the failure to give reasons in an award does not vitiate the award and as such the learned Subordinate Judge has taken a wrong view of law in holding that the award is arbitrary. Secondly, he contended that the papers which were transmitted along with the award clearly show that the parties were heard before the award was made and as such there was no violation

of the principles of natural justice. According to learned counsel, as no procedure is prescribed relating to an arbitration proceeding, the arbitrator is not required to maintain an order-sheet. The failure to maintain an order-sheet, therefore, to show as to how the proceedings were conducted cannot be made a valid ground for setting aside an award. There is substance in the contentions which have been raised by learned counsel.

5. In the case of Bungo Steel Furniture (Pvt) Ltd. v. Union of India, AIR 1967 SC 378 it has been observed by their Lordships of the Supreme Court as follows:

"It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself."

In the case of Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030 their Lordships observed as follows:

"In the present case, the arbitrator gave no reason for the award. We do not find in the award any legal proposition which is the basis of the award, far less a legal proposition which is erroneous. It is not possible to say from the award that the arbitrator was under a misconception of law. The contention that there are errors of law on the face of the award is rejected."

The observations of their Lordships of the Supreme Court in the two cases, referred to above, clearly lay down the principle that an award is not vitiated simply because no reasons have been given by the arbitrator. The learned Subordinate Judge, therefore, was quite unjustified in taking the view that the award appeared to be arbitrary because no reason was given by the arbitrator and because there was nothing to indicate as to what evidence was adduced before him and what matters weighed with him for giving the award.

6. It appears from the records of the proceedings which were sent by the arbitrator along with the award that he sent registered notices dated the 7th of September, 1960, to both the parties to submit copies of documents along with the statement of facts. It appears that on the 22nd of October, 1960, the plaintiffs Messrs. S. Ranjan and Brothers, sent

a letter to the arbitrator acknowledging the receipt of the notice and along with that letter they sent copies of certain documents. In that letter they made a statement of facts. The proceeding in respect of the first hearing of the arbitration matter, which was heard on the 14th of July, 1961, at Calcutta, shows that the parties and their lawyers were heard at great length. In the note the arbitrator observed:

"Both parties having completed their evidence and having nothing further to produce in evidence, the hearing was closed at this stage."

7. From what I have stated above it is abundantly clear that the arbitrator gave notice to the parties to file documents and ultimately he heard the parties and their lawyers at length. It cannot, therefore, be said that the arbitrator has not followed the principles of natural justice. The principles of natural justice demand that the arbitrator should follow such a procedure which a reasonable man would follow in deciding a dispute impartially in the absence of any special procedure agreed or consented to by the parties. In the case of *V. Gurumurthy Raju v. V. Narasimha Raju*, AIR 1954 Ori 234 a Division Bench of the Orissa High Court observed that,

"Proceedings before arbitrators need not be conducted with such meticulous care as is required in ordinary Civil Courts so long as there is substantial compliance with the principles of natural justice." The learned Subordinate Judge has referred in his judgment to a decision in the case of *Pratap Singh v. Kishanprasad and Co. Ltd.*, AIR 1932 Bom 68. In that case the learned Single Judge observed as follows:

"It is a well-known principle of the law of arbitration that an inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a Court of law, and that therefore a party to the arbitration must not only have notice of the time and place of the meeting, but he should be allowed reasonable opportunity of proving his case either by evidence or by arguments or both, and of being fully heard. The notice must be sufficiently long in order to give the party that reasonable opportunity if he wants to be heard. If there is no sufficient notice there cannot be a proper hearing nor a valid award, it being a well-recognised rule of natural justice that a man's legal rights cannot be determined without giving him an opportunity of being heard."

In the instant case, as I have already shown, the parties were given notice and the plaintiff actually sent certain documents along with the statement of facts. The proceeding relating to the hearing on the 14th of July, 1961

shows that the arbitrator noted down the arguments made by the parties at length. Copies of the proceedings were forwarded to the plaintiff and others on the 11th of August, 1961, as it appears from the record. There is nothing to show that any prayer was made on behalf of the plaintiff for further hearing or for opportunity to file more documents or to adduce any other evidence. It cannot, therefore, be said that the plaintiff was not given sufficient opportunity to place its case before the arbitrator. Learned counsel appearing on behalf of the respondent in course of his argument has not shown any provision in the Arbitration Act under which an arbitrator is required to maintain an order-sheet in respect of an arbitration proceeding. On the failure of the arbitrator, therefore, to maintain an order-sheet, his award cannot be said to be vitiated.

8. Mr. Tribeni Prasad Sinha, learned counsel appearing for the respondent, contended before us in course of his argument that the failure to give notice under Section 14 (1) of the Arbitration Act has vitiated the award. As I have already stated, the same contention was raised in the lower court and it was overruled as it appears from paragraph 10 of the order under appeal.

The validity of the award does not depend upon the notice of the same being given to the parties. The object of giving notice under sub-section (1) of Section 14 of the Arbitration Act is to give opportunity to the parties to file objection to the validity of the award. As I have already stated, the objection to the validity of the award was filed by the plaintiff before the award was actually received in the Court.

The learned Subordinate Judge has rightly taken the view that the very fact that the plaintiff had filed objection even before the actual receipt of the award by court goes to show that the plaintiff had notice of giving of the award and as such no prejudice was caused to it even if no notice was actually issued to it by the arbitrator.

9. As both the grounds on which the learned Subordinate Judge has set aside the award are not cogent and legal, this appeal has to be allowed and the order of the learned Subordinate Judge set aside.

10. In the result, this appeal is allowed but in the circumstances of the case there will be no order for costs.

11. KANHAIYAJI, J. :— I agree.

LGC/DVC

Appeal allowed.

AIR 1969 PATNA 128 (V 56 C 35)
TARKESHWARNATH, J.

Hazi Khosal Biswas, Appellant v. Ram Sundar Bhagat and others, Respondents
 A. F. A. D. No 578 of 1966, D/-18-7-1968
 from decision of 1st Addl. Sub. J. Purnea D/- 10-5-1966.

Civil P. C. (1908), Ss. 100-101 — Substantial error or defect in procedure — What amounts to, stated — Finding of fact by trial Court reversed by lower appellate Court — High Court not entitled to interfere merely because some of reasons given by trial Court are not considered. 1968 BLJR 374 held no longer good law in view of AIR 1963 SC 302.

The High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court because there is no jurisdiction under Section 100, C. P. C. to correct that error. That is why, even if the appreciation of evidence made by the lower appellate court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower appellate court has placed the onus on a wrong party or discards admissible evidence on the ground that it is inadmissible or fails to consider an issue which had been tried and found upon by the trial Court and proceeds to reverse the trial Court's decision without the consideration of such an issue or if the lower appellate court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may in some cases, be said to amount to a defect or error in procedure. Merely because the judgment of the lower appellate court is not as elaborate as that of the trial Judge, or because some of the reasons given by the trial Judge have not been expressly reversed by the lower appellate court, the High Court is not entitled to interfere with the conclusions of the lower appellate Court.

(Para 6)

Thus, where in a title suit both the trial Court and the lower appellate Court found that the plaintiff had taken settlement of the land in suit and disbelieved the case of the defendants with regard to their possession in respect of the suit land, but differed on the question of plaintiff's subsisting title, mere fact that the lower appellate court has not referred to all the comments which the trial Court had made with regard to the evidence of the plaintiff's witnesses is not a sufficient ground for reversing the finding of the final Court

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of fact when there is nothing to show that the finding on the question of possession had been arrived at without a consideration of the evidence or that the appellate Court had relied on some evidence which was not admissible or had approached the case from a wrong point of view. (1968) B. L. J. R. 374 held no longer good law in view of AIR 1963 SC 302.

(Para 6)

Cases Referred: Chronological Paras
 (1968) 1968 BLJR 374 = 1968
 BLJR 359, Sheikh Bashiruddin
 v. Dhani Mohammed 6
 (1963) AIR 1963 SC 302 (V 50) =
 (1963) 3 SCR 604, Ramachandra
 Ayyar v. Ramalingam Chettiar 6

Mahendra Pd. Pandey, for Appellant;
 Jyotirmoy Ghose, for Respondents.

JUDGMENT:— This appeal by defendant No. 1 (the son of original defendant no. 1) arises out of a suit for declaration of title and recovery of possession in respect of 228 acres of land appertaining to revisional survey plots Nos. 3307 and 3527 of the revisional survey khata No. 903 of village Sukhasan and also for recovery of Rs. 248/10/- as compensation received by him (defendant) from the Land Acquisition Department in respect of 0.38 acres of land.

2. The case of the plaintiff was that he took settlement of 3 bighas 17 kathas and 19 dhooors of land bearing cadastral survey plot No. 582 along with other lands by means of a registered kabuliat dated 3-3-37 from the landlords. He further took raiyati settlement of 12 bighas and odd kathas of land from the same landlords in the same village by means of another registered kabuliat dated 12th March, 1937 and came in possession of all the lands amalgamating them into one, holding on an amalgamated rental. Later on 0.38 acre of land out of cadastral survey plot No 582 was acquired by the State of Bihar and compensation for the crops raised on that land was awarded to him. The remaining portion of that plot continued in possession of the plaintiff but during the recent revisional survey operation that portion came to be recorded in Nos 3305, 3307 and 3527. Plot No. 3305 was recorded in the name of Harekisin Bhagat (son of the plaintiff) in the revisional survey khata but the remaining two plots 3307 and 3527 were wrongly recorded in the name of Hazi Ramjan Biswas the ancestor of defendants 1 to 1 (c) as his occupancy holding, while the names of defendants 2 and 3 were wrongly recorded as bataidars of plots 3307 and 3527 respectively in spite of objections by the plaintiff. Hazi Ramjan Biswas fraudulently realised the amount of compensation to the extent of Rs 284/10/- in respect of 0.38 acres without the knowledge of the plaintiff. The revisional survey entry

regarding plot Nos. 3307 and 3527 was incorrect and being emboldened by that entry the defendants dispossessed the plaintiff from those two plots in Baisakh 1365Fs. which gives a cause of action to the plaintiff for the suit giving rise to this appeal.

3. Hazi Ramjan Biswas, defendant No. 1 died during the pendency of the suit, but he had filed a written statement contending that cadastral survey plot number 582 was never settled with the plaintiff and the plaintiff never came in possession of that plot. According to defendant No. 1 this plot was settled with him by means of a registered kabuliata dated 16th April, 1937 by some of the co-sharer landlords, namely, Sant Saran Chaudhry and others and later on that settlement was approved by the remaining co-sharer landlords. Defendant No. 1 had paid rent to the landlords and he continued in possession throughout ever since the time of that settlement. He denied the title and possession of the plaintiff in respect of the land in suit. His further plea was that the entries in the revisional survey khatian with regard to plot Nos. 3307 and 3527 were absolutely correct. Defendants 2 and 3 as well filed a written statement supporting the case of defendant No. 1 and these defendants claimed to be the bataidars of those two plots.

4. The learned Additional Munsif held that the plaintiff had acquired title to the lands settled with him, but he failed to prove his subsisting title, meaning thereby his possession over the suit land within twelve years of the institution of the suit and hence the Munsif came to the conclusion that the plaintiff was not entitled to a decree. Accordingly he dismissed the suit of the plaintiff. Being aggrieved by the said decree, the plaintiff filed an appeal. The learned Additional Subordinate Judge took a different view of the evidence and came to the conclusion that the plaintiff had not only proved his title to the land as a raiyat but had proved his possession as well within twelve years of the date of the suit. He further found that the plaintiff's case that he was dispossessed from the suit land only four years prior to the date of the institution of the suit was correct. In view of these findings he allowed the appeal, set aside the judgment and decree of the learned Munsif and decreed the plaintiff's suit declaring his title and granting him decree for possession in respect of the land in suit and compensation to the tune of Rs. 242/13/- only recoverable from defendants 1 to 1(c). Hence defendant No. 1 (who is the son of original defendant No. 1) has filed this appeal.

5. Learned Counsel for the appellant urged two points in this appeal. The

first one was that the judgment of the learned Additional Subordinate Judge was not in accordance with law inasmuch as he had not considered all the reasonings given by the learned Munsif which persuaded him for discarding the evidence of the plaintiff's witnesses and holding that the plaintiff had failed to prove his subsisting title. The contention was that the finding of the learned Additional Subordinate Judge that the plaintiff had proved his possession within twelve years of the suit was vitiated, inasmuch as he did not consider the evidence of the plaintiff's witnesses properly and ignored the comments made by the trial court with regard to their evidence. The second point was that the trial court had framed an issue (no. 6) to the effect, whether the entry in the record of rights was wrong, but this issue had escaped the attention of the learned Additional Subordinate Judge.

6. I would deal with the points in the order, in which they have been urged. Both courts found that the plaintiff had taken settlement of the land in suit, but they differed on the question of possession. The learned Munsif dealt with the evidence of the plaintiff's witnesses and came to the conclusion that the oral testimony of those witnesses was not satisfactory for holding that the plaintiff had got possession of the suit land as alleged by him or that he had subsisting title to the suit land. The learned Additional Subordinate Judge on the other hand also referred to the evidence of the plaintiff's witnesses but he came to a different conclusion and that conclusion was in favour of the plaintiff on the question of possession. He dealt with the oral evidence of the plaintiff's witnesses in paragraph 10 of his judgment and commenced that paragraph by observing that "there is overwhelming oral evidence on the side of the plaintiff to show that he came in possession of the land after settlement and continued in possession of it till four years prior to the date of the institution of the suit, when he was forcibly dispossessed by the defendants".

Thereafter he dealt with the evidence of Patwari (P. W. 1) and observed that P. Ws. 2, 4, 7 and the plaintiff (P. W. 12) had stated that the plaintiff had been coming in possession of the land till four years prior to the date of the institution of this suit. He took the view that the plaintiff was supported on the question of possession by P. Ws. 2, 6, 7, 8, 9 and 10, all of whom were competent witnesses, as they were either residents of village Sukhasan or they were employees of the co-sharer landlords. All those witnesses supported the case of the plaintiff that he continued in possession of the suit land for 24 or 25 years and he was dispossessed from that

land about four years back. He again observed that P. Ws. 2, 4, 8, 9 and 10 owned land near the land in suit and so their testimony regarding possession of the plaintiff could not be discarded. After dealing with the oral evidence he considered the documentary evidence filed by the plaintiff and then he gave a finding on the question of possession. It should be mentioned here that both the courts disbelieved the case of the defendants with regard to their possession in respect of the suit land. It is true that the learned Additional Subordinate Judge has not referred to all the comments which the trial court had made with regard to the evidence of the plaintiff's witnesses, but that by itself can hardly be a ground for reversing the finding of the final court of fact, inasmuch as, it cannot be said in the present case that the finding on the question of possession has been arrived at without a consideration of the evidence or that the appellate Court had relied on some evidence which was not admissible or had approached the case from a wrong point of view.

Learned counsel for the appellant in support of his contention referred to a recent decision of this court in *Sheikh Bashiruddin v. Dhani Mohammad*, 1968 BLJR 374. Rajkishore Prasad J. observed in that case that simply recording findings of fact, without any discussion of the evidence, was no judgment at all and such a judgment could not be said to be a proper judgment of reversal. His Lordship then observed as follows:—

"The court of appeal below may ultimately be correct, if it had considered the evidence, in reversing the judgment of the trial court, but it must appear from the judgment itself that the Court of appeal below has considered all the reasonings given by the trial court for coming to the contrary conclusions. In this view of the matter, the judgment under appeal cannot stand".

His Lordship ultimately remanded that second appeal for a fresh decision in accordance with law. I must say with great respect that this view is not in accordance with the principles laid down by the Supreme Court in *V. Ramchandra Ayyar v. Ramalingam Chettiar*, AIR 1963 SC 302 while considering the scope of Section 100 of the Civil Procedure Code. In that case the trial Court had decreed the suit, but that decree was reversed by the lower appellate court. Thereafter the High Court in second appeal reversed the judgment and decree of the lower appellate court and restored those of the trial court. Learned counsel for respondent No. 1 tried to support the judgment and decree of the High Court and urged that the lower appellate court had erred in reversing the judgment of the trial Court without considering all the reasons

given by the trial Court. Dealing with this contention of Mr. Chatterjee, learned counsel for that respondent, Gajendra-gadkar, J. as he then was, observed as follows:—

"He says that if the lower appellate court wanted to interfere with the trial Court's conclusions of fact, it was necessary that all the reasons given by the trial court should have been examined and the whole of the evidence set out by the trial Court in its judgment should have been taken into account. Since the judgment of the lower appellate Court is not elaborate and some of the grounds set out in the trial court's judgment have not been examined, that constitutes an error or defect in the procedure and so, the High Court was entitled to correct that error or defect, because the said error or defect affected the decision of the merits in the case. The judgment of the appeal court, Mr. Chatterjee contends, "must come into close quarters" with the judgment of the trial court and meet the reasoning given therein, before it can be treated as conclusive between the parties for the purposes of Section 100."

Thereafter his Lordship referred to a catena of decisions and discussed the scope of Section 100 in the following manner:

"That is why, even if the appreciation of evidence made by the lower appellate court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower appellate court has placed the onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be regarded as a defect in procedure: if in dealing with questions of fact, the lower appellate court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower appellate court fails to consider an issue which had been tried and found upon by the trial court and proceeds to reverse the trial court's decision without the consideration of such an issue, that may be regarded as an error or defect in procedure; if the lower appellate court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court, however, erroneous, the said conclusions may appear to be to the High Court, because as the Privy Council

has observed, however, gross or inexcusable the error may seem to be there is no jurisdiction under Section 100 to correct that error".

Ultimately his Lordship held that Mr. Chatterjee was not right in contending that because the judgment of the lower appellate court was not as elaborate as that of the trial judge, or because some of the reasons given by the trial Judge had not been expressly reversed by the lower appellate court, the High Court was entitled to interfere with the conclusions of the lower appellate Court. The result was that the judgment and decree of the High Court were set aside inasmuch as the High Court was not justified in interfering with the finding of fact recorded by the lower appellate court in favour of the appellants. In view of these principles, I must overrule the contention raised by learned counsel for the appellant that the judgment of the lower appellate court suffered from the said infirmity and hence the finding of fact arrived at by him should be reversed in this second appeal. The question as to whether the plaintiff had proved his possession within twelve years of the suit was entirely a question of fact and the finding given by the lower appellate Court is binding in the second appeal.

7. So far as the second point, with regard to the entry in the revisional survey khatian, is concerned, it is not correct to argue that the lower appellate court missed this aspect of this case. In fact learned Additional Subordinate Judge observed in paragraph 13 that Ext. E was the certified copy of the revisional survey khatian in respect of these two plots which stood recorded in the name of Hazi Ramjan Ali, but this entry appeared to have been made without the survey authorities having any material before them to make that entry. Moreover, the plaintiff's title and possession having found to be correct, the recent entry in the revisional survey khatian regarding the two plots in the name of Hazi Ramjan Biswas must be held to be correct. Accordingly there is no merit even in the second contention and it must be overruled. The plaintiff has proved his title and possession within twelve years of the suit and he was entitled to a decree.

8. In the result, the appeal is dismissed with costs payable to the plaintiff respondent no. 1.

GDR/D.V.C. Appeal dismissed.

AIR 1969 PATNA 131 (V 56 C 36)

N. L. UNTWALIA AND
S. WASIUDDIN, JJ.

Ramdeyal Singh, Appellant v. State of Bihar, Respondent.

A. F. O. D. No. 576 of 1963, D/- 19-8-1968, from decision of Sub. J., Sasaram, D/- 7-10-1963.

Land Acquisition Act (1894), S. 18 — Scope and applicability — Provisos of S. 18 are mandatory — Application for reference, not made within prescribed time — Land Acquisition Judge can refuse to entertain reference and can reject it on this ground — AIR 1963 All 556 (FB) & AIR 1929 All 769 & AIR 1958 Punj 490, Dissented from — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Mandatory and directory provisions).

S. 18 along with its provisos circumscribes certain conditions the fulfilment and the compliance of which are essential and there are pre-requisite conditions and the application for reference would itself not be entertainable if those conditions are not complied with and one of the important conditions is that it should be within the time specified under Cls (a) and (b) of the provisos. Hence if the application is not within time, then it will be an incompetent reference if the Collector in spite of this bar of limitation chooses to make the reference. (1855) 6 Moo Ind App. 134 (P. C.), Rel. on. (Para 4)

In interpreting whether a certain provision of law can be regarded as mandatory or directory the intention of the legislature has to be ascertained. The legislature by enacting the two provisos of S. 18 of the Act obviously intended to specify the period within which the application for reference should be filed and did not consider it proper that such application should be filed at any time depending on the choice of the party concerned. A reference under S. 18 of the Act is for the determination of the question of the quantum of compensation and it cannot be left to the sweet will of the awardee to come to court at any time. It could not, therefore, have been the intention of the legislature that such provision restricting the period in which such application should be filed be only directory and not mandatory. AIR 1964 Pat 53 Appld. (Distinction between reference under S. 18 and that under S. 30 pointed out). AIR 1966 SC 237, Ref. (Paras 6, 8)

Though the Collector acting under the Land Acquisition Act is an agent of the Govt., the Government is bound by the acts of its agent only in so far as those acts are in accordance with law and the Govt. is not bound by the acts of his agent which are contrary to the provisions of law. When there is a specific

provision of law the general law of principal and agent cannot be applied and the Government cannot be estopped from pleading that certain provisions of law have not been followed merely because at some stage or the other it directed the Collector to make a reference. AIR 1957 Raj. 44, Foll.

(Para 8)

Thus a Land Acquisition Judge in a reference under Section 18 can go into the question whether the application for reference was made within the time prescribed under sub-section (2) of Section 18 of the Act. The necessary *sine qua non* of the reference by the Collector under Section 18 of the Act is that it must be made in accordance with the provisions of that section, such as, within the period prescribed by the two provisos of sub-section (2) of the Section. Hence if the Land Acquisition Judge finds on the materials placed before him that the application is barred by limitation in the sense that it was not presented within the period prescribed under the two provisos of sub-section (2) of S 18 of the Act, then he can refuse to entertain the reference and can also reject the reference on this ground. AIR 1963 All 556 (FB) and AIR 1929 All 769 and AIR 1958 Punj 490, Dissented from; AIR 1937 Cal 680 & AIR 1944 Bom 200 & AIR 1951 Bom 156 & AIR 1955 Mad 23 & AIR 1957 Raj 44 & AIR 1963 Ker 3 (FB) & AIR 1962 J. & K. 59, Foll.

(Paras 17, 15, 9)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 237 (V 53) =
(1965) 3 SCR 576, Dr. G. H. Grant v. State of Bihar 6
- (1964) AIR 1964 Pat 53 (V 51), Mahesh Pd. Sinha v. Manjay Lal 5
- (1963) AIR 1963 All 556 (V 50) =
ILR (1963) 1 All 983 (FB), State of U. P. through the Collector of Nainital v. Abdul Karim 9, 14
- (1963) AIR 1963 Ker 3 (V 50) =
ILR (1962) 1 Ker 580 (FB), Kochukunju Padmanabhan v. State of Kerala 13
- (1962) AIR 1962 J & K 59 (V 49), Swami Sukhanand v. Samaj Sudhar Samiti 13
- (1958) AIR 1958 Punj 490 (V 45) =
ILR (1958) Punj 854, Hari Krishna Khosla v. State of Pepsu 14
- (1957) AIR 1957 Raj 44 (V 44) = ILR (1956) 6 Raj 653, State of Rajasthan v. L. D. Silva 8, 12
- (1956) AIR 1956 Pat 108 (V 43) =
1956 BLJR 44, Lila Mahton v. Sheo Govind Singh 9
- (1955) AIR 1955 Mad 23 (V 42) =
ILR (1955) Mad 1062, Kanna Navanna Narayanappa Naidu v. Revenue Divisional Officer, Sivakasi 11

- (1951) AIR 1951 Bom 156 (V 38) =
53 Bom LR 257, G. J. Desai v. Abdul Mazid Kadri 10
- (1944) AIR 1944 Bom 200 (V 31) =
ILR (1944) Bom 90, Mahadeo Krishna Parkar v. Mamlatdar of Alibag 1, 10
- (1940) AIR 1940 Pat 102 (V 27) =
ILR 19 Pat 321 (SB), Jagarnath Lall v. Land Acquisition Deputy Collector, Patna 9
- (1937) AIR 1937 Cal 680 (V 24) =
ILR (1938) 1 Cal 231, Anant Ram Banerjee v. Secretary of State 9
- (1929) AIR 1929 All 769 (V 16) =
ILR 52 All 96, Secy. of State v. Bhagwan Prasad 14
- (1906) ILR 30 Bom 275 = 7 Bom LR 697, In re, Govt. and Nanu N. Kothare 9
- (1855) 6 Moo Ind App. 134 (PC), Nusserwanjee Pestonjee v. Meer Mynooddeen Khan 4
- Keshri Singh and Rewati Raman Saran, for Appellant, S. Sarwar Ali, for Respondent.

S. WASIUDDIN, J. :— This appeal arises out of Land Acquisition Case No. 94/13 of 1963/1960. A piece of land measuring 1.24 acres has been acquired by the Government for the construction of Forest Department building in village Lakharawan, District Shahabad by declaration No. 5554 dated 10-5-1958 published in the Gazette on 11-7-1958. The appellant is the awardee and the Collector awarded a sum of Rs 359825 P. as compensation and Rs. 539.74 P. as additional compensation, the total amount being Rs 4137.99 P. The awardee being dissatisfied made a prayer before the Collector for making a reference under Section 18 of the Land Acquisition Act. The Collector accordingly made the reference and before the Land Acquisition Judge a point was taken on behalf of the respondent, that is, the State of Bihar that the reference was barred by limitation. It may be mentioned here that the findings of the Land Acquisition Judge have not been challenged with regard to the dates of the service of the notice of award etc. and at the time of the hearing of this appeal also these dates have not been challenged.

The award was made on 21-7-1959 and the notice of the award as contemplated by sub-section (2) of Section 12 of the Land Acquisition Act (hereinafter to be referred to as the Act) was served on 25-7-1959 on the awardee. The petition was filed by the awardee before the Collector for making the reference under Section 18 of the Act on 14-9-1959, that is to say, more than six weeks after the receipt of the notice of the award. It was, therefore, in such circumstance, urged before the Land Acquisition Judge that the application for making the refer-

ence was barred by limitation under clause (b) of sub-section (2) of Section 18 of the Act. The Land Acquisition Judge examined this matter and he has discussed in his judgment about the application being barred by limitation and relying on a decision of the Bombay High Court in the case of Mahadeo Krishna Parkar v. Mamlatdar of Alibag, AIR 1944 Bom 200, was of opinion that if the reference does not comply with the terms of the Act then the Court cannot entertain the objection and see whether the statutory conditions have been complied with and the reference is within time.

It may be mentioned here that it has been urged on behalf of the Appellant that once the Collector had made the reference it was beyond the competence and the jurisdiction of the Land Acquisition Judge to go into the question about the application being within time or not. The Land Acquisition Judge held that the application was not within time and, therefore, the reference which had been made was without jurisdiction and as such the Land Acquisition Judge had no jurisdiction to look into the matter contained in the petition. As regards the quantum of compensation in respect of which the reference was made, the Land Acquisition Judge also recorded a finding which is in favour of the appellant and this finding has also not been challenged here in this appeal.

2. This appeal was put up before a single Judge Shambhu Prasad Singh, J. who heard the matter and by his order dated 30-1-1968, he has referred the appeal to a Division Bench because it involves a question of law of some importance which should be settled at rest by a Division Bench. It was pointed out in that order that there was a conflict in the opinion of the different High Courts on the question whether the Land Acquisition Judge could or could not go into the question of limitation when once the reference had been made. It is, therefore, in such circumstance, that this appeal has been heard by a Division Bench and the question which has to be decided is really of importance because of the conflict of opinion between the different High Courts and there being no direct decision of our High Court on this point or of the Supreme Court. The question which needs decision is as follows:—

"Whether the Land Acquisition Judge in a reference under Section 18 of the Land Acquisition Act can go into question that the application for reference was not made to the Collector within the time prescribed under sub-section (2) of Section 18 of the Land Acquisition Act and if so, can the Land Acquisition Judge refuse to entertain the reference, if he finds it to be time-barred?"

3. Now, before I take up a discussion of the different decisions of the High Courts on this point, it will be better if I first of all refer to the relevant provisions of the Act. Part III of the Act deals with the "Reference to Court and procedure thereon", and the first relevant provision in this connection is Section 18 which is as follows:—

"18(1) Any person interested who has not accepted the award may, by written application to the Collector require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken;

Provided that every such application shall be made:—

(a) If the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire".

4. For the purpose of the matter under consideration sub-section (2) with its two provisos are important. Sub-section (2) lays down that the grounds on which objection to the award is taken. So this means that first of all there should be an application before the Collector and this application must contain the grounds on which the objection to the award has been taken. There are two provisos to this section, and we are concerned here with proviso (b) to this sub-section which lays down that in other cases the application shall be made within six weeks of the receipt of the notice from the Collector under Section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire. As far as this proviso is concerned, it means that in a case where a notice has been served on the awardee under sub-section (2) of Section 12, then he has to present the application before the Collector for making the reference within six weeks from the date of the receipt of the notice. As stated above, here in the present case, the admitted position is that the notice was served on the awardee on 25-7-1959 and the application for making the reference was filed on 14-9-59.

Section 19 of the Act lays down that in making the reference the Collector

shall state, for the information of the Court, in writing about the certain matter as laid down in the section under clauses (a) to (d). Sub-section (2) of Section 19 lays down that to the said statement shall be attached a schedule giving particulars of the notices served upon and of the statements in writing made or delivered by, the parties interested respectively. Section 20 lays down that on receipt of the reference the Court shall thereupon cause a notice, specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the persons named in the section under clauses (a), (b) and (c). Section 21 of the Act is also important because it lays down that the scope of the enquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection.

It has been urged by the learned counsel appearing for the appellant that the provisions of the sections, mentioned above, and particularly the provisions of Section 21 of the Act putting restrictions on the scope of the proceeding show that once a reference has been made, the Land Acquisition Judge cannot go into the question that is behind the reference to see whether the application for reference was filed within time or not. It has also been urged that the Collector in making the reference acts as an agent of the State Government and once the reference has been made by such an agent no objection thereafter can be taken relating to the maintainability of such application for making the reference as being time-barred. It is true that Section 21 puts down a restriction on the scope of a proceeding, but this section cannot be divorced and read separate from the other provisions of the Act. Section 18 along with its provisos clearly show that the section circumscribes certain conditions the fulfilment and the compliance of which are essential and, in my opinion, there are pre-requisite conditions and the application for reference would itself not be entertainable if those conditions are not complied with and one of the important conditions is that it should be within the time specified under clauses (a) and (b) of the provisos. In this connection, I may refer to a decision of the Privy Council in the case of *Nusserwanjee Pestonjee v. Meer Mynodeen Khan*, (1855) 6 Moo Ind App 134 (PC) where it was held by the Privy Council which is as follows:—

"Wherever jurisdiction is given to a court by an Act of Parliament or by a regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the regula-

tion itself, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction for if they be not complied with the jurisdiction does not arise."

In my opinion, the application for making the reference has to be filed within the time limit as prescribed by clauses (a) and (b) of the Provisos to Section 18 and if the application is not within time, then it will be an incompetent reference if the Collector in spite of this bar of limitation chooses to make the reference.

5. A question here also arises for consideration whether this condition which has been laid down, viz. the period within which the application for reference should be filed can be regarded as mandatory or directory, and I may in this connection refer to a decision of our own High Court in the case of *Mahesh Pd. Sinha v. Manjay Lal*, AIR 1964 Pat 53 where the question for consideration was whether the provision to the petition to be accompanied by an affidavit in the prescribed form under Section 83(1) of the Representation of the People Act, 1951 was mandatory or not and there was a full discussion about the interpretation regarding the statutes being mandatory or directory. Reference also in that case was made to Article 656 of the *Halsbury's Laws of England*, 3rd Edition, Volume 36 at page 435 which is as follows:—

"No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the general object to be secured.

Although no universal rule can be laid down, provisions relating to the steps to be taken by the parties to legal proceedings in the widest sense have been construed with some regularity as mandatory; and it has been observed that the practice has been to construe provisions as no more than directory, if they relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of them would work serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature."

6. In interpreting whether a certain provision of law can be regarded as mandatory or directory the intention of the legislature, as quoted above, has to be ascertained, and in this present case, in my opinion, it appears that the legislature by enacting the two provisos of Section 18 of the Act obviously intended

to specify the period within which the application for reference should be filed and did not consider it proper that such application should be filed at any time depending on the choice of the party concerned. A reference under Section 18 of the Act is for the determination of the question of the quantum of compensation and naturally the matter cannot be left in an indefinite position and it cannot be left to the sweet will of the awardee to come to court at any time and if such be the position, it would mean that even after several years the awardee may come and file an application for making a reference. It could not, therefore, have been the intention of the legislature that such provision restricting the period in which such application should be filed be only directory and not mandatory. I may also point out here that there is a distinction between a reference under Section 18 of the Act and under Section 30 of the Act. There is no prescribed limit of time under section 30 of the Act, as has also been pointed out in a decision of the Supreme Court in the case of Dr. G. H. Grant v. State of Bihar, AIR 1966 SC 237. A reference under Section 30 of the Act can be also made suo motu by the Collector, but that does not appear to be the position with regard to a reference under section 18 of the Act.

7. As it will appear from the quotations from Halsbury's Laws of England that when there is a provision relating to the steps to be taken by the parties to legal proceedings they in the widest sense have been construed with some regularity as mandatory; and it has been observed also that the practice has been to construe provisions as no more than directory, if it relates to a performance of a public duty because in such a case to hold such act null and void would work serious general inconvenience, or injustice, to person who has no control over those entrusted with the duty, without at the same time promoting the main object of the legislature.

8. Here in this case the time limit has been imposed under the section which applies to the awardee and, therefore, an awardee has to file the application within such time. It may also be mentioned here that there does not seem to be any provision in the Act for the extension of such time or condonation of such delay and, therefore, it can be said that the legislature never intended that there should be any relaxation with regard to the position of the limitation of time in this respect. It has also been vehemently argued by the learned counsel appearing for the appellant that the position of the Collector while making the reference is that of an agent and in some decisions, as I will presently discuss, it has, no doubt, been observed that the position

of the Collector is of an agent or a mouth-piece of the Govt. and, therefore, it has been urged that that if the Collector acting as an agent makes a reference although the application is barred by limitation, the State Government cannot turn round and say that the reference is incompetent as it is beyond limitation because once the reference has been made by such an agent, the Land Acquisition Judge cannot, as urged by the learned counsel for the appellant go into the question whether such application is barred by limitation or not. In my opinion, this contention also does not seem to be correct and I may in this connection refer to the case of State of Rajasthan v. L. D. Silva, AIR 1957 Raj 44 where also a similar point had been urged.

It was held there that a Collector can only make a reference in accordance with the provisions of law and if he transgresses those provisions, it is open to the Government to challenge his action in Court and it is open to the court to examine the question of the validity of the order of reference. It was also held there that though the Collector acting under the Land Acquisition Act is an agent of the Govt., the Government is bound by the acts of its agent only in so far as those acts are in accordance with law and the Govt. is not bound by the acts of his agent which are contrary to the provisions of law. It was also pointed out that when there is a specific provision of law the general law of principal and agent cannot be applied and the Government cannot be estopped from pleading that certain provisions of law have not been followed merely because at some stage or the other it directed the Collector to make a reference. In my opinion, the same principle should apply in this present case also and as the reference of the Collector was contrary to the provisions of law, so the Govt. cannot be bound even though the Collector be taken as an agent and the reference by him would be without jurisdiction, inasmuch as, it was entertained by him in direct violation of the law as laid down in this respect in Section 18 of the Act.

9. I will proceed to discuss the different decisions of the High Courts on this point and before I do so it will be better if I take up a discussion of the decisions of our own High Court. It appears that there are only two relevant decisions in this case (sic) of our High Court, but not directly on the point and these are in the case of Jagarnath Lall v. Land Acquisition Deputy Collector, Patna, AIR 1940 Pat 102 (SB) and the other in the case Lila Mahton v. Sheo Govind Singh, AIR 1956 Pat 108. In Jagarnath's case, AIR 1940 Pat 102 (SB) a petition for revision was filed against an order passed by the Land Acquisition Deputy

Collector of Patna refusing to refer an objection to an award for determination by the Civil Court. There the question was, therefore, whether such an application for revision against the order of Collector was entertainable and it was held by the Special Bench of our High Court that the wording of Section 18(1) leaves the Collector no alternative but to refer the matter if the application is made within the periods prescribed by the Section and is not barred by proviso 2 to Section 31 of the Act.

It may be mentioned here that as far as the present case relates we are not concerned with the provisions as made in Section 31 of the Act. The Special Bench further held that the Land Acquisition Deputy Collector had no right whatsoever to refuse to refer the matter on the grounds that the objections to the award were not bona fide and were frivolous. It was also held that the land acquisition proceedings upto the time when the award is made are administrative proceedings and not judicial proceedings. On the question whether such a revision application was maintainable or not, it was held that the High Court did not have the revisional jurisdiction even if the Deputy Collector might have been acting judicially because it does not confer power as contemplated under section 115 of the Code of Civil Procedure. The point which has to be decided in this present case did not arise in that case because it was a different matter, but the observations of this Special Bench do show that the jurisdiction of the Collector comes into force only if an application is made within the period prescribed by the section, that is to say, by the provisos (a) and (b) of sub-section (2) of Section 18 of the Act, as mentioned above.

In *Lila Mahton's case* AIR 1956 Patna 108, the question which came up for consideration was whether the Land Acquisition Judge had jurisdiction to go behind the reference and to see whether the dispute between the parties was or not about Shukmi right and it was held that there was no such jurisdiction. I may also refer here in this connection to certain observations in this judgment at page 110 which were to the effect that the 'Court' does not sit on appeal over the Collector; and the Land Acquisition Act does not give any authority to the 'court' either in express terms or by implication to go behind the reference and to see whether the Collector acted rightly or wrongly. It is true that a Land Acquisition Judge while hearing a reference under Section 18 of the Act does not sit in appeal or revision against the order of the Collector, but if the application before the Collector for making the reference is beyond the period of

limitation, then it will naturally affect the jurisdiction of the Collector to make the reference. The question which arises for consideration in this present case did not come up for a decision in that case and further it may also be pointed out that the case, referred to above, was in a reference under Section 30 of the Act and not under section 18 of the Act.

I may now refer to the decisions of the other High Courts and I may mention here that the views of the High Courts of Bombay, Madras, Kerala, Calcutta, Rajasthan, Jammu and Kashmir are of the same as are being held by me in this case. The Allahabad High Court has more or less consistently taken a different view and the matter was considered by a Full Bench decision of the Allahabad High Court in the case of *State of Uttar Pradesh through the Collector of Nainital v. Abdul Karim*, AIR 1963 All 556 (FB), where, no doubt, after a consideration of the various decisions of the High Courts and of the Allahabad High Court it was held that the Land Acquisition Judge cannot go into the question of limitation once the reference has been made. I may first of all discuss the views of the other High Courts and then in the end the views of the Allahabad High Court and I may also mention here that the views of the Punjab High Court seem on the line with the views of the Allahabad High Court. I will first of all refer to a decision of the Calcutta High Court in the case of *Ananta Ram Banerjee v. Secretary of State*, AIR 1937 Cal 680 and I may refer to the observations of the Calcutta High Court at pages 685 and 686, which are as follows:—

"When the jurisdiction of a court is challenged, that Court has the power and it is its duty to decide it. The Special Judge derives his jurisdiction from the reference made under section 18 by the Collector. If the reference made by the Collector is *ultra vires*, the Special Judge would have no jurisdiction to proceed further and must stop the reference in limine. If the question of power of the Collector to make the particular reference be raised before the Special Judge, he must decide it. It is on this principle that the Special Judge must decide the question, if raised, as to whether the Collector made the reference beyond time and if he finds it to be so, reject the reference without proceeding further. (1906) ILR 30 Bom 275. In the matter of *Government & Nanu N. Kothare*. If the question raised by the Secy. of State before the Special Judge is that the reference had been made by the Collector by mistake at the instance of a person who had accepted the award, and if the claimant's case be that he had not accepted the award, the question of fact as to whether the claimant had accepted

the award must be gone into by the Special Judge and if he decides that question in the affirmative, he must throw out the reference on that ground. The case before us does not come within the strict terms of S. 18, for there was no acceptance of the award by the appellant, but is within an inch of the bar imposed by that section and it would not be wrong for the learned President to say that the contract alleged in the case being established, the reference was not to be further proceeded with."

In the Calcutta High Court case, AIR 1937 Cal 680 the question of limitation did not come up for consideration because the question was whether the award was ultra vires. But that is also a matter which affected the decision of the Collector, and it has been observed there, as quoted above, that the Special Bench derives the jurisdiction from the reference made under section 18 by the Collector and if the reference made by the Collector is ultra vires, the Special Judge would have no jurisdiction to proceed further. It would therefore, follow that if an application for reference is barred by limitation then the reference by the Collector is without jurisdiction and if it is without jurisdiction the Land Acquisition Judge cannot entertain such a reference.

10. The Court below while holding that the application was barred by limitation relied on a decision of the Bombay High Court in the case of AIR 1944 Bom 200. In that case the Collector made a reference under Section 18 of the Act, but at the same time while making the reference he made a note of his opinion that it was barred by limitation, the Bombay High Court in the aforesaid ruling held that the Collector was wrong in doing this and if the Collector thought that it was barred by limitation, then he should have declined to make the reference. In that case this question also arose for consideration whether the Land Acquisition Judge can go into the question and it was held that it is not the question of sitting in appeal or revision and the Land Acquisition Judge can go into the question to see if the conditions laid down in the Act have been duly satisfied. The judgment in the case was delivered by Beaumont C. J. (as he then was) and his observations in the last concluding paragraph of his judgment at page 201 are as follows:—

"The basis of the appellant's argument is that the Collector, acting under section 18, is not a Court, or at any rate not a court subordinate to the District Court or to this Court, and that the Court cannot interfere with his decision either in appeal or in revision. That, no doubt, is true, but that is not really the position.

The Collector has power to make a reference on certain specified conditions. The first condition is that there shall be a written application by a person interested who has not accepted the award, the second condition is as to the nature of the objections which may be taken, and the third condition is as to the time within which the application shall be made. It seems to me that the court is bound to satisfy itself that the reference made by the Collector complies with the specified conditions, so as to give the Court jurisdiction to hear the reference. It is not a question of the Court sitting in appeal or revision on the decision of the Collector; it is a question of the Court satisfying itself that the reference made under the Act is one which it is required to hear. If the reference does not comply with the terms of the Act, then the Court cannot entertain it. I have myself some difficulty in seeing on what principle the Court is to be debarred from satisfying itself that the reference, which it is called upon to hear, is a valid reference. I am in entire agreement with the view expressed by Chandavarkar, J., that it is the duty of the Court to see that the statutory conditions have been complied with. In my opinion therefore the learned Assistant Judge was right in dismissing the reference on the ground that it was out of time. The appeal therefore must be dismissed with costs."

I may also refer here in this connection to another decision of the Bombay High Court in the case of G. J. Desai v. Abdul Mazid Kadri, AIR 1951 Bom 156 and the judgment in that case was delivered by Chagla C. J. (as he then was) and his observations in that judgment were as follows:—

"Now the power of the Collector to make a reference is circumscribed by the conditions laid down in S. 18 & one important condition is the condition to be found in the proviso. That proviso lays down the period within which the application has got to be made. Therefore if the application is made which is not within time the Collector would not have the power to make the reference. In order to determine the limits of his own power it is clear that the Collector would have to decide whether the application presented by the claimants is or is not within time, and satisfies the conditions laid down by the proviso. Assuming that the Collector is wrong in the view that he takes as to the maintainability of the petition and refuses to make a reference, it would always be open to the claimants to come to Court and get the Court to compel the Collector to make a reference if they satisfy the Court that their application was within time. On an application under Sec. 45 what the Court will

have to consider is whether the Collector failed to discharge his statutory duty and one of his statutory duties is to make a reference if the application is within time. Therefore in order to decide the petition under section 45 the Court would have to consider the question of limitation and take a contrary view to the view taken by the Collector if the Collector was wrong in his decision. Equally so if a reference was made by the Collector which was not a proper reference under Section 18, it would be for the Court to determine the validity of the reference because the very jurisdiction of the Court to hear a reference depends upon a proper reference being made under Section 18, and if the reference is not proper, there is no jurisdiction in the Court to hear it. This seems to me to be the clear interpretation of the plain language of the section used by the Legislature."

11. I have already stated above, that the Madras view has also been on the lines of the Bombay High Court and I may refer here to the case of Kana Navanna Narayanappa Naidu v. Revenue Divisional Officer, Sivakasi, AIR 1955 Mad 23. In that case also the application for making the reference under section 18 was filed after the expiry of six weeks from the date of the receipt of the notice of the award. Many decisions have been considered in this case also by the Madras High Court and there was also an observation to the effect that "there was cleavage of Judicial opinion on the question, whether a court, can or cannot go behind the reference." In that case arguments were advanced to the effect that the Court cannot compel the Collector to make a reference (as it stood before the Constitution) and so once the reference is before the Court it is not at liberty to find out whether the application was within time. It has already been noted in this decision that this question has agitated the minds of the courts for nearly fifty years and there has been difference of Judicial opinion. It was held in that case that a perusal of Section 18 shows that certain conditions are to be complied with and all these are matters of substance and their compliance is a condition precedent to the exercise of the power of reference under the section. One of the arguments also advanced before the Madras High Court was that the Collector acted as an agent and this was also not acceptable by the Madras High Court. The observations and the final conclusions in the decision were to the effect as follows.—

"On principle apart from authority it is difficult to accept the line of reasoning contained in the cases laying down, that whatever might be defects and imperfections in the reference made, when once

it is before the Court, that tribunal is debarred from finding out whether a valid reference has been made. It is no doubt true that under sub-section (1) of S. 18 of the Land Acquisition Act, a person interested who has not accepted the award may by written application require the Collector to make a reference regarding the matters enumerated later on in that sub-section but the first proviso to that section is imperative in stating that every such application shall be made within six weeks from the date of the award, if the person making it was present or represented before the Collector at the time when he made the award. We are not concerned with the second proviso (b)."

12. The Rajasthan High Court in the case of AIR 1957 Raj 44 took the same view as of the Madras and the Bombay High Courts, and it was held by the Rajasthan High Court also that the Collector can make a reference only when it is in accordance with the provisions of law. I have already stated above in the earlier part of my judgment that one of the arguments advanced in that case also was that the Collector was acting as an agent, and it was held that the Government cannot be bound by the acts of the agents which are contrary to the provisions of law.

13. In a Full Bench decision in the case of Kochukunju Padmanabhan v. State of Kerala, AIR 1963 Ker 3 (FB), this High Court also followed the views of the Madras and the Bombay High Courts. The Full Bench of Jammu and Kashmir in the case of Swami Sukhanand v. Samaj Sudhar Samiti, AIR 1962 J. & K. 59 has also followed the Madras and Bombay High Courts' views and it was held in this case that "a Land Acquisition Court is entitled to go behind a reference made to it by the Collector and determine whether the reference fell within the scope and ambit of the jurisdiction conferred upon him by the statutory provision under which the reference was purported to be made and that if the court comes to the conclusion that the reference is ultra vires, the Court will have no jurisdiction to proceed further with the reference and is bound to reject it in limine."

14. The Punjab and Allahabad High Courts have taken a different view and the Punjab High Court has followed the Allahabad High Court's view and I may refer here to the case of Hari Krishna Khosla v. State of Pepsu, AIR 1958 Punj 490. It was held in this case that the proviso, which prescribes the period within which the application is to be presented and occurs in sub-section (2) is purely procedural, and the real matters on which the reference can be required

being stated in sub-section (1) and that the provision relating to the period within which the application has to be made cannot be regarded as a condition precedent to the exercise of the jurisdiction by the Collector in the same manner as the conditions on which a creditor can make a petition under Section 9 of the Provincial Insolvency Act. The decisions of the other High Courts have been considered by the Punjab High Court and the view expressed by the Allahabad High Court in ILR 52 All 96=(AIR 1929 All 769) was held to be correct and it was followed by the Punjab High Court.

The Punjab High Court, therefore, has relied on the view and the reasonings for the view expressed by the Allahabad High Court and in a Full Bench decision of the Allahabad High Court in the case of AIR 1963 All 556 (FB) all the decisions of the Allahabad High Court and of the other High Courts were considered and it was held that that the Land Acquisition Judge cannot go into the question of limitation once the reference has been made. I may give here in brief some of the reasonings on which this view has been held by the Allahabad High Court on the basis of the arguments which were advanced in that case. The Allahabad High Court held that the Section was not sensibly drafted, as there was no provision requiring the Collector to make the reference or laying down in what circumstances he must or may or must not or may not make the reference. It also appears that the view of the Allahabad High Court was that the interpretation of the section is that if the application for reference is made within time it must be considered on merits by the Collector and if made after the expiry of the period, it may be ignored regardless of the merits, and that this view did not militate against any provision in the statute and it may not be treated as a corresponding limitation on the Collector, and there was no express provision for forbidding a reference on a time barred application.

I have already referred to the provisions of Section 18 of the Act and true it is that the section does not lay down as to what would the consequence if an application is filed beyond the expiry of the period laid down in clauses (a) and (b) of the Proviso to this Section. But reading the section as it stands, it clearly implies as has been held by the other High Courts also that one of the pre-requisite conditions can confer a jurisdiction on the Collector to make the reference is that the application should be made within time, and in this view of the matter and in agreement with the views of the other High Courts, which I have discussed above with due respect I have to say

that I do not agree with the view of the Allahabad High Court in this respect.

15. It also appears that one of the arguments which was advanced and which appealed to the Allahabad High Court was that no jurisdiction was conferred on the District Judge (Land Acquisition Judge) to go into the question behind the reference and that once a reference is made, he has to proceed as laid down in Section 20 of the Act. I have already referred in the earlier part of my judgment to the provisions of section 20 of the Act which lays down that the Court shall cause a notice, specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, and that this notice has to be served on the persons named in the section, viz, the applicant and all the persons interested in the objection and if the objection is in regard to the area of the land or to the amount of the compensation, notice to the Collector also. In my view Section 20 prescribes as to what the Land Acquisition Judge has to do after a reference by the Collector under section 18 of the Act has been received. But it does not necessarily imply or mean that the Land Acquisition Judge has to shut his eyes and has no jurisdiction at all to see whether the pre-requisite conditions as laid down in section 18 of the Act had been complied with or not. It also appears that one more argument which had been advanced and which had been accepted by the Allahabad High Court was on the basis of the provision of Section 21 of the Act. This section lays down as follows:—

"Restriction of scope of proceedings — The scope of the enquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection."

This, in my opinion, only means that the Land Acquisition Judge has to confine himself in the enquiry to a consideration of the interests of the persons affected by the objection, but it in no way debars his jurisdiction to see whether the pre-requisite conditions as laid down in section 18 of the Act have been complied with or not. The view of the Allahabad High Court was also to the effect that the wording and the language of sections 23 to 26 show that the District Judge has to determine the question of the amount of compensation and refusal to do so because the application is time barred runs counter to the language of the section. Here again, I may state with due respect that I do not agree with this opinion of the Allahabad High Court.

16. It also appears that this view was also acceptable to the Allahabad High

Court that the Collector is acting administratively in making the award and the reference and even if he be acting judicially while making the reference, he is not subordinate or inferior to the District Judge and the latter cannot revise any finding of his as provided in sections 23 to 26 of the Act. In my opinion, if an objection is taken before the Land Acquisition Judge that the pre-requisite conditions as laid down in the section have not been complied with, such as, that the application was beyond the period prescribed therein and the Land Acquisition Judge examines the question whether the conditions were complied or fulfilled or not will not mean that the Land Acquisition Judge would be sitting in appeal or revision against the order of making the reference by the Collector, but he would be only examining if the pre-requisite conditions as laid down in section 18 of the Act have been complied with or not and thereby to see whether the Collector had the jurisdiction or not to make the reference. The argument about the Collector being an agent was also acceptable to the Allahabad High Court, but I have discussed this aspect of the matter also earlier.

17. On a consideration of the entire matter, such as the relevant provisions of the Act and the decisions of the different High Courts, it will be clear that the majority of the High Courts are in favour of this view that a Land Acquisition Judge in a reference under Section 18 of the Act can go into the question whether the application for reference was made within the time prescribed under sub-section (2) of Section 18 of the Act. In an agreement with the majority view of the High Courts and with respect in disagreement with the Allahabad and Punjab High Courts, I am also of opinion that the necessary *sine qua non* of the reference by the Collector under Section 18 of the Act is that it must be made in accordance with the provisions of that section, such as, within the period prescribed by the two provisos of sub-section (2) of the section, and as a necessary corollary it follows that if the Land Acquisition Judge finds on the materials placed before him that the application is barred by limitation in the sense that it was not presented within the period prescribed under the two provisos of sub-section (2) of Section 18 of the Act, then he can refuse to entertain the reference and can also reject the reference on this ground. The point which I have formulated and which arises for consideration by this Bench is, therefore, answered on the lines indicated above. In result, therefore, it follows that this appeal has no merit and it is dismissed, but in the circumstances of the case no order for costs is made.

18. UNTWALIA, J. :— I agree.
SSG/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 140 (V 56 C 37)

G. N. PRASAD, J.

Kedar Prasad Sinha and another, Petitioners v. State of Bihar and others, Respondents.

Original Criminal Misc. No. 3 of 1968,
D/- 12-8-1968.

(A) Contempt of Courts Act (1952), Ss. 1, 3 — Interference with due course of justice in pending cases — Revision petitions before High Court against order of committal Court declining permission to withdraw prosecution — Offending publication creating atmosphere of prejudice against petitioner — Publication, held did amount to technical contempt of High Court.

Contempt of court may take various forms. A person is guilty of contempt of court if he does anything which obstructs or interferes with the due course of justice or which is calculated or intended to interfere with the due course of justice. But actual interference or intention to interfere with the course of justice is not a necessary ingredient of the offence of contempt of court. Even without such ingredient a person may be guilty of contempt of court if he does an act which tends to obstruct or interfere with the due course of justice in a pending cause. AIR 1941 Pat 185, Foll. (Para 13)

During the pendency of two revision petitions before High Court against order of committal court declining permission to Assistant District Prosecutor under S. 494, Cr. P. C. to withdraw from prosecution a case of rioting and murder against A and B along with nine others, certain offending matter was published in official gazette and in a daily newspaper in Government announcement about submission of allegations against the then Law Minister before a Commission of Inquiry. It was stated in the offending matter that the Law Minister had ignored the advice of the District Magistrate as well as of the Law Secretary and had passed an order that the case should be withdrawn and that was how the petition for withdrawal was filed in court. The statements of facts conveyed the impression that the withdrawal petition was the outcome of the personal action of the then Law Minister and not supported by reasons of State or public policy. On the contrary, it was filed although the concerned officers were of the view that justice demanded that the case should be proceeded with and thrashed out in court. It was indicated

KL/LL/F152/68

in the offending matter that the then Law Minister had passed orders in the matter without obtaining the approval of the council of Ministers and had thereby misused his official position and power with a view to interfere with the administration of justice in a serious case of rioting and murder. The offending publication had the effect of creating an atmosphere of prejudice against the case of A and B in the two criminal revision applications pending in High Court.

Held, that the offending publication did amount to technical contempt of High Court. (Paras 17, 19)

Held also, that the mere submission of such allegations against the then Law Minister before a Commission of Inquiry would not have amounted to contempt of Court. But the mischief was committed by publicising the said allegations with full knowledge that the criminal revision petitions were pending in High Court and the question as to whether the withdrawal petitions were bona fide or not was still to be considered by High Court. Therefore, the offending matter should not have been released for publication either in the official gazette or in the public press, at least until the disposal of the criminal revision applications aforesaid. (Para 19)

(B) Criminal P. C. (1898), Ss. 494, 439 — Scope of S. 494 — Refusing consent to withdrawal, manifestly improper — High Court has power to interfere.

S. 494 is couched in very general terms and does not lay down any fixed rule as to the reasons for withdrawal. But for consenting to the withdrawal, the court must be satisfied that it is a bona fide application and supported by reasons of State or public policy. It must also be convinced about the inexpediency of continuing the prosecution. These aspects of the question will have to be considered in the light of the materials which are brought on the records of the case. Giving or withholding the consent to the withdrawal of the public prosecutor from the prosecution is judicial act and the discretion conferred on the court under S. 494 must be exercised judicially. The order under S. 494 is thus liable to revision by High Court, if the discretion vested in the Magistrate to refuse consent has been improperly or arbitrarily exercised. Ordinarily, High Court is reluctant to interfere with the discretion given, but undoubtedly has power to do so, and will do so in special circumstances where refusing consent to withdrawal appears to be manifestly improper. AIR 1949 Pat 233 (FB), Foll. (Paras 17, 16)

(C) Constitution of India, Art. 166(3) — Rules of Execution Business (1965) Sch. 3, Item No. 20 — Proposal for institution of withdrawal of a prosecution against

advice tendered by Judicial Department — It must be referred to Council of Ministers for discussion and final orders of Governor. (Para 17)

(D) Contempt of Courts Act (1952), S. 3 — Publication amounting to technical contempt of High Court — Offending matter directed to be published by the then Law Minister and not by Council of Ministers — Entire Council of Ministers cannot be held liable for releasing offending matter for publication — Constitution of India, Art. 166. (Para 19)

(E) Contempt of Courts Act (1952), S. 3 — Publication amounting to technical contempt of High Court — Offending publication should not have been made by editor and printer of daily newspaper as a matter of routine — Fact that it was published in official Gazette is no justification for publication made by them — Both held responsible for contempt of High Court. (Para 21)

(F) Contempt of Courts Act (1952), S. 4 — Punishment — Publication amounting to technical contempt of High Court — Contempt committed is of technical character — Neither sentence of imprisonment nor that of fine imposed — Only warning given. (Para 23)

Cases Referred: Chronological Paras (1949) AIR 1949 Pat 222 (V 36) =

50 Cri LJ 474 (FB), King v. Parmanand 16

(1949) AIR 1949 Pat 233 (V 36) =

50 Cri LJ 488 (FB), King v. Moule Bux 16

(1941) AIR 1941 Pat 185 (V 28) =

21 Pat LT 980, Supdt and Remembrancer of Legal Affairs, Bihar v. Murli Manohar Prasad 13

(1939) AIR 1939 Mad 257 (V 26) =

ILR (1939) Mad 466 (SB), P. S. Tuljaram Rao v. Sir James Taylor, Governor of Reserve Bank of India 13

(1900) 1900-2 QB 36 = 69 LJ QB

502, Queen v. Gray 13

(1889) 58 LJ QB 490 = 61 LT 343,

Hunt v. Clarke 14

(1742) 2 Atk 469 = 26 ER 683, Read

and Huggonson, In re 13

B. C. Ghose, Deb Prasad Mukherjee, Pralay Kumar, Mahendra Pd. Pandey, Sankat Kumar Ghattopadhyaya, Balbhadra Singh and Radha Raman, for Petitioners; Brajeshwar Mallik, S. Sarwar Ali, A. G. P. R. N. Tewari, Standing Counsel, Janardan Pd. Sinha, Mani Lal, K. P. Verma, Rudradeo Kumar Sinha and T. P. Mandal for Opposite Party.

ORDER :— This rule has been issued at the instance of the petitioners Kedar Prasad Sinha and Arjun Pandey, calling upon the respondents, who are twenty-five in number, to show cause why they should not be committed for contempt of Court.

2. The material facts are the following :—

The petitioners along with nine others are accused in a case of rioting and murder which was instituted upon a police report. While the commitment proceedings were pending in the court of a Munsif Magistrate at Jamui (District Monghyr), the Assistant District Prosecutor in charge of the case filed a petition under Section 494, Code of Criminal Procedure, for permission of the Court to withdraw from the prosecution. That was on the 18th September 1967. But the court declined to grant the permission. Against that order two criminal revision applications were filed in this court, one on behalf of the State of Bihar which was numbered as Criminal Revision No. 2035 of 1967, and the other on behalf of the petitioners which was numbered as criminal Revision No. 2036 of 1967. Both these Criminal Revisions were admitted by this court on the 30th November, 1967, and they are still pending for final hearing.

3. During the pendency of the aforesaid Criminal Revisions certain matter was published in the official gazette known as the Bihar Gazette in its extraordinary issue dated the 12th March 1968, and the same was also published in a daily newspaper of Patna known as the Searchlight in its issue dated the 14th March, 1968. It was in the following terms.

"Allegation No. J-4.

Withdrawal of Case against K. P. Sinha.

Sri Kedar Prasad Sinha and Sri Arjun Pandey were facing prosecution along with nine others in a serious case of rioting with murder which was pending before the Munsif Magistrate Jamui. They filed a revision petition before the Additional Sessions Judge, Monghyr, against their prosecution, which was dismissed. Thereupon on 6-6-67 they presented an application direct to the then Minister for law, Sri Hasibur Rahman, who directed that the law Secretary should examine the matter and report and in the meanwhile the District Magistrate was requested to take two months adjournment of the case and also send the case diary with his report.

On 17/8/67 the District Magistrate sent his report opposing withdrawal of the case. Even before the District Magistrate's letter was diarised in the law Department Sri Hasibur Rahman called for the file directly from the Dealing Assistant and ordered that a telegram should be sent to the District Magistrate to take further adjournment for a fortnight. The matter was then examined thoroughly by the officers of the Law Department and in his note dated 30-8-1967,

the Law Secretary recommended against withdrawal of the prosecution pointing out that there was a prima facie case and justice demanded that it should be thrashed out in Court.

Sri Hasibur Rahman, however, ignored the advice of the District Magistrate as well as of the Law Secretary and ordered on 10-9-67 that the case should be withdrawn. A petition for withdrawal was accordingly filed on 18-9-67 but was rejected by the trial Court. Thereupon, Sri Hasibur Rahman directed that a revision should be filed in the High Court against the refusal of the trial Court to allow withdrawal of the case. A revision was accordingly filed which is still pending before the High Court.

Sri Hasibur Rahman thus by misuse of his official position and power unnecessarily interfered with the administration of justice in a serious case of rioting with murder."

4. The contention of the petitioners is that the printed matter constitutes contempt of this Court, inasmuch as the publication was made "on the merits of the case and affecting the merits of the case to present how the application for withdrawal of the case had been made in spite of and contrary to opposition by certain officials who appeared to be interested in the case" and as "such publication has a result of interfering with the course of justice and prejudicing the mankind against the petitioners in the pending case" (vide paragraphs 6 and 7 of their petition).

5. Respondent No. 1 is the State of Bihar, Respondent No. 2 is Sri Bindeshwari Prasad Mandal who at the relevant time was the Chief Minister of Bihar, and respondents Nos. 3 to 20 were the members of his council of Ministers. Among them, Sri Shambhunath Jha (respondent no 3) was Minister without Portfolio, and the rest were Ministers in charge of the different departments of the Government. Sri Subhas Chandra Sarkar (respondent no. 21) and Sri Awadesh Kumar Tiwari (respondent no. 22) are respectively the Editor and the printer cum publisher of the Searchlight, a well-known daily newspaper of Patna, Sri S. N. Chatterji, (respondent no 23) is the Superintendent Secretariat Press, Bihar, Sri Ram Prasad Sinha (respondent no. 24) is the Superintendent Stationery Stores and Publication, Bihar. Lastly, Sri S. V. Sohoni (respondent no. 25) is the Chief Secretary of the Government of Bihar.

6. According to the petitioners, by reason of the said publication (in the Bihar Gazette and in the Searchlight) each of these respondents has become liable to be committed for contempt of Court. The averments on the point are

contained in paragraphs 4, 10 and 11 of their petition which read:—

4. "That while the said matter is still pending in this Hon'ble Court, respondent no. 3, issued for publication what purported to be the allegations against Sri Hasibur Rahman Ex-Minister of Bihar and Respondent no. 22 published the same in the Searchlight of 14th March, 1968.

10. That respondent no. 2 was the Chief Minister and Respondents nos. 3 to 20 were the members of the Council of Ministers who are alleged to have abetted and approved of the aforesaid statements and issued directions to publish the same. Respondent no. 3 had handed over the statements to the press for publication in the newspaper. Respondent no. 22 has published the same in the Searchlight of morning edition of the 14th March, 1968 of which respondent no. 21 is the Editor, without taking due care to verify the correctness of the statements and without taking care to avoid causing prejudice to the case of the petitioners.

11. That the same has been printed and published in the Bihar Gazette Extraordinary dated the 12th March, 1968, by respondents 23 to 24. A copy of the Gazette has been despatched to Subscribers along with the Bihar Gazette dated the 13th March 1968 and received by Patna subscribers on 21st March, 1968." Subsequently, in a supplementary affidavit it has been stated that respondent no. 25 is also liable for contempt of Court, since the offending matter was published in the Bihar Gazette Extraordinary dated the 12th March, 1968 under his signature.

7. Upon notice, respondent no. 12 did not appear and the rule has been heard ex parte against him. The other respondents have appeared through their respective counsel and they have been heard. Counter-affidavits showing cause have also been filed by 16 of them. The stand of the ex-Ministers has been sufficiently explained in the counter affidavits of respondents Nos. 2 and 3. The Ex-Chief Minister and the other members of his council have taken full responsibility for the contents of the offending publication, but they maintain that they have said nothing about the merits of the question of withdrawal of the criminal case pending decision in this Court. It has been stated that the offending matter was intended for submission to a Commission of Enquiry headed by an ex-Judge of the Supreme Court by way of allegations against the conduct of a former law Minister, Sri Hasibur Rahman to the effect that he had abused his official position in relation to the criminal case in question by trying to have that case withdrawn in the teeth of opposition of the District

Magistrate and the Secretary to Government, Law Department, by adopting a procedure which was in utter disregard of the instructions contained in the Rules of Executive Business (framed under Art. 166(3) of the Constitution of India). In paragraphs 6, 7, 10 and 11 of the counter affidavit of the ex-Chief Minister (respondent no. 2) it has been stated :—

6. "That the subject matter of the said allegation against Sri Hasibur Rahman was not the merit of the decision taken by him for withdrawing the case but the procedure adopted by him in the teeth of opposition of the District Magistrate and the Secretary to Government, Law Department and in complete disregard of the instructions contained in the Secretariat Instructions regarding flow of papers so much so that he went to the extent of taking the file direct from the dealing assistant and passing orders. These are all facts on records and the said allegation contained a resume of these very facts."

7. "That the Cabinet of which respondent no. 2 was the Chief Minister did nothing other than advising the Governor of the State for entrusting this matter to another statutory authority i. e. the Commission of Inquiry headed by an ex-Judge of the Supreme Court of India, and, as such, entrustment to a fact finding statutory body regarding, the procedure adopted in arriving at the decision in question, cannot, it is hereby submitted, amount to contempt of Court."

10. "That the Cabinet was assisted in coming to the decision in question by the Law Department of the State Government, where the allegation in question had been actually drafted by the Vigilance Commissioner and the Chief Secretary to the Govt. of Bihar, and, nobody at any stage even pointed out that the formulation of the present allegation and its entrustment to the Commission of Inquiry headed by an eminent Ex-Judge of the Supreme Court would in any manner attract the provisions of the Contempt of Courts Act. It would thus be obvious that they also bona fide believed that the two issues were distinct and severable and the entrustment of corruption allegation to Commission of Inquiry was not at all objectionable for in that eventuality they should have and must have pointed out this fact to the Cabinet."

11. "That in the absence of any such report from the Law Department and other high-ranking State officials, the respondent no. 2 did believe in a bona fide manner that nothing wrong was being done by entrustment of the allegation to the Commission of Inquiry."

8. In paragraph 5 of his counter-affidavit, the ex-Minister without portfolio

(respondent no. 3) has stated that the decision of the Cabinet to submit the aforesaid allegations to the Commission of Inquiry was taken in the name of the Governor of Bihar and was printed in the Bihar Gazette and was formally released to the press."

9. In his affidavit, the Chief Secretary (respondent no. 25) stated that the "offending matter happened to be included by inadvertence" and that as soon as his attention was drawn to the matter the "offending charge was deleted." He has also expressed regret for "the error".

10. Respondents nos 28 and 24 also have expressed their regret for the publication made in the official Gazette "mechanically" in course of their official duty, and have offered unconditional apology for the said publication.

11. In their counter affidavit, the Editor and the printer (respondents nos. 21 and 22) of the Searchlight have stated:

4 "That the news contained in Annexure "A" of the petition filed by the petitioner was the part of a Gazette Notification of Bihar Government and was published in good faith and in public interest without knowing the truth or falsehood"

5 "That it is submitted that the aforesaid news was published in the ordinary course of business without knowing the truth or falsehood of the facts contained in the news".

7. "That it is submitted that the aforesaid publication of the news in the daily paper was never intended to reflect on any pending case before the Hon'ble High Court or any Court, nor does it intend to impede the course of justice or to pollute the stream of administration of justice of this Hon'ble Court."

12. Substantially, two questions arise for decision in this case. The first is, whether the offending matter contains anything which constitutes contempt of Court. Secondly, are all or any of the respondents guilty of such contempt.

13. It is well known that contempt of Court may take various forms. A person is guilty of contempt of Court if he does anything which obstructs or interferes with the due course of justice or which is calculated or intended to interfere with the due course of justice. But actual interference or intention to interfere with the course of justice is not a necessary ingredient of the offence of contempt of Court. Even without such ingredient a person may be guilty of contempt of Court if he does an act which tends to obstruct or interfere with the due course of justice in a pending cause. To quote what Harnes, C. J. said in Superintendent and Remembrancer of Legal Affairs, Bihar v. Murli Manohar Prasad, 21 Pat

LT 980 at p. 998=(AIR 1941 Pat 185 at p. 194)

"It has always been laid down in England, and indeed in this country, that the writer of an article can be guilty of contempt without intending to interfere with the due course of justice. An article written with the deliberate intention of interfering with the due course of justice would be an extremely serious matter meriting very serious punishment. He can, however, be guilty of writing an article which tends to interfere with the course of justice without intending so to interfere. The test has always been not what the writer intended but what effect the words would have upon readers. In my judgment the case of P. S. Tuljaram Rao v. Sir James Taylor, Governor of Reserve Bank of India, ILR (1939) Mad 466 =(AIR 1939 Mad 257) cannot be regarded as dissenting from the long-established view relating to cases of this kind. Once it is held that words are likely to cause substantial interference with the due course of justice or likely substantially to prejudice the hearing of a case or the trial of an accused person then the writer of such an article is guilty of contempt whether he intended such results or not. The question of intention is irrelevant in considering whether the offence has been committed, though, of course, it is a most important matter in considering the appropriate sentence to be imposed."

Therein it was further held (at page 989 of Pat LT)=(at p 188 of AIR):

"It has been frequently laid down that any act done or writing published, which is calculated to interfere with the due course of justice is a contempt of Court and writing prejudicing the public for or against a party are similarly contempt. See Queen v. Gray, (1900) 2 QB 36 and In re. Read and Hugonson, (1742) 2 Atk 469. It has also been laid down that no intent to interfere with due course of justice or to prejudice the public need be established if the effect of the article or articles complained of is to create prejudice or is to interfere with the due course of justice."

14. In another English case, Hunt v. Clarke, (1889) 58 LJ QB 490, it was held that a publication in a newspaper pending an action or before the trial of an action of any observation which in any way prejudices the parties to the action is technically a contempt of court; but the Court will not exercise its extraordinary power of committal if the offence complained of is of a slight or trifling nature and only if it is likely to cause substantial prejudice to the parties in the action.

15. I will assume, as urged before me, that this is not a case of intentional inter-

removed by him from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral." Under sub-section (2) of the same section:—

"The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed by him from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral."

The Second Schedule can be amended by notification of the Central Government provided that the maximum rate of 20 per cent of the sale-price of the mineral at the pit's head is not exceeded and that the enhanced rate of royalty for any mineral cannot take place more than once during any period of four years.

76. Sections 10 to 12 deal with the procedure for obtaining prospecting licences or mining leases in respect of land in which the minerals vest in the Government. Section 13 deals with the power of the Central Government to make rules in respect of minerals and under clause (i) of sub-section (2), for "the fixing and collection of dead rent, fines, fees or other charges and the collection of royalties in respect of—

- (i) prospecting licences,
- (ii) mining leases,
- (iii) minerals mined, quarried, excavated or collected."

77. The Counsel for the petitioners rely very strongly on Section 14 which says that:—

"The provisions of Sections 4 to 13 (inclusive) shall not apply to prospecting licences and mining leases in respect of minor minerals."

It is sought to be spelled from what is said in Section 14 that the State Government has been deprived of the power to charge royalties in respect of minor minerals for regulation of whose prospecting licences and mining leases it has been given the power to make rules. If the royalty could be asked only in respect of minerals and not minor minerals, such intention could have been made clear in Section 9. As stated in Section 9, royalty is paid in respect of a mineral removed by a lessee from the leased area. It is to be noted that sub-section (2) of Section 15 specially saves the rules which had been in existence before the commencement of the Act. As stated in sub-section (2)—

"Until rules are made under sub-section (1) any rules made by a State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force."

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It is not in dispute that before the Punjab Minor Mineral Concessions Rules, 1964 (hereinafter called the Rules) were made on 25th of April, 1964, there were in existence the Punjab Minor Mineral Rules of 1934 and there was a provision in the Rules that the Collector could charge royalties at the rates specified. As emphasised by Gurdev Singh, J., Chapter II of 1964 Rules deals with grant of mining leases in respect of land in which the minerals vest in the Government, while Chapter III, from Rule 34 to Rule 45, deals with grant of mineral concessions in respect of minor minerals in respect of the land in which minor minerals vest in a person other than the Government. The scale of royalties is fixed only with respect to such leases where the minor minerals vest in the Government. I am in agreement with the reasoning of the Division Bench of the Patna High Court in AIR 1965 Pat 491, that:—

"Unless there be any compelling reason to think that the Parliament wanted to exclude the minor minerals from the imposition of any royalty whatsoever, Section 15 cannot be read to mean such exclusion from the powers of the State Government. The scheme of the Mines and Minerals Act is that the Union Government is given power by the Parliament, to modify the rates of royalty for all minerals except the minor minerals and everything was left to the State Government in respect of minor minerals. The scope of the rule-making power of the State Government, as provided in Section 15 (1), is identical with that of the Central Government, as given in Section 13 (1) and it includes the power to prescribe the rates of royalty." As observed by Mahapatra, J., speaking for the Court:—

"Had the Parliament wanted really to exclude minor minerals from payment of royalty, it would have expressed their intention in Section 9 which specifically provides for payment of royalties on all minerals. The exclusion of Sections 4 to 13 as mentioned in Section 14, in respect of minor minerals, is for the sole purpose of conferring all such powers as covered by those sections, on the State Government, in respect of minor minerals."

78. The concept of 'royalty' which has been discussed in elaborate detail by Gurdev Singh, J., implies of necessity that it is a charge by the owner of minerals from those to whom he gives the concession to remove them. Section 9 also talks of royalty being paid in respect of minerals removed from the area of the mining operations. The State Government, as is made clear in the Rules, charges royalty only from such owners or lessees who are excavating brick-earth and where the property in this minor

mineral vests in the State Government. Manifestly, the State Government has not taken upon itself to charge royalty for use of brick-earth anywhere and everywhere. It is only from such areas where this minor mineral vests in the Government that the right to charge royalty is made. It has been emphasised in the letters issued by the State Government to the lessees that the Shariat Wajab-ul-Arz is to be examined in every case to find out whether the property in the minor mineral vests in the State Government. As held in ILR 1966 (1) Punj 166, the jurisdiction of the Civil Court to decide the rival claims of the parties relating to ownership of the mineral rights in the land does not appear to be barred by any provision of law and any party wanting a decision on this point can institute a suitable action according to law. The State Government itself has not claimed royalty on the minor minerals which are not ordered by it. In the last analysis, it is not for this Court to determine disputed questions of title and wherever the right of the Government is controverted it will have to be established in an appropriate Court that the property in minor minerals does in fact vest in the Government.

79. Looked in the perspective that the royalty is to be charged at specified rates in respect only of minor minerals vesting in the State Government and only when the brick-earth is being used, it cannot be said that it is in the nature of a tax. In the words of Mr Justice B K Mukherjee in the Supreme Court decision of AIR 1954 SC 282 —

"A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristics of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax."

The royalty, along with receipts from minor minerals as observed by Gurdev Singh J., is credited under the head: "XXXIX — Industries — Miscellaneous" and is levied only on those who are using brick-earth where its property vests in the Government. The element of compulsion is thus limited and a user of brick-earth whose property does not vest in the Government does not have to pay royalty. I do not think that the levy of royalty in such a situation is a tax and

in agreement with my learned brother, I consider that it is appropriately in the nature of a rent.

80. The various cases, to which our attention has been invited by Mr Bhagirath Dass, Mr. Tuli, Mr. Sachar and other learned Counsel, do not deal exactly with the situation with which we are confronted in this case, and in agreement with my learned brother, I would dismiss these petitions, leaving the parties to bear their own costs.

RSK/D.V.C.

Petitions dismissed.

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(V 56 C 18)

D. K. MAHAJAN AND
GURDEV SINGH, JJ.

Grand Cinema, Mansa, Petitioner v. Entertainment Tax Officer, Bhatinda and others, Respondents.

Civil Writ Petns. Nos. 2084 of 1963 and 136 of 1964, D/- 21-2-1968.

Punjab Entertainments Duty Act (16 of 1955) (as amended in 1963), Ss. 14-A and 15 — S. 14-A is ultra vires Art. 14 of Constitution — (Constitution of India, Art. 14).

The offences and penalties in S 14A are the same as in S. 15 (1) with only one difference that a prescribed authority imposes the penalty under S. 14A while a trial before a Magistrate is held under S. 15. Thus for the same offence there are two different modes of trial. There are no criteria in the Act or its preamble or the rules made thereunder as to in what cases covered by S 15 (1), action is to be taken under S 15 (2) or S 14A. The matter is entirely within the discretion of the executive authority. No reasonable basis can be given for differentiating persons similarly situated in the application of these parallel provisions which aim at the same objective. It cannot be said that in view of the gravity of the aim of the Act, namely to collect tax and to check its evasion, a discretion is conferred on the executive. A person is entitled to claim among two parallel provisions for the same purpose, the benefit of a more beneficial provision. Otherwise, discrimination so far as he is concerned will result. Thus S 14A is ultra vires Art. 14 of the Constitution. AIR 1968 SC 1, Foll. (Paras 7 and 8)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1 (V 55)=

1968-70 Pun LR 261, A. C. Aggarwal v. Mst. Ram Kali

(1962) AIR 1962 SC 63 (V 49)=
1962-2 SCR 694=1962 (1) Cri

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LJ 106. Delhi Administration v. Ram Singh 7

Atma Ram, for Petitioner; S. K. Jain, for Advocate-General, for Respondents.

D. K. MAHAJAN, J.— This order will dispose of Civil Writ Petitions Nos. 2084 of 1963 and 136 of 1964. They relate to two different orders but the point, that requires determination being common to both of them, therefore they are being disposed of by one order.

2. These petitions, under Articles 226 and 227 of the Constitution of India, were referred to a larger Bench by Shamsheer Bahadur, J., in view of the importance of one of the principal points that arose for determination and which, in our opinion, really concludes the matter.

3. The principal question, that requires determination is, whether Section 4 of the Punjab Taxation Laws (Amendment) Act, 1963, which introduced Section 14-A in the Punjab Entertainment Duty Act (Act No. XVI of 1955), is ultra vires Article 14 of the Constitution of India?

4. The petitioner, in both the cases, *Is Grand Cinema*, *Mansa*, and has filed the present petitions through Shri Dev Bhushan, Manager and Shri Jagdish Lal Sharma, Partner. In both these petitions, action taken by the Prescribed Authority under Section 14-A is called in question on the ground that this provision is ultra vires Article 14 of the Constitution of India. To appreciate this contention, it will be necessary to set out the relevant provisions of the parent Act. Section 10 provides for the method of levy of entertainment tax. Section 13 provides for the production and inspection of accounts and documents with the object of realization of the entertainment duty. Section 14 gives the power to the officer of a prescribed rank for entry and inspection of the places of entertainment. Section 15, which is the principal section, and on which the entire argument has turned, provides for offences and penalties and reads thus:—

"15 (1) If the proprietor of an entertainment

(a) fraudulently evades the payment of any duty due under this Act, or

(b) obstructs any officer making an inspection a search or seizure under this Act, or

(c) acts in contravention of, or fails to comply with any of the provisions of this Act or the rules thereunder, he shall, on conviction, be liable in respect of each such offence to a fine which may extend to one thousand rupees, and when the offence is a continuing one, with a daily fine not exceeding fifty rupees during the period of the continuance of the offence.

(2) No Court shall take cognizance of an offence under this Act or under the rules made thereunder except on a complaint made by a person authorised in this behalf by the Government and no Court inferior to that of a Magistrate of the First Class shall be competent to try any of the offences under this Act."

This section was amended in 1963 and the figure "one thousand" has been replaced by the figure "two thousand" (Section 5 of the Punjab Taxation Laws Amendment Act (Act No 5 of 1963))

5. Section 16 gives the power to the Prescribed Authority to compound offences and reads thus:—

"16 (1) The prescribed authority may, at any time, accept from a person, who has committed an offence under this Act, by way of composition of such offence, a sum of money not exceeding two hundred and fifty rupees or double the amount of duty payable under this Act, whichever is greater

(2) On payment of such sum of money, as may be determined under sub-section (1), the Prescribed Authority shall, where necessary, report to the Court that the offence has been compounded and thereafter no further proceedings shall be taken against the offender in respect of the same offence and the said Court shall discharge or acquit the accused, as the case may be."

Section 14-A, as already stated was added to the Parent Act in the year 1963, and reads thus:—

"14-A(1) Where a proprietor of an entertainment commits any of the acts specified in sub-section (1) of Section 15, the prescribed authority may, after affording such proprietor a reasonable opportunity of being heard, direct him to pay, by way of penalty in addition to the tax assessed by it on such proprietor, if any, under sub-clause (ii) of clause (e) of Section 2, a sum not exceeding two thousand rupees.

(2) No prosecution for an offence under this Act shall be instituted against a proprietor of an entertainment in respect of the same facts on which a penalty has been imposed on him under sub-section (1)".

The only other provision, that need be noticed, is Section 8 of the Punjab Cinemas (Regulation) Act (Act 11 of 1952). Section 8 of this Act has been amended by the Punjab Cinemas (Regulation) Amendment Act (Act No. 4 of 1963) The amended Section 8, as it stands now is reproduced below:—

8. (1) Notwithstanding anything contained in this Act, the State Government or the Licensing Authority may, at any time, suspend, cancel or revoke a licence,

granted under Section 5, on one or more of the following grounds, namely:—

x x x x x
(e) the licensee has been convicted for not less than three times of an offence punishable under clause (a) of sub-section (1) of Section 15 of the Punjab Entertainments Duty Act, 1955, or has compounded such offence for not less than three times under Section 16 of that Act;

(f) a penalty under Section 14-A of the Act referred to in clause (e) has been imposed for not less than three times on the licensee; or

(g) x x x x x
(2). Where the Government or the licensing authority is of the opinion that a licence granted under Section 5 should be suspended, cancelled or revoked, it shall, as soon as may be, communicate to the licensee the grounds on which the action is proposed to be taken and shall afford him a reasonable opportunity of showing cause against the action proposed to be taken.

(3) If, after giving such opportunity, the Government or the licensing authority, as the case may be, is satisfied that the licence should be suspended, cancelled or revoked, it shall record an order stating therein the ground or grounds on which the order is made, and shall communicate the same to the licensee in writing.

(4) Where the order suspending, cancelling or revoking a licence under sub-section (3) has been passed by a licensing authority, any person aggrieved by the order may, within thirty days of the communication of such order to him, prefer an appeal to Government which may pass such order as it thinks fit

(5) The order of the Government shall be final."

We have reproduced this provision for the purpose of showing that three consecutive prosecutions in the offence mentioned in Section 15 or Section 14-A entail forfeiture of the licence to exhibit cinematographs.

6. This now brings us to the consideration of the question of vires of Section 14-A. It is common ground that all the three consecutive penalties have been imposed under Section 14-A, and on different dates. The first petition is a challenge to the orders passed under Section 14-A which are Annexures 'P' and 'Q' dated the 10th of September, 1963 and the 15th of October, 1963, respectively, and in the second petition, order, Annexure 'D' dated the 10th of January, 1964, under Section 14-A is being challenged. The reason appears to be this that in the order, Annexure 'D' to the second petition, it was observed that—

x x x x x
It is certain that a good deal of evasion of tax is going on in the cinema and now

that the penalty has been imposed on the cinema three times for indulging in the evasion of duty, as follows:

(1) Rs. 225/- on 10-9-1963.

(2) Rs. 500/- on 15-10-1963.

(3) Rs 250/- (present detection), case should be moved to the District Magistrate Bhatinda for the cancellation of the licence in accordance with the provisions of law.

x x x x x
7. On a combined reading of the provisions quoted above, it is obvious that Section 15 (1) specifies the offences as well as the punishment for the same. Sub-section (2) of Section 15 provides as to who will take cognizance of the offences. According to this provision, it is a Magistrate of the First Class who takes cognizance on a complaint made by a person authorized in this behalf. The moment, one turns to Section 14-A, one finds that the offences and the penalties are the same as in Section 15 (1). The only difference is that an Authority Prescribed imposes the penalty after affording the proprietor a reasonable opportunity of being heard. In Section 15 also, the proceedings are against the proprietor. Thus, for the same offence, there are two different modes of trial.

It cannot be disputed and indeed it was not, that one mode is more beneficial than the other and it is also obvious. A trial before a Magistrate means that the evidence has to be judged according to the rules laid down in the Evidence Act and the trial has to be according to the procedure prescribed in the Code of Criminal Procedure; whereas in a case under Section 14-A, only an opportunity of a hearing before a Prescribed Authority is provided. Thus it is only a hearing before a quasi judicial Tribunal and the only requirement is that it should be according to the rules of natural justice.

There are no criteria in the Act or its preamble or the rules made thereunder as to in what cases covered by Section 15 (1), action is to be taken under Section 15 (2) or Section 14-A. The matter is left entirely to the sweet discretion of the executive authority. The learned Counsel for the State has been unable to give us any reasonable basis for differentiating between persons similarly situated in matter of application of these parallel provisions which aim at the same objective. His only contention was that the Act aims at collection of tax and to check its evasion. Therefore, in view of the gravity of the matter, it was thought fit to confer discretion on the executive.

We are unable to appreciate this argument. A citizen is entitled to urge that if there are two parallel provisions for the same purpose, he is entitled to the benefit of a more beneficial provision; or otherwise there would be discrimination

so far as he is concerned. This result follows in the present case and cannot be avoided. The principles, when discrimination results and becomes violative of Article 14 of the Constitution of India, are well settled. The difficulty only arises in their application to the facts of a given case. In *A. C. Aggarwal v. Mst. Ram Kali*, 1968-70 Pun LR 261= (AIR 1968 SC 1), their Lordships of the Supreme Court observed as follows—

"The inhibition of Article 14 that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against discrimination by the State amongst equals and to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile treatment. If law deals equally with all of a certain well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for whom the law has been made is different from other persons and, therefore, there is no discrimination against equals. Every classification is in some degree likely to produce some inequality but mere production of inequality is not all by itself enough. The inequality produced in order to encounter the challenge of the Constitution must be the result of some arbitrary step taken by the State. Reasonable classification is permitted but such classification must be based upon some real substantial distinction bearing a reasonable and just relation to the thing in respect of which such classification is made. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds."

As a matter of fact, the observations of their Lordships of the Supreme Court in a later part of this very decision support the conclusion at which we have arrived at; and I may only refer to the following observations made at page 270.—

"From the copies of the reports made in these cases to the Magistrate by the police—made available to us at the hearing of these appeals—it is clear that they disclose offences under Section 3 against the respondents. Therefore, the question is whether the Magistrate can choose to ignore the cognizable offence complained of and merely have recourse to Section 18 and thus deprive the parties proceeded against of the benefit of a regular trial as well as the rights of appeal in the event of their conviction. Bearing in the mind the purpose of these

provisions as well as the scheme of the Act and on a harmonious construction of the various provisions in the Act, we are of the opinion that in cases like those before us, the Magistrate who is also a Court as provided in Section 22 must at the first instance proceed against the persons complained against under the penal provision in Sections 3 or 7 as the case may be, and only after the disposal of those cases take action under Section 18 if there is occasion for it. Under Section 100 (1) (b) of the Code of Criminal Procedure, the Magistrate is bound to take cognizance of any cognizable offence brought to his notice. The words 'may take cognizance' in the context mean 'must take cognizance'. He has no discretion in the matter, otherwise that section will be violative of Article 14. But as laid down in *Delhi Administration v. Ram Singh* (1962) 2 SCR 694=(AIR 1962 SC 63), only an officer mentioned in Section 13 can validly investigate an offence under the Act. Hence if the cases before us had been investigated by such an officer, there is no difficulty for the Magistrate to take cognizance of those cases.

x x x x x"

8. For the reasons recorded above, we are clearly of the view that Section 14-A is ultra vires the Article 14 of the Constitution of India, because it cannot be justified on any of the grounds enumerated in the various authorities of the Supreme Court dealing with Article 14.

9. The net result, therefore, is that these petitions are allowed and the proceedings taken against the petitioner under Section 14-A are quashed. In view of the scanty assistance we have received from the Counsel for the parties, we will make no order as to costs.

10. **GURDEV SINGH, J.:**— I agree
JRM/D.V.C. Petitions allowed.

AIR 1969 PUNJAB & HARYANA 101
(V 56 C 19)

R. S. SARKARIA, J.

Chanan Singh Kishan Singh, Petitioner v. State of Punjab and others, Respondents.

Criminal Revn No. 541 of 1967, D/- 19-8-1968 from order of Dist. Magistrate Bhatinda, D/- 23-5-1967.

(A) Criminal P. C. (1898), Ss. 145, 439 — Findings of fact arrived at on enquiry under S. 145 — When can be interfered with in revision.

In revision, the High Court rarely interferes with findings of fact arrived at by a Magistrate on an enquiry under Section 145. It is a rule of practice that

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the High Court seldom goes into the evidence in revision unless it is necessary to do so by reason of exceptional circumstances, or by reason of a manifest error of law (Para 6)

(B) Criminal P. C. (1898), S. 145 — Addition of parties after commencement of enquiry but before its conclusion — Not barred — Issue of fresh order under sub-section (1) is not necessary.

If during an enquiry under S 145, the persons who move the Magistrate to start the proceedings or the persons against whom the proceedings are initiated, drop out and the person really concerned in the dispute appears before the Magistrate at a date subsequent to the making of the preliminary order, the dispute on account of which apprehension of a breach of the peace has arisen would still be there, and the Magistrate would have to make an order to prevent the same. The dispute being the same and still subsisting, it is not at all necessary for the Magistrate to issue a fresh order under sub-section (1) of Sec 145 AIR 1949 All 623 & AIR 1946 Pat 389 & (1903) ILR 30 Cal 155 (FB), Rel. on.

(Para 7)

True, that S 145 does not contain any express provision for addition of parties after the commencement of enquiry, except with regard to the bringing of the legal representatives of a deceased party on the record, but there is also nothing in Section 145, which prohibits the Magistrate from adding the parties even after the initiation of the proceedings. On general principles, the Magistrate will have the power to add all parties who were originally concerned in the dispute, which is the foundation of the proceedings. However, it may not be proper for the Magistrate in a particular case to add a party to such proceedings after the conclusion of the enquiry at the stage of final arguments.

(Para 8)

Cases Referred: Chronological Paras

(1949) AIR 1949 All 623 (V 36)=50

Cri LJ 949, Mt. Kulsumunnisa v. Rex

(1946) AIR 1946 Pat 389 (V 33)= 7

47 Cri LJ 1013, Leela Singh v. B P. Singh

(1903) ILR 30 Cal 155=6 Cal WN 7

737 (FB), Krishna Kamini v. Abdul Jabbar

J. S. Rakhi, for Petitioner; T. S. Man- gat, for Respondent (Sarup Dass).

ORDER:— This is a revision under Section 439 of the Code of Criminal Procedure, against an order, dated 23-5-1967, of the District Magistrate, Bhatinda, upholding an order, dated 17-10-1966, of the Executive Magistrate 1st Class, Mansa. It arises out of the following circumstances:

2. There was a dispute over some land and other immovable property, situated in the area of village Nangal Kalan, Tehsil Mansa. Apprehending a breach of the peace, Mansa Police made a report for proceedings under Section 145, Criminal Procedure Code, against Chanan Singh and 5 others as party No 1, and Prem Dass and 4 others as party No 2. The case was first put up before the Sub-Divisional Magistrate, Mansa, who, after satisfying himself from the police report that a dispute likely to cause a breach of the peace existed concerning the land measuring 307 Kanals and 4 Marlas, situated in the area of village Nangal Kalan, made a preliminary order in writing on 12-4-1965, requiring both the parties to attend his Court, and to put in written statements of the respective claimants regarding the fact of actual possession. In July, 1965, Sarup Dass as party No 3 also joined the proceedings before the Sub-Divisional Magistrate. He made an application, claiming to be in possession of the land in question. Prem Dass, party No 2, withdrew from the case and did not prosecute his claim further. Thus, two parties, namely, Chanan Singh etc., party No 1, and Sarup Dass, party No 2, were left in the field. Both these parties submitted their written statements, claiming to be in possession of the land in dispute at the material time. Party No 1 also submitted affidavits of Ram Chand, Gurdial Singh, and Chanan Singh. Counter-affidavits were put in by Sarup Dass, party No 2, who also furnished a copy of the Roznamcha, dated 5-12-1964, kept by the Patwari. He also produced a copy of an order of the District Judge, Bhatinda.

3. The learned Executive Magistrate First Class, Mansa, to whose Court the case was transferred, came to the conclusion that the affidavits of the parties, which were of formal type and amounted to an effort to rebut each other's claim, were not very reliable. He, however, placed 'more reliance' on the copy of the Roznamcha, dated 5-12-1964, and the order of the District Judge, Bhatinda. He came to the conclusion that at the material time, party No 2, Sarup Dass, was in actual possession of the land. He, therefore, passed an order that Sarup Dass be maintained in possession till evicted under the order of a competent Civil Court. Against that order, dated 17-10-1966, of the Executive Magistrate, party No 1, Chanan Singh, etc., went in revision before the District Magistrate, Bhatinda, who dismissed it by an order, dated 23-5-1967. Hence this revision by party No. 1.

4. Mr. J. S. Rekhi, the learned Counsel for the petitioner has canvassed these points:—

(1) No clear-cut finding has been recorded by the Courts below, that Sarup Dass respondent was in possession of the disputed land either on 12-4-1965 (the date of the preliminary order) or had been forcibly and wrongfully dispossessed by the petitioner within two months preceding that date.

(2) That the Magistrate and the District Magistrate have not discussed the affidavits of the parties at all, and dismissed them with the observation that the affidavits furnished by one party contradicted those of the other.

(3) That the Courts below have misread the Roznamcha, dated 5-12-1964, of the Patwari, and have completely ignored the Khasra Girdawari produced by the petitioner.

(4) Sarup Dass respondent, in whose favour the final order has been made by the Magistrate, was an intervener who came into the picture long after the date (12-4-1965) of the making of the preliminary order, and no order in his favour could be made without going through all the formalities prescribed by Section 145, Criminal Procedure Code.

(5) The Courts below have misunderstood and misinterpreted the judgment of the District Judge.

(6) The Magistrate has made a palpably wrong observation, inasmuch as he says that in the litigation before the Sikh Gurdwaras Tribunal, Sarup Dass has been recognised as Chela of Sawan Dass.

5. None of these contentions holds water. The preliminary order was made by the Magistrate on 12-4-1965. He has very clearly recorded the finding that Sarup Dass, party No. 2, has been in constant possession of the land in dispute since 5-12-1964, when possession of the land was delivered to him in compliance with an order, dated 3-9-1964, of the Sub-Divisional Officer, Mansa. In other words, it was clearly held that at the date of the preliminary order also, Sarup Dass was in actual physical possession of the disputed land. Further, there is nothing to show that the Magistrate did not scrutinise the affidavits produced by both the parties. True, he said that these affidavits were of a formal type because the affidavits submitted by one party contradicted the affidavits furnished by the other party. But all that he meant to say was that the affidavits were not of much assistance. He rightly attached more importance to the report, dated 5-12-1964, in the Patwari's Roznamcha. This report evidenced that in compliance with an order of the Sub-Divisional Officer, Mansa, passed on 3-9-1964, the actual physical possession of the disputed land was delivered by the Patwari and other revenue functionaries to Sarup Dass on 5-12-1964. Chanan Singh, who had initially entered into possession as Cha-

kotadar, was ousted. There is nothing on the record to show that after his ouster, Chanan Singh regained that possession. That is why, the Court below did not attach much importance to the entries in the subsequent Khasra Girdawaris.

6. It is well settled that in revision, the High Court rarely interferes with findings of fact arrived at by a Magistrate on an enquiry under Section 145, Criminal Procedure Code. It is a rule of practice that the High Court seldom goes into the evidence in revision unless it is necessary to do so by reason of exceptional circumstances, or by reason of a manifest error of law. Certainly, the impugned order cannot be said to be an order passed on no evidence.

7. Nor do I find any force in the contention that the Magistrate was not competent to pass an order in favour of Sarup Dass, simply because he was not a party to these proceedings at the date of the preliminary order. True, he was accepted as a party to these proceedings sometime in the middle of July, 1965, when he appeared and put in his affidavit, asserting that he was in actual possession of the land. There is ample authority in support of the proposition, that if during an enquiry under Section 145, Criminal Procedure Code, the persons who had moved the Magistrate to start the proceedings or the persons against whom the proceedings were initiated, drop out and the person really concerned in the dispute appears before the Magistrate at a date subsequent to the making of the preliminary order, the dispute on account of which apprehension of a breach of the peace had arisen would still be there, and the Magistrate would have to make an order to prevent the same. The dispute being the same and still subsisting, it is not at all necessary for the Magistrate to issue a fresh order under subsection (1) of Section 145, Criminal Procedure Code. See *Mt Kulsumunnisa v. Rex*, AIR 1949 All 623, *Leela Singh v. B P Singh*, AIR 1946 Pat 389 and *Krishna Kamini v Abdul Jabbar*, (1903) ILR 30 Cal 155 (FB).

8. True, that Section 145, Criminal Procedure Code, does not contain any express provision for addition of parties after the commencement of enquiry, except with regard to the bringing of the legal representatives of a deceased party on the record, but there is also nothing in Section 145, which prohibits the Magistrate from adding the parties even after the initiation of the proceedings. On general principles, the Magistrate will have the power to add all parties who were originally concerned in the dispute, which is the foundation of the proceedings. However, it may not be proper for

the Magistrate in a particular case to add a party to such proceedings after the conclusion of the enquiry at the stage of final arguments. In the case before me, however, the preliminary order, as amended subsequently, required the parties to produce their affidavits on 2-6-1965. The record further shows that this preliminary order was published in the village on 1-6-1965. The order, dated 2-6-1965, shows that Sarup Dass was present before the Magistrate on that date. He requested for extension of the time for putting in affidavits and claims. The parties were consequently asked to put in their affidavits on 16-6-1965. On 16-6-1965 also, Sarup Dass and other were present, but Chanan Singh, etc., had not been served. Process was issued to them. On subsequent dates, i.e., 26-6-1965, 3-7-1965 and 15-7-1965, the Counsel for the parties were present. On 15-7-1965, before the actual commencement of the enquiry under subsec. (4) of S 145, Sarup Dass joined as a party and put in his written statement to claim the possession of the disputed land. Sarup Dass was thus joined as a party before the start of the enquiry.

9. The Courts below have mainly relied on the report of the Patwari's Roznamcha on the delivery of possession to Sarup Dass in compliance with an order of the Sub-Divisional Magistrate, on 3-9-1964. It may be noted that on 7-12-1964, Chanan Singh instituted a civil suit claiming injunction to restrain Sarup Dass, etc., from disturbing his possession. By means of the said judgment, the District Judge declined to issue an injunction in his favour. Thus, there was no misreading of the evidence of the District Judge.

10. There is, no doubt, some force in point No. 6 canvassed by Mr. Rekhi. He has produced for my perusal a certified copy of an order, dated 7-11-1963, of the Sikh Gurdwaras Tribunal, Punjab, by which the petition of Sawan Dass under Section 8 of the Sikh Gurdwaras Act, 1925, was dismissed on the ground that he had failed to show that he was a hereditary of its holder. The point whether or not Sawan Dass was the duly constituted Chela of Bala Dass was not directly or substantially in issue in that case. Thus, it is true that Sawan Dass had described himself in his petition as Chela of Bala Dass. But even if the Magistrate has misinterpreted that order of the Tribunal, then also it will not make any difference so far as the finding of fact recorded by the Magistrate with regard to the actual possession of Sarup Dass is concerned.

11. For reasons aforesaid, I would dismiss this revision petition. No costs.

YPB/D.V.C.

Revision dismissed.

AIR 1969 PUNJAB & HARYANA 104
(V 56 C 20)

R. S. NARULA AND S. S.
SANDHAWALIA, JJ.

Shri Ram Kishan and others, Petitioners v. Secretary to Govt., State of Haryana, Co-operative Dept. Chandigarh and others, Respondents.

Civil Writ No. 2076 of 1968, D/- 8-8-1968.

(A) Co-operative Societies — Punjab Co-operative Societies Act (25 of 1961), S. 27 — Panipat Co-operative Sugar Mills Ltd., Bylaws, Bylaw 9 (b) (vii) — Interpretation of bylaw — One-third of Directors have to retire every year — Period of supersession cannot be excluded.

The bylaw as framed does not at all refer to the Board or its members actually functioning as Directors, but has relation only to the point of time starting with the date of the constitution of the Board, irrespective of whether the Board as such or any of its members was able to function during the first period of one year after its constitution or at any time during that one year or not. According to bylaw 9 (b) (vii) of the bylaw of the Society, one-third of the elected Directors of its Board of management must retire at the end of the first year and another one-third at the end of two years from the date of the constitution of the elected Board and the remaining one-third would automatically cease to be Directors on the expiry of three years from the aforesaid date. The time during which the Board of Directors might have remained under suspension or the Directors or any of them might not have been able to function for whatever reason cannot be excluded from or added to the period during which the Director or Directors in question can remain in office under the bylaw. (Paras 8, 9)

(B) Constitution of India, Art. 226 — Joint petition — Three petitioners similarly situated on the date of petition — Petitioners also apprehending common danger and wishing to raise identical points — Joint petition is maintainable. (Para 10)

(C) Constitution of India, Arts. 226 and 227 — Res judicata — Suit filed for permanent injunction — Temporary injunction prayed for but not granted — Plaintiff's suit dismissed on the statement made by the plaintiff for withdrawal of the suit — Held, that the dismissal of the suit disentitled the plaintiff to claim the same relief on the same grounds in a writ petition, on general principles of res judicata and on the principles of O. 23, R. 1, Civil P. C. — Civil P. C. (1908),

S. 11 and O. 23, R. 1. AIR 1961 SC 1457 & AIR 1964 SC 782, Foll. (Para 10)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 782 (V 51)=

(1963) Supp 2 SCR 828, Phool

Chand v. Chandra Shanker 10

(1961) AIR 1961 SC 1457 (V 48)=

1962-1 SCR 574, Daryao v. State

of U. P. 10

(1920) 5 B & Ald 360=106 ER 1223,

Doe d Shrewsbury v. Wilson 9

Kuldip Singh, for Petitioners; C. D. Dewan, Dy. Advocate-General (Haryana), for Nos. 1 and 2; Mohinder Jit Singh Sethi, (for No. 3) and Bhal Singh Malik, (for No. 4), for Respondents.

ORDER:— In this petition under Articles 226 and 227 of the Constitution we are called upon to construe bylaw 9 (B) (vii) of the Bylaws of the Panipat Co-operative Sugar Mills Ltd., Panipat, district Karnal (hereinafter called the Society) so as to decide whether the period commencing from the date of supersession of the Board of Directors of the Society by the Government and terminating with the order of this Court setting aside the said supersession is or is not liable to be excluded from the period of one year at the end of which one-third of the Directors are liable to retire in rotation. The facts leading to the filing of this writ petition are these.

2. The last Board of Directors of the Society was elected on January 8, 1966. There were ten elected Directors and three were nominated by the Government. One-third of the elected Directors were due to retire after one year of the constitution of the Board of Directors, i. e., on January 7, 1967. The Directors who were to retire had to be selected by drawing lots in a meeting of the Board. Before such a meeting could be held, the Board was superseded under Section 27 of the Punjab Co-operative Societies Act (25 of 1961) (hereinafter referred to as the Act) by order of the State Government on and with effect from January 11, 1967. Civil Writ Petition No. 89 of 1967, filed by Dharam Singh Rath, Acting Chairman of the Board of Directors of the Society (respondent No. 4 in the present petition) was allowed by the order of Tek Chand, J., dated August 29, 1967, as the State Government did not oppose the petition. The learned Judge issued a writ of certiorari setting aside the order of the Registrar, Co-operative Societies superseding the Board of Directors and also issued a writ in the nature of mandamus restoring the Board of Directors of the Society which had been removed by the order impugned in that writ petition. On the restoration of the Board, proceedings were taken in hand for retiring the first lot of one-third members of the Board of Directors who were due to

retire on January 7, 1967. As a result of the lots drawn for that purpose, one-third of the Directors retired on March 18, 1968. These were the Directors who would in the normal course have retired within a short time after January 7, 1967.

3. On May 20, 1968, the Registrar, Co-operative Societies, Haryana, Chandigarh (hereinafter called the Registrar) sent a communication (Annexure 'A') to the General Manager of the Society informing the Society that the Government had in consultation with their Law Department intimated to the Registrar that the second instalment of the annual retirement of one-third members of the Board of Directors of the Society had become due since January 8, 1968. Respondent No. 4, the Vice-Chairman of the Society sent letter, dated nil (copy Annexure 'B') to the Secretary to Government of Haryana in the Co-operative Department in connection with a copy of the Registrar's letter, dated May 20, 1968, which had been endorsed to the Government saying that the second term had not yet expired as the Board had functioned only for about one year due to its supersession by the Government for a period of about 7½ months (from January 11, 1967 to August 29, 1967), and that one-third of the members of the Board having already retired, the question of retiring another one-third did not arise at that stage.

The Vice-Chairman, therefore, asked the Government to examine all those matters before deciding the issue as the Vice-Chairman had consulted the Society's Legal Adviser and he was of the view that the period during which the Board had remained under supersession could not be counted in the term of the elected Board of Directors as there was no elected Board during that time. Ultimately, by memorandum, dated June 18, 1968 (Annexure 'C'), the Registrar informed the General Manager of the Society to convene a meeting of the Board of Directors of the Society at 11 A. M. on July 4, 1968, in the premises of the mills of the Society for drawing lots to retire the second group of one-third elected members of the Board. It was desired that a copy of the notice of the meeting should be sent to the Registrar's office. Permission to convene the meeting at a shorter notice in terms of Rule 80 (1) (i) of the Punjab Co-operative Societies Rules, 1963, was also accorded in the same communication. In pursuance of the direction of the Registrar, the General Manager (respondent No. 3) issued notice, dated June 19/20, 1968, (Annexure 'D') to all the members of the Board to draw lots for retirement of the second group of one-third elected members of the Board. It was to quash the abovesaid direction of the Registrar

(Annexure 'C') and the General Manager's notice of the meeting (Annexure 'D') that the present writ petition was filed by Ram Kishan, Chandgi Ram and Dr Parma Nand, three Directors of the Society, on July 2, 1968, during the summer vacation of this Court. On the application for interim stay of operation of the order and stay of the holding of the meeting, the Vacation Bench (Gopal Singh and Tuli, JJ.), directed on July 3, 1968, that the meeting be held and lots drawn on the 4th of July, 1968, but effect might not be given to the result of the drawing of the lots till the writ petition came up for hearing before the Motion Bench. When this petition came up for motion hearing on August 1, 1968, all the respondents were represented before us by Counsel.

All the parties were anxious to have the issues involved in the case settled at the earliest possible opportunity. We, therefore, issued notice of the main case for August 5, 1968, and in view of the novelty of the point sought to be argued before us and the same being *res integra*, we admitted the petition to a Division Bench. After hearing the Counsel for the parties at length in connection with the stay matter we vacated the order which had been passed by the Vacation Bench on July 3, 1968 but directed that re-election in place of the Directors who had retired as a result of the drawing of lots on July 4, 1968, may not be held till the date fixed for the hearing of the writ petition. Two separate written statements were filed by respondent No. 2 the Registrar and by the General Manager of the Mills respectively.

4. Though a large number of points had been taken up in the writ petition, only one matter was argued before us and Mr Kuldip Singh, Bar-at-Law, the learned Counsel for the petitioners expressly stated that he was not pressing any other point. The solitary contention which was pressed by the learned Counsel is contained in the following words in paragraph 14 (ii) of the writ petition:—

"That bylaw 9 (B) (vii) could only be interpreted to mean that the second lot for retiring the members could only be drawn when the Board has completed a life of two years in the office. The period during which the Board of Directors had been superseded cannot be counted towards the life of the Board and the Government interpretation of the rule in this respect is not correct and is bad in law and the same is liable to be set aside."

The same point has been repeated in a somewhat different language in ground No. (iii) which reads:—

"That when the Board of Directors is superseded all the Directors ceased to be so from that very time. They are ousted from the office and they have no control

whatsoever in the working of the Society. Under the circumstances counting of that period when the Board remained out of office for the purpose of bylaw 9 (B) (vii) is arbitrary and illegal."

5. In order to appreciate the very brief but equally lucid arguments of Mr. Kuldip Singh on the point in issue, it is necessary to set out at this stage, the relevant extracts from bylaw 9 of the bylaws of the Society. Bylaw 9 is the first bylaw in the Chapter dealing with the "Board of Directors". Bylaw 9 (A) states that the Board of Directors shall consist of 15 Directors including seven representatives of individuals, three representatives of co-operative institutions, and five Government nominees. Clause (v) of bylaw 9 (A) then reads:—

"Notwithstanding the provisions of bylaw No. 9 (i), (ii) and (iii) the first Board of Directors shall be nominated by the Government. The Board shall hold office for a maximum period of three years. In nominating the first Board of Directors Government may appoint as many directors as it deems proper from time to time provided that the total number of directors holding office at one time does not exceed 15, and the maximum period for which the nominated Board of Directors hold office does not exceed three years from the date of first nomination. Subject to these conditions, Government shall have the power to make such changes in the nominated Board of Directors as it may consider necessary from time to time. The nominated Board of Directors, shall elect a Chairman, and if necessary a Vice-Chairman and also a Secretary. For the conduct of any business, the presence of at least one-third of the directors shall be necessary."

The abovequoted clause governs the constitution of the "first Board of Directors" who have to be nominated by the Government. The Board of Directors with which we are concerned was admittedly not the first Board of the Society. It had been constituted by the election of seven representatives of individuals and three representatives of co-operative institutions and nomination of the remaining Directors by the Government. The clause has, however, been quoted as reference has been made thereto during arguments.

6. Bylaw 9 (B) provides *inter alia* that "on the expiry of the period of nomination by the Government, the Board of Directors with the exception of Government representatives shall be elected". Then follows clause (vii) of bylaw 9 (B) around which the whole controversy in this case revolves:—

"The Directors, except the Government representatives shall retire in rotation,

one-third of the Directors retiring yearly. For the first two years, the retiring Directors shall be selected by casting lots. Retiring Directors are eligible for election."

Other clauses of bylaw 9 and the other bylaws in the chapter relating to the Board of Directors are neither relevant for deciding this case, nor has any reference been made thereto at the hearing of this petition.

7. It is the common case of the parties that the maximum life of the Board of Directors provided by the bylaws is three years, and that no minimum period during which the Directors must hold office has been expressly provided by any bylaw. No argument has been addressed to us regarding any possible difference which might have been made in the date on which the second group of one-third Directors had to retire by the actual retirement of the first group of one-third Directors on March 18, 1968, instead of in January, 1967. All that has been vehemently argued is that the word "yearly" in clause (vii) of bylaw 9 (B) refers to the end of a period of twelve months during which the Directors have been functioning. On the other hand, the contention of respondents (other than respondent No 4) is that "yearly" refers to the end of each year during the first two years commencing from the date on which the Board of Directors is constituted by election. Mr. Kuldip Singh submits that the object of the relevant bylaw is that the Directors of the Board should actually function for three years and that at the interval of every year of actual working of the Directors, one-third should retire.

On the other hand, the contention of the contesting respondents is that the actual working of the Directors is not relevant for the purpose of enforcement of the provisions contained in the relevant bylaw, and that a mere mathematical calculation of the period referred to therein has to be made starting from the point of time at which the elected Board is constituted. No authority in support of either of the two propositions was cited at the Bar by the learned Counsel appearing before us. It was claimed on behalf of the petitioners that instead of retiring on the 7th of January, 1968, the second group of one-third numbers of Directors of the Board are due to retire in or about the end of August, 1968, i.e., by adding to the period ending January 7, 1968, the period during which the Board remained suspended under a purported order of the State Government. Mr. Mohinderjit Singh Sethi, Advocate for respondent No. 3, who addressed the main argument on behalf of the contesting respondents with great ability stressed the point that the period of superses-

sion could not in this case be taken into account as the order of supersession which was later quashed by the High Court as being illegal, should be treated as a nullity and that as a result of this situation, the Board should be deemed to have continued to function during the period during which it did not actually function.

8. After hearing learned Counsel for the parties at length, we are of the considered opinion that the bylaw as framed does not at all refer to the Board or its members actually functioning as Directors, but has relation only to the point of time starting with the date of the constitution of the Board, irrespective of whether the Board as such or any of its members was able to function during the first period of one year after its constitution or at any time during that one year or not. The first batch of one-third of its elected members must retire on the date in the next year on which the Board was constituted in the previous year, and the second group of one-third members of the Board must similarly retire on the same date in the second year, leaving the last one-third group of the elected members who would automatically cease to be Directors at the end of three years from the date on which they were originally elected. Any other construction of the bylaw in question would, in our opinion, create anomalies and result in absurdities, which must according to settled principles of interpretation of statutes be avoided. The argument of Mr Kuldip Singh to the effect that the Directors who had no opportunity to function for two years for no fault of theirs should not be compelled to retire before they have had opportunity to so act by drawing lots for the retirement of the second group of Directors who have to retire by rotation, does not appear to be sound.

If all the elected Directors were to meet an accident while travelling by some vehicle on duty as Directors of the Society and were to be hospitalised for one year, it cannot be said that there would be no retirement at the end of the first year. If such an accident were to happen immediately after the expiry of two years, the last remaining one-third of the group of the originally constituted Board, cannot claim that the maximum life of the Board in so far as it affects them, stands extended to four years instead of three. Similarly, it cannot, in our opinion, be argued that if by any chance, the Directors who have to retire under the bylaw in question have been in illegal detention or imprisonment during some months and their detention or imprisonment has subsequently been declared by a competent Court to have been illegal and void, they can possibly claim to

remain in office for an additional period to that extent beyond the period of the first year or second year or third year of the Board as the case may be. The life of a State Legislature is fixed at five years in the Constitution. The members of the Legislative Assembly of a State which might have been suspended for say one year out of those five years on account of the imposition of the President's rule cannot, in our opinion, claim at the end of five years that general elections in that State would not be held for another year, and they must continue in office as they have not yet completed five years of actual working as M. L. A.s.

Still this would be the result of accepting the contention of Mr. Kuldip Singh. Neither there is provision in the Act nor in the rules nor even in the bylaws for extending the life of the Board of management of a co-operative society in the State of Haryana. In the absence of such a provision, the life of the Board as a whole cannot be extended beyond three years. Still this would be the result if the Board were to be superseded, in the third year of its constitution and were to remain under supersession for say eight months, and then the order of supersession were to be set aside on a date when more than three years have elapsed since the Board was constituted. The effect of the construction of the bylaw in question canvassed by Mr. Kuldip Singh would be that the life of the Board or at least a part of it will not come to an end on the expiry of the maximum period of three years provided in the bylaws. Mr. Sethi, further, contended that no hardship would be caused to the members who may have to retire by rotation according to the strict construction of bylaw 9 (B) (vii) without having actually worked for a full year or two years as the case may be, because they can seek re-election. Our decision should not, in my opinion, be affected by an argument of hardship or want of hardship alone.

9. When bylaw 9 (B) (vii) requires that one-third of the Directors should retire yearly, it means that one-third should retire every year. Every year, in the context means at the end of every year. This leads us of necessity to the question as to the point of time from which the year starts. The only possible answer is one year from the date on which the Board came into existence for the first one-third members, and two years from the same date for the second, and three years from the said date for the remaining one-third elected members of the Board. Year, of course, would mean the civil year as distinguished from the astronomical year. The construction sought to be put on the bylaw on behalf of the petitioners would lead

to unimaginable uncertainties and possible absurdities to some of which reference has already been made. "Yearly" has been described in Stroud's Judicial Dictionary, Volume 4, at page 3357 as "only a word of calculation." No construction like that canvassed by Mr. Kuldip Singh enters into a matter of pure calculation.

In *Doe d. Shrewsbury v. Wilson*, (1720) 5 B & Ald 360 (382), referred to in illustration No. 5 under the meaning of the word "yearly" at page 3358 of Stroud's Judicial Dictionary, Volume 4, the words "made payable yearly" were considered to mean the same as if the words had been "payable every year." "Yearly" means once a year. In *Corpus Juris Secundum*, Volume 101, at page 646, "Yearly" is shown to convey "accruing or coming every year; annual." According to the construction sought to be put by the petitioners "yearly" may in certain circumstances mean "after more than one year," and not during every year. There appears to be no warrant for such an interpretation of the bylaw. We, therefore, hold that according to bylaw 9 (B) (vii) of the bylaws of the Society, one-third of the elected Directors of its Board of management must retire at the end of the first year and another one-third at the end of two years from the date of the constitution of the elected Board and that the remaining one-third would automatically cease to be Directors on the expiry of three years from the aforesaid date. We further hold that the time during which the Board of Directors might have remained under suspension or the Directors or any of them might not have been able to function for whatever reason it might have so happened, cannot be excluded from or added to the period during which the Director or Directors in question can remain in office under the aforesaid bylaw. The solitary contention canvassed in this case on behalf of the petitioners, therefore, fails.

10. In fairness to Mr. Mohinderjit Singh Sethi, it may be noticed that he raised some preliminary objections to the maintainability of this writ petition to which we are referring at the tail end of the judgment because we do not think it proper to leave the main question undecided after hearing the Counsel for the parties on merits at length. We do not find much force in the first objection of Mr. Sethi to the effect that in the circumstances of this case, the three petitioners should not be permitted to maintain a joint writ petition. This is so because all the three petitioners were similarly situated on the date the writ petition was filed, and apprehended common danger and wanted to raise identical points in support of their joint claim.

There is, however, force in the other two objections pressed by Mr. Sethi. In order to decide those points, an additional fact has to be taken into account. As a result of the lots drawn in the meeting of the Board of Directors held on July 4, 1968, Ram Kishan petitioner No. 1, Dharam Singh Rathie respondent No. 4, and one Ram Chander who is not a party in the case before us, were selected by drawing lots for being retired in the second batch. The objection of Mr. Sethi is that the lots for retirement not having fallen on petitioners Nos. 2 and 3, their application has become infructuous, and they having no more interest in maintaining this petition whereunder the only relief claimed was to quash order Annexure 'C' and notice Annexure 'D', it would be embarking on the decision of a purely academic question, if their writ petition was now allowed to be heard on merits.

This part of the second objection of Mr. Sethi may not be really fatal to the petition as it would have been open to petitioners Nos. 2 and 3 to amend the prayer clause in the writ petition so as to claim that at the end of three years from the date of the constitution of the Board, they would not be liable to retire as they would be entitled to continue in office for an additional period of 7½ months to make up time during which they could not function on account of the illegal order of supersession of the Board of Directors by the Government. It is the next part of the objection to which there can, in our opinion, be no reply. It was pointed out that Ram Kishan petitioner No. 1 filed a suit for permanent injunction in the Court of the Subordinate Judge, Karnal on July 2, 1968, against the Society, and its Vice-Chairman, claiming that the defendants in the suit be restrained from retiring the Directors of the Society in pursuance of the direction of the Registrar on inter alia the ground: "that the Board remained superseded and did not function from 11-1-1967 to 29-8-1967, and legally this period cannot be computed for the purpose of determining the period for retiring the Directors" (Clause (d) of paragraph 7 of the plaint of which certified copy has been filed by the respondents on the record of this case).

It is said that an application for temporary injunction during the pendency of the suit was made by Ram Kishan petitioner No. 1 under Order 39 Rules 1 and 2 and Section 151 of the Code of Civil Procedure on July 2, 1968, along with the plaint of that suit. A certified copy of the application has also been produced. By its detailed order, dated July 4, 1968, the Subordinate Judge 1st Class, Karnal, dismissed the application for temporary injunction after considering the argu-

ments of the plaintiff in the suit including the point on which we have been addressed in this writ petition. As soon as temporary injunction was refused, Ram Kishan plaintiff made a statement before the Subordinate Judge that he wanted to withdraw the suit and accordingly the learned Subordinate Judge passed the following final order in the suit on July 4, 1968:—

"In view of the above statement of the plaintiff, the suit is dismissed as having been withdrawn."

It is admitted that no leave to file a fresh suit on the same cause of action was either prayed for by Ram Kishan or granted by the Court. These facts have given rise to two objections. Firstly, it is contended that the petitioners are guilty of concealment of a material fact inasmuch as they kept back from this Court the factum of the filing of the civil suit at the time of filing this writ petition on July 2, 1968. Mr. Kuldip Singh stated that the petitioners Nos. 2 and 3 were not aware of this, and Ram Kishan inadvertently did not mention anything about the suit though he could not possibly have written anything about what happened in the suit on July 4, 1968, after the filing of the writ petition on the second of July. Be that as it may, it is contended that on the authority of the pronouncements of the Supreme Court in *Daryao v. State of U. P.*, AIR 1961 SC 1457, and in *Phool Chand Sharma v. Chandra Shanker*, AIR 1964 SC 782, the dismissal of the suit of petitioner No. 1 should be held to disentitle the petitioner to claim the same relief on the same grounds in a petition under Article 226 of the Constitution on general principles of *res judicata*, and on the principles of Order 23 Rule 1 of the Code of Civil Procedure.

I think there is great force in this objection of Mr. Sethi. Ram Kishan petitioner has, in any event, disentitled himself in the circumstances of this case to claim any relief from this Court under Articles 226 and 227 of the Constitution on the same grounds on which he instituted the suit which he voluntarily got dismissed. In the view we have taken of the solitary contention of the petitioners, on the merits of the case, it is not necessary to deal further with these objections of Mr. Sethi.

11. For the foregoing reasons, this petition fails and is accordingly dismissed. In view, however, of the fact that the main question raised in the case was somewhat novel and is not covered by the pronouncement of any High Court or of their Lordships of the Supreme Court, we direct that the parties shall bear the costs of this case as incurred by them

MOVJ/D.V.C.

Petition dismissed.

AIR 1969 PUNJAB & HARYANA 110
(V 56 C 21)

FULL BENCH

SHAMSHER BAHADUR, R. S. NARULA
AND GOPAL SINGH, JJ

Bhaiya Ram Hargo Lal, Petitioner v.
Mahavir Parshad Murari Lal Mahajan,
Respondent.

Civil Revision No 913 of 1967, D/- 3-10-1968 decided by Full Bench on order of reference made by P. C. Pandit, J., D/- 23-7-1968

Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 — Eviction under — Prior Notice under S. 106 of T. P. Act determining contractual tenancy essential — Such notice however not essential where contractual tenancy has already been determined. AIR 1952 Punj 422, Overruled.

(i) An application for ejectment of a monthly tenant under Sec 13 of the East Punjab Urban Rent Restriction Act cannot succeed without the contractual tenancy being first determined by a notice under Sec. 106 of the Transfer of Property Act.

(ii) No notice under Sec. 106 of the Transfer of Property Act is required to be served as a condition precedent for filing an application for eviction of a mere statutory tenant whose contractual tenancy has already been terminated by an appropriate notice, or whose tenancy has already come to an end by efflux of time or forfeiture or for any other valid reason under any of the clauses of S 111 of the Transfer of Property Act, and in whose favour no new contractual tenancy has, thereafter been created.

(iii) A fifteen days' notice under Section 106 of the Transfer of Property Act is not required to be served even to terminate a contractual monthly tenancy when there is an express stipulation to the contrary in the contract of tenancy or when the service of such notice is rendered unnecessary by any local law or usage. At the same time a notice of a longer period will have to be served to terminate a contractual tenancy where a specific term in the contract so requires;

(iv) Want of service of notice under Sec. 106 of the Transfer of Property Act continues to be a good defence despite the enforcement of East Punjab Urban Rent Restriction Act in every case in which such a defence would have been valid and available under the general law of the State if the Rent Restriction Act has not been enacted as the Punjab Act has not impliedly repealed or abrogated Sections 106 and 111 (h) of the Transfer of Property Act or the principles of those provisions in so far as they have been

applied in Punjab as principles of equity, justice and good conscience;

(v) Nothing contained in the Rent Restriction Act can be deemed to require the service of a notice under Sec. 106 of the Transfer of Property Act in a case where such notice would not have been required if the Rent Restriction Act was not in force.

(vi) The notice required to be served in the Punjab (where the statutory provisions of S. 106 of the Transfer of Property Act do not apply and merely its equitable principles have been applied) has to be a notice to quit or a notice terminating the tenancy and such notice must give reasonable time to quit. Considering the law laid down in various decided cases, fifteen days appear to be the minimum reasonable period of such a notice. In Punjab, however, such a notice need not necessarily terminate strictly with the end of a month of the tenancy.

Further (i) Plea of want of notice under Sec 106 of the Transfer of Property Act is not such that cannot be waived by a tenant. A tenant is entitled to waive the objection regarding non-issue of such a notice if he likes. Waiver is, however, a deliberate and conscious act as distinguished from estoppel which may be created by law. Whether the objection has in fact been waived or not in a particular case is a question of fact which has to be decided like any other such question on the direct and circumstantial evidence available in a given case.

(ii) Objection as to validity of a notice is merely a part of the main objection as to non-issue of the requisite notice and can also be waived by a tenant, if he so likes, e.g., a tenant may accept a shorter notice than that of fifteen days to be sufficient notice. But the mere denial of receipt of notice by a tenant may not, on proof of service of a notice, by itself amount to waiver of objection as to the period of the notice not being reasonable. AIR 1952 Punj 422, Overruled. AIR 1969 Punj 26, Approved; AIR 1949 Cal 61 & ILR (1955) Punj 36 & AIR 1951 SC 115 & AIR 1953 Bom 76 & AIR 1963 SC 120 & AIR 1958 SC 789 & AIR 1953 Sau 113 & AIR 1961 SC 1067 & AIR 1964 SC 461 & AIR 1964 SC 1341 & AIR 1965 SC 101 & AIR 1967 SC 1419 & AIR 1968 SC 794 & AIR 1962 SC 554, Rel. on. (Para 33)

Cases Referred: Chronological Paras

(1969) AIR 1969 Punj 26 (V 55)=

70 Pun LR 720, Sawaraj Pal v.

Janak Raj

2, 4, 22, 33

(1968) AIR 1968 SC 794 (V 55)=

1968-2 SCJ 614, Delhi Motor Co.

v. U. A. Basrurkar

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(1968) 70 Pun LR (Delhi) 55, C. L.

Mehra & Sons v. Kharak Singh

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- (1968) 70 Pun LR 672=1968 Cur LJ 536, Raj Kumar v. Major Gurmitinder Singh 31
- (1967) AIR 1967 SC 1419 (V 54)=1967-1 SCR 475, Manujendra Dutt v. Purnedu Prosad Roy 2, 19, 27
- (1967) AIR 1967 Mad 57 (V 54)=ILR (1966) 2 Mad 437 (FB), Raval & Co. v K G Ramachandran 27
- (1965) AIR 1965 SC 101 (V 52)= (1964) 5 SCR 239, Mangi Lal v. Suganchand 18, 19
- (1964) AIR 1964 SC 461 (V 51)= (1963) Sup 2 SCR 906, Pooranchand v Motilal 16
- (1964) AIR 1964 SC 1341 (V 51)= (1964) 5 SCR 157, Abbasbhai v. Gulamnabi 17, 19, 27
- (1963) AIR 1963 SC 120 (V 50)= (1963) 3 SCR 312, Punjalal Bhagwandin v. Bhagwatprasad Prabhuprasad 9, 13, 15
- (1962) AIR 1962 SC 554 (V 49)= (1962) 3 SCR 604, Dr H. S. Rikhy v. New Delhi Municipal Committee 24
- (1961) AIR 1961 SC 1067 (V 48)=1961 Andh LT 364, Ganga Dutt Murarka v. Kartik Chandra Das 14, 16, 26, 27
- (1960) AIR 1960 Cal 40 (V 47)=Chandra Nath Mukherjee v. Chulai Pashi 31
- (1959) AIR 1959 SC 149 (V 46)= (1959) Supp (1) SCR 528, Bashes-har Nath v Commr. of Income Tax Delhi and Rajasthan 32
- (1958) AIR 1958 SC 789 (V 45)=1959 SCR 799, Dr. K A. Dhair-ryawan v J R Thakur 26
- (1957) AIR 1957 Punj 27 (V 44)=ILR (1956) Punj 1129, Union of India v. Firm Balwant Singh Jaswant Singh 32
- (1956) AIR 1956 All 680 (V 43)=1956 All LJ 872, Dist. Board Benaras v. Churhu Rai 32
- (1956) AIR 1956 Assam 113 (V 43), Kishanlal Singol v Hari Kisson 30
- (1955) 57 Pun LR 441=ILR (1955) Punj 36, Hem Chand v. Smt. Sham Devi 6, 11, 13, 15, 27
- (1953) AIR 1953 SC 228 (V 40)=1953 SCR 1009, Namdeo Lokman v Naramadabai 2
- (1953) AIR 1953 Bom 76 (V 40)=54 Bom LR 505, Raghubir Nara-yanan v G A. Fernandes 9, 15
- (1953) AIR 1953 Sau 113 (V 40), Karsandas v Karsanji 10, 15, 24
- (1952) AIR 1952 Punj 422 (V 39)=54 Punj LR 358, Bawa Singh v. Kundan Lal 2, 8, 13
- (1951) AIR 1951 SC 115 (V 38)=1951 SCR 145, Brij Raj Krishna v S K Shaw & Bros 7, 8, 11, 13, 15
- (1950) AIR 1950 Pat 366 (V 37)=31 Pat LT 93, Province of Bihar v. Kamakshya Narain Singh 32
- (1949) AIR 1949 Cal 61 (V 36)=52 Cal WN 604, Gurupada Haldar Jiban Krishna Das Firm v Arjoondas Goenka 6, 12, 13
- (1949) AIR 1949 Mad 780 (V 36)=1949-1 Mad LJ 412, Krishna-murthy v Parthasarathy 19, 27
- (1948) AIR 1948 Cal 150 (V 35)=52 Cal WN 212, Charu Chandra v Snigdhendru Prosad 32
- (1947) AIR 1947 PC 197 (V 34)=ILR (1948) Mad 214, Vellayan Chettiar v. Govt, Province of Madras 32
- (1947) AIR 1947 Lah 1 (V 34)=ILR (1947) Lah 449 (FB), Milkha Singh v Mst Shankari 4
- (1947) AIR 1947 Lah 382 (V 34), Hasham v Mt Fazal Begum 4, 8, 10
- (1933) AIR 1933 Lah 134 (V 20)=34 Pun LR 162, Rattan Sen v. Smt Krishna Kaur 4
- (1923) AIR 1923 Lah 659 (V 10)=79 Ind Cas 957, Chunilal v. Chuni Lal 4
- (1891) 1891-2 QB 267=60 LJQB 505, Kutner v. Phillips 24
- A N. Mittal with Baldev Kapur, for Petitioner, G C. Mittal with S. K. Aggarwal and Parkash Chand Jain, for Respondent; Roop Chand, for the Intervener.
- R. S. NARULA, J.:— The circumstan-ces in which the following three ques-tions of law have been referred to this Full Bench at the instance of P C Pan-dit, J., are given in substantial details in the order of reference passed by the learned Single Judge, on July 23, 1968, and need not be recapitulated in any de-tail:—
- (i) Whether an ejectment application under Section 13 of the East Punjab Urban Rent Restriction Act (3 of 1949) can be filed without the prior issue of notice under Section 106 of the Transfer of Property Act, 1882;
- (ii) Whether the objection regarding non-issue of a notice under Section 106 of the Transfer of Property Act can be waived by the tenant, and
- (iii) Whether objection as to the validi-ty of the notice can be waived by a tenant in a case in which a defective notice has been issued.
2. The admitted facts giving rise to this reference are that the respondent (hereinafter called the landlord) gave one week's notice of ejectment to the peti-tioner (hereinafter referred to as the ten-ant) on July 26, 1965, before presenting an application to the Rent Controller for ejectment under Section 13 (3) (a) (i) of the East Punjab Urban Rent Restriction Act (3 of 1949) (hereinafter referred to as the Act) on August 27, 1965, and that the contractual monthly tenancy of Bhai-ya Ram tenant had not been terminated any earlier by any other notice. The

serving of the notice was pleaded in the petition for eviction. In the tenant's written statement, the receipt of the notice was denied. No issue was framed regarding the factum of service or validity of the notice referred to above. The Rent Controller passed an order for ejectment which was upheld by the Appellate Authority. In the revision petition filed by the tenant in this Court under Section 15 of the Act, it was sought to be argued, *inter alia*, that no notice under Section 106 of the Transfer of Property Act terminating the lease in favour of the tenant had been issued by the landlord before filing the application for ejectment and, therefore, no order for eviction of the tenant under Section 13 of the Act could be passed against him. It had been held by a Division Bench of this Court (Falshaw and J. L. Kapur, JJ.) in *Bawa Singh v Kundan Lal*, 1952-54 Pun LR 358=(AIR 1952 Punj 422), that the Act is a complete code by itself and, therefore, excludes the necessity of serving a notice under Section 106 of the Transfer of Property Act as a condition precedent for successfully claiming ejectment of a monthly tenant

In *Sawaraj Pal v. Janak Raj*, 1968-70 Pun LR 720=(AIR 1969 Punj 26), my Lord Shamsher Bahadur, J. and myself held following the subsequent chain of authorities by the Supreme Court, to which reference will presently be made, that the only effect of a landlord succeeding in proving that his case fell within one of the clauses of Section 13 entitling him to eject his tenant was to take the case out of the purview of Section 13 which grants a blanket protection against the eviction of the tenant subject to the exceptions carved out in that provision, and that the said section merely places further restrictions and fetters on the ordinary rights of a landlord to eject his tenant, but does not purport to take away any of the pre-existing rights of a tenant under the general law of the State. The Division Bench in *Sawaraj Pal's case*, 1968-70 Pun LR 720=(AIR 1969 Punj 26) (*supra*), held, *inter alia* that the argument of the landlord to the effect that the Act being a complete code by itself could no more be invoked in view of the ratio of the judgments of the Supreme Court in cases under the Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) (hereinafter called the Bombay Rent Act) and in *Manujendra Dutt v. Purnendu Prosad Roy*, AIR 1967 SC 1419, under the West Bengal Thika Tenancy Act. As the earlier Division Bench judgment in the case of *Bawa Singh*, 1952-54 Pun LR 358=(AIR 1952 Punj 422) (*supra*) was not brought to our notice at the hearing of *Sawaraj Pal's case*, 1968-70 Pun LR 720=(AIR 1969 Punj 26) and as reliance was sought to

be placed on the same for canvassing the point of view of the landlord, the learned Single Judge rightly thought it necessary to have the main point (question No. 1) settled more authoritatively by a Full Bench on account of the apparent conflict between the two Division Bench judgments, the earlier of which was not noticed in the later one though arguments on which the earlier judgment was based had been dealt with by us in *Sawaraj Pal's case*, 1968-70 Pun LR 720=(AIR 1969 Punj 26). This is how in the present reference we are called upon to answer the abovesaid three questions so as to resolve the conflict between the Division Bench judgments of this Court in the case of *Bawa Singh*, 1952-54 Pun LR 358=(AIR 1952 Punj 422) on the one hand and the later Bench decision in *Sawaraj Pal's case*, 1968-70 Pun LR 720=(AIR 1969 Punj 26) on the other.

3. It is the common case of both sides that the statutory provisions of the Transfer of Property Act do not apply to the Punjab. Nor is there any dispute about the well settled proposition of law that the equitable principles contained in any of the provisions of that enactment have all along been and are entitled to be followed in Punjab and principles of equity, justice and good conscience relating to the points covered by those provisions, for or against which there is no specific statutory enactment in force in the State. The first question on which the parties, therefore, joined issue before us during the course of their arguments was whether the requirements of Section 106 of the Transfer of Property Act, and if so to what extent, contain principles of equity, justice and good conscience which may be invoked as such by litigants in this State. The relevant part of Section 106 of the Transfer of Property Act reads:—

"In the absence of a contract or local law or usage to the contrary a lease of immovable property for any other purpose (for any purpose other than agricultural or manufacturing) shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post"

The relevant requirements of the section in the absence of a contract or law to the contrary, are:—

(1) a monthly tenancy can be terminated by a notice in writing;

(2) the notice should be of fifteen days;

(3) the fifteen days' notice must expire with the end of a month of the tenancy; and

(4) the notice should be served in the manner prescribed by the section. Section 111 of the Transfer of Property Act enumerates the methods by which a lease of immovable property may be determined. Clause (h) of that section which is relevant reads:—

"A lease of immoveable property determines on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other." Section 6 of the Punjab Laws Act (4 of 1872) provides that in cases not otherwise specially provided for, i.e., in cases not covered by any statutory law or customary law or personal law, the Judges have to decide cases coming before them "according to justice, equity and good conscience." It is on account of the said statutory provision that the Courts in the State are bound to decide questions — not covered by the general, statutory, customary or personal law applicable in the State — according to justice, equity and good conscience.

4. If it is once held, as is claimed by the respondent, that nothing contained in Section 106 of the Transfer of Property Act can be invoked on principles of equity, justice or good conscience; and that a monthly tenant is not entitled to any notice at all for being required to vacate the premises under his tenancy, no other question would arise in this case. In *Chuni Lal v. Chuni Lal*, AIR 1923 Lah 659, *Moti Sagar, J.*, held that where there is no contract, Section 106 applies as the said section merely lays down in a codified form what in fact has always been understood to be the general law on the subject. The learned Judge went to the length of holding that even an agreement to the contrary providing for one month's notice does not amount to validating a notice which might have been given at any time as an agreement to the contrary was only as to the period of the notice, but the notice must all the same end with the month of the tenancy as required by Section 106 of the Transfer of Property Act

The general law relating to the invoking of equitable principles contained in any statutory provision which does not otherwise apply to Punjab was laid down by a Full Bench of the Lahore High Court in *Milkha Singh v. Mst. Shankari*, AIR 1947 Lah 1 (FB). The dispute there related to the invoking of the principles contained in Section 53-A of the Transfer of Property Act, no part of the Act being otherwise applicable to the State of Punjab. The Bench of five Judges held (by majority of four to one) that "the mention of Section 53-A, Transfer of Property Act, in the proviso to Sec. 49, Registration Act, cannot deprive the Province of the Punjab of the benefit of the

proviso simply because the Transfer of Property Act is not in force in this Province."

It was held that though Section 53-A was not applicable to the Punjab the principles embodied therein are applicable. It was held that so far as the defence of part performance is concerned, the position in the Punjab is exactly the same as in other parts of the country where the Transfer of Property Act is in force. In *Hasham v. Mt. Fazal Begum*, AIR 1947 Lah 382, the question that arose before *Achhru Ram, J.*, was similar to the main point with which we have to deal in this reference. The claim for ejectment had been decreed by the District Judge on the ground that the premises in question were required by the plaintiff for her personal use and ejectment on that ground was permitted by the proviso to Section 10 of the Punjab Urban Rent Restriction Act (10 of 1941) which proviso contained exceptions to the bar contained in the purview of Section 10 for maintaining a suit for ejectment subject to certain restrictions. The proviso to Section 10 of the 1941 Punjab Act was in the following terms:—

"Provided that nothing in this section shall apply where the tenant has committed any act contrary to the provisions of clause (o) or clause (p) of Section 108, Transfer of Property Act, 1882, or has been guilty of conduct which is a nuisance or an annoyance to any adjoining or neighbouring occupier, or where the premises are reasonably and bona fide required by the landlord either for the erection of buildings or for his own occupation or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court."

The District Judge had repelled the tenant's plea that the landlord was not entitled to succeed as he had not terminated the monthly tenancy by a notice in terms of Section 106 of the Transfer of Property Act. The same point was pressed before the Lahore High Court in the second appeal before *Achhru Ram, J.* Allowing the plea of the tenant, the learned Judge held:—

"The only effect of the plaintiff succeeding in establishing that the premises were required by her for her own personal use was to take the case out of the purview of Section 10 which places certain restrictions on the ordinary Common Law right of a landlord to eject his tenant who is not holding for a fixed term by the service on him of a notice to quit. It means that any suit brought for the ejectment of a tenant by a landlord who needs the premises for his own personal use shall be decided according

to the ordinary law governing the relations between landlords and tenants and not with reference to the provisions of Section 10, according to which a six months' notice to quit or notice of such longer period as may be required under the contract of tenancy is a condition precedent for the maintainability of a suit for the tenant's ejectment."

4A. In spite of the fact that the Transfer of Property Act did not apply to the Punjab, it was held by the Lahore High Court in Hasham's case, AIR 1947 Lah 382 (supra), that a tenancy which is for a fixed term can, except in cases where the tenant has done or omitted to do something which involves a forfeiture of the tenancy or otherwise gives the landlord the right of re-entry, be determined only by the service on the defendant of a valid notice to quit, and without the determination of the tenancy a suit for ejectment cannot be maintained.

In Rattan Sen v. Smt. Krishna Kaur, AIR 1933 Lah 134, and in a recent judgment of the Delhi High Court in C. L. Mehra & Sons v. Kharak Singh, 1968-70 Pun LR (Delhi) 55, it was held that in the absence of a contract to the contrary, a monthly tenant is entitled to at least a fifteen days' notice of eviction even in places where the Transfer of Property Act does not apply. It was in this state of law that Shamsher Bahadur, J., and myself held in Sawaraj Pal's case, 1968-70 Pun LR 720=(AIR 1969 Punj 26) that a monthly tenancy in the Punjab, in the absence of a specific contract and in the absence of any statutory provision to the contrary, cannot be terminated without serving at least fifteen days' notice of eviction as a condition precedent to the claim of possession in an action under the Act. Out of the relevant requirements of Section 106 of the Transfer of Property Act, it appears to us that the statutory presumption of a tenancy being monthly and the requirement of service of a notice of ejectment contain principles of equity, justice and good conscience. So far as the second ingredient of the section is concerned that is, about the notice being for fifteen days, all that need be said is that once it is held that a notice of ejectment is necessary, it goes without saying that such notice must be reasonable. What is reasonable notice may normally depend on the circumstances of each case, but it appears to us that the period of fifteen days required by Section 106 is practically the minimum reasonable period required for terminating a monthly tenancy.

Mr Gokal Chand Mittal, the learned Counsel for the landlord-respondent, referred to the following passage in the judgment of the Supreme Court in Nam-

deo Lokman v. Narmadabai, AIR 1953 SC 228 (at p 233):—

"In our opinion, the provision as to notice in writing as a preliminary to a suit for ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the Transfer of Property Act, 1882, or to leases executed prior to 1-4-1930," and argued that on the analogy of the judgment of the Supreme Court in Namdeo's case, AIR 1953 SC 228 it should be held that the requirements of clause (h) of Section 111, and of Section 106 of the Transfer of Property Act, cannot be invoked as they are not based on any principles of justice, equity or good conscience.

The argument of Mr. Gokal Chand Mittal appears to us to be misconceived. Their Lordships held in unequivocal terms (paragraph 16 of the AIR report) that "it is axiomatic that the Court must apply the principles of justice, equity and good conscience to transactions which come up before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions." On that basis it was, therefore, held "that the provisions of the Act (Transfer of Property Act) which are but a statutory recognition of the rules of justice, equity and good conscience also govern those transfers. If, therefore, we are satisfied that the particular principle to which the legislature has now given effect by the amendment of Section 111 (g) did in fact represent a principle of justice, equity and good conscience, undoubtedly the case will have to be decided in accordance with the rules laid down in the section, although in express terms it has not been made applicable to leases executed prior to 1929 or even prior to the Transfer of Property Act coming into force." The ratio of the judgment is contained in the above quoted passage. It was on applying the principles set out in the passage quoted above that their Lordships of the Supreme Court held in Namdeo's case, AIR 1953 SC 228 that the introduction of the provision for service of a notice under clause (g) of Section 111 of the Transfer of Property Act by the amending Act of 1929 was not based on principles of equity, justice or good conscience. That cannot possibly be held to apply to the requirement of a notice of termination of a monthly tenancy referred to in Section 106 of the Transfer of Property Act which provision has been enacted in recognition of a pre-existing principle of equity and good conscience. We, therefore, hold that the principles of Section 106 of the Transfer of Property Act have to be invoked under Sec-

tion 6 of the Punjab Laws Act and are accordingly deemed to be requirements of law in the absence of any statutory provision or contract to the contrary. At the same time, we have not been persuaded by the petitioner to hold contrary to what we decided in Sawaraj Pal's case, 1968-70 Pun LR 720=(AIR 1969 Punj 26) about the third requirement of the section relating to the necessity of the notice terminating strictly with the end of the month of a tenancy not being part of the general law as the said rule is too technical to be called in aid as a mere principle of equity.

5. Having held that despite the fact that the Transfer of Property Act is not applicable to the State of Punjab, it is necessary under the general law of the land to terminate a monthly tenancy by at least fifteen days' notice of ejectment, all that remains to be considered in connection with the first question is whether the said requirement (which will for the purposes of the said question be treated on the same level as a statutory requirement) has been abrogated by anything contained in the East Punjab Urban Rent Restriction Act 1949 or not. Before dealing with the first question referred to us, I would refer to the case law on the subject in a yearwise chronological order.

6. In Gurupada Halder Jiban Krishna Das Firm v. Arjoondas Goenka, AIR 1949 Cal 61, a learned Single Judge of the Calcutta High Court had to deal with proviso (b) to Section 12 (1) of the Calcutta Rent Ordinance (1946) which provided that a tenant would lose the immunity from eviction conferred by Section 12 (1) of the said Ordinance, where in the absence of a contract to the contrary, the tenant had without the consent of the landlord in writing sub-let the premises. Section 12 (1) gave protection to tenants against eviction and the proviso contained the category of cases in which the protection given by the purview would be lost. It was argued on behalf of the tenant that despite his case falling squarely in clause (b) of the proviso referred to above, he was not liable to ejectment without the service on him of a notice to quit the premises. Biswas, J., held that ejectment could not be ordered unless it was proved (i) that the requisite notice to quit had been served, and also (ii) that the tenant had done something which deprived him of the protection to which he would otherwise have been entitled to under the purview of Section 12 (1) of the Ordinance. The abovesaid judgment of the learned Single Judge of the Calcutta High Court was specifically disapproved by J. L. Kapur, J., in Hem Chand v. Smt. Sham Devi, 1955-57 Pun LR 441, to which case reference will presently be made.

7. Next comes the judgment of the Supreme Court in Brij Raj Krishna v. S. K. Shaw and Brothers, AIR 1951 SC 115, on certain observations in which reliance has continuously been thereafter placed for holding in favour of the landlord on the point in question. It is, therefore, necessary to deal with that case at a little length. The landlord filed an application under Sec. 11(1)(a) of the Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947) (hereinafter called the Bihar Act) before the House Controller for the eviction of the tenant on the ground of non-payment of rent. Section 11 (1) of the Bihar Act provided:—

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except

....."

Then followed the list of cases in which the protection conferred by Section 11 (1) would not be available to a tenant. The House Controller passed an order for the eviction of the tenant on the ground of non-payment of rent. The order was upheld in appeal by the Commissioner. The tenant thereupon filed a suit in the Munsif's Court at Patna for a declaration to the effect that the order of the Controller was illegal, ultra vires and without jurisdiction. The decree of the trial Court dismissing that suit of the tenant was upheld in appeal, but the High Court reversed the same and held that the order of House Controller was without jurisdiction. The High Court observed that the expression "non-payment of rent" in Section 11 of the Bihar Act must be given an interpretation which would have the effect of enlarging the protection against the determination of a tenancy enjoyed by a tenant under the ordinary law, and, therefore, the tenant who brought all the rent due from him in Court before the order of his eviction could be passed, was deemed to be protected against eviction. For so holding reliance was placed on Section 111 of the Transfer of Property Act.

On a certificate granted by the High Court, the landlord went up in appeal to the Supreme Court. It was held by Fazl Ali, J., who wrote the judgment of the Court, that any attempt to import the provisions relating to the law of Transfer of Property for the interpretation of Section 11 of the Bihar Act would seem to be out of place as that section begins with the words "notwithstanding anything contained in any agreement or law to the contrary". It was in that context that the learned Judge observed that Section 11 of the Bihar Act is a self-contained section and it is wholly unneces-

sary to go outside the Bihar Act for determining whether a tenant is liable to be evicted or not and under what conditions he could be evicted. Their Lordships of the Supreme Court held that inasmuch as Section 11 of the Bihar Act clearly provided that a tenant was not liable to be evicted except on certain conditions and one of the conditions laid down for the eviction of a monthly tenant was non-payment of rent and if the Controller was satisfied that there had been non-payment of rent, an order for ejectment had to be passed. It is noteworthy that the question which was before the Supreme Court in Brij Raj Krishna's case, AIR 1951 SC 115 (supra), was whether the scope of the exception to the protection granted to tenants against eviction could be enlarged by invoking the provisions of some enactment containing the general law the operation of which had been excluded by the non obstante clause with which Section 11 started.

No question of applying the general law of the land on the point on which the special Act was silent arose in that case. What the Patna High Court had held which was not approved by the Supreme Court, was that though Section 11 (3) (b) of the Bihar Act provided that "Controller shall, if he is satisfied that the claim of the landlord is bona fide, make an order directing the tenant to put the landlord in possession of the building" in case of non-payment of rent, the provision conferred a right upon the landlord very much in excess of the right that he enjoys under the ordinary law in the matter of determination of tenancy and unless the section was interpreted in the manner which appealed to the High Court, it would have conferred very much larger power on the Controller than that possessed by the Civil Courts under the ordinary law in the matter of passing decrees for eviction of tenants.

The Patna High Court had further held that the principle of law and equity on which relief against forfeiture for "non-payment of rent" is based, will have been completely abrogated, and the protection of a tenant in possession of a building instead of being enlarged will have been very much curtailed". It was in this context that the Supreme Court held that the Bihar Act sets up a complete machinery for the investigation of the matters referred to in the relevant section upon which the jurisdiction of the Controller to order eviction of a tenant depends, and that, therefore, the Controller alone had to decide whether or not there was non-payment of rent and no suit lay against his such finding as his decision had been made final by the Act.

Their Lordships observed that the Bihar Act had entrusted the Controller with a jurisdiction which includes the

authority to determine whether there is non-payment of rent or not, and also to order eviction of a tenant in case he is found guilty of non-payment and that even if the Controller might be deemed to have wrongly decided the question of non-payment of rent, his order could not be questioned in a Civil Court. The landlord's appeal to the Supreme Court was allowed on that short ground. The above analysis of the judgment of the Supreme Court in the case of Brij Raj Krishna, AIR 1951 SC 115 would show that the Supreme Court never held that in the absence of a specific statutory provision or a contract to the contrary, the requirements of Section 106 of the Transfer of Property Act are abrogated by a provision in a Rent Control Act which merely grants protection against eviction to tenants subject to certain exceptions.

8. Then comes the judgment of Falshaw and J. L. Kapur, JJ., in 1952-54 Pun LR 358=(AIR 1952 Punj 422) (supra) on account of which this reference to this Full Bench has been necessitated. The case arose under this very Punjab Act (East Punjab Urban Rent Restriction Act, 3 of 1949). Notice of ejectment had actually been issued in that case requiring the tenant to vacate the premises by the 1st of October, 1950. The controversy related to the validity of that notice under Section 106 of the Transfer of Property Act. It was the contention of the landlord to the effect that the Rent Act which was a complete code by itself, had superseded the provisions of the Transfer of Property Act, that prevailed with the learned Judges of the Division Bench. J. L. Kapur, J., with whom Falshaw, J., agreed, referred to some English and Indian decided cases, and firstly held on the facts of the case that the Court below was in error in holding that the notice was not a proper one. He further observed that the relationship between landlord and tenant was at that time regulated in the Punjab by the 1949 Act, and after referring to the provisions of Section 13 of the Act, and to the judgment of the Supreme Court in the case of Brij Raj Krishna, AIR 1951 SC 115, held:—

"This shows quite clearly that in order to determine whether a tenant has become liable to eviction or not, the Controller must confine himself to the provisions of the Act, and to no other provision."

The learned Judge distinguished the judgment in Hasham's case, AIR 1947 Lah 382 (supra) on the ground that the wording of the proviso in the 1941 Punjab Act was different inasmuch as Section 108 of the Transfer of Property Act had been specifically referred to therein, and it could not, therefore, be said that

the rule laid down in that case by Achhru Ram, J., would be applicable to a case where the elaborate and self-contained provisions of the Rent Restriction Act applied.

9. A Division Bench of the Bombay High Court (Chagla, C. J. and Bhagwati, J.), was called upon to consider the scope and effect of Section 28 of the Bombay Act in *Raghubir Narayan v. G. A. Fernandes*, AIR 1953 Bom 76. Their Lordships held that Section 28 of the Bombay Act applied only to those suits between a landlord and tenant where a landlord had become entitled to possession or recovery of the demised premises and that a landlord becomes entitled to possession only when there is determination of tenancy, which can be determined by any of the modes laid down in Section 111 of the Transfer of Property Act. The Bench of the Bombay High Court further held that once a tenancy is determined as aforesaid then Section 108 (q) of the Transfer of Property Act requires the lessee to put the lessor into possession of the property, and that it was, therefore, clear that it was only on the determination of the lease or tenancy that the landlord becomes entitled to the possession of the property and it is only then that he can file a suit for a decree for possession in which case Section 28 applies and in such a case suit can only be filed as provided in the Bombay Rent Act.

If the law laid down by Chagla, C. J. and Bhagwati, J. is correct, we would be bound to answer question No. 1 referred to us in favour of the tenant. It may be mentioned at this very stage that the abovesaid judgment of the Bombay High Court was expressly approved by their Lordships of the Supreme Court in the case of *Punjalal Bhagwanddin v. Bhagwatprasad Prabhuprasad*, AIR 1963 SC 120.

10. Another judgment which was approved by the Supreme Court in the same case was given by a Division Bench of the Saurashtra High Court (Shah, C. J. and Baxi, J.) in *Karsandas Ramji v. Karsanji*, AIR 1953 Sau 113. The question that arose before the Saurashtra High Court related to the applicability of Sections 108 and 111 of the Transfer of Property Act to an action for ejectment filed under the Bombay Rent Act, which Act was held to apply to Saurashtra. The Division Bench held in so many words that a tenancy must be duly determined either by a notice to quit or by efflux of time or under one or other of the clauses of Section 111 of the Transfer of Property Act, before a landlord can sue to evict his tenant on any of the grounds contained in the various clauses of sub-section (1) of Section 13 of the Bombay Rent Act. Reference was made by the Saurashtra High Court to the judgment amongst

others of Achhru Ram, J. in *Hasham's case*, AIR 1947 Lah 382 (supra) for coming to the abovementioned conclusion. The learned Judges held that repeal of the relevant provisions of the Transfer of Property Act could not be implied from the provisions of Section 15 or from any other provisions of the Bombay Rent Act.

11. In ILR 1955 Punj 36=1955-57 Pun LR 441, the same question came up for consideration before another Division Bench of this Court consisting of G. D. Khosla and J. L. Kapur, JJ. The main judgment was written by Khosla, J. The learned Judge observed that on a first reading of Section 9 of the Delhi and Ajmer-Merwara Rent Control Act (19 of 1947) it appeared to him that the provisions of the Rent Control Act were only put in a negative form and were not enabling. On a careful reading of the judgment of the Supreme Court in the case of *Brij Raj Krishna*, AIR 1951 SC 115, however, he came to the conclusion that the 1947 Delhi Rent Act was "really a complete code in itself," and then held—

"It seems to me, therefore, that the Rent Control Act lays down not only the rights inter se of the landlord and tenant, but also provides the procedure for obtaining the relief of ejectment, and that being so, the provisions of Section 106 of the Transfer of Property Act requiring the serving of a notice upon the tenant have no relevance when considering an application for ejectment made under the Rent Control Act. I am therefore, of the opinion that no notice was necessary in this case".

12. It appears that the judgment of the Calcutta High Court in *Gurupada Haldar Jiban Krishna Das's case*, AIR 1949 Cal 61 (supra), had been cited before the Bench on behalf of the tenant. J. L. Kapur, J., who appended a separate short note of his own while agreeing with the order proposed by Khosla, J., added in that connection as below:—

"Mr. Bishan Narain referred to a judgment of the Calcutta High Court in AIR 1949 Cal 61 (supra), where it was held that the provisions of Section 108 of the Transfer of Property Act are applicable in spite of the fact that the Act of West Bengal provides that the Calcutta Rent Ordinance would be applicable notwithstanding anything contained in the Transfer of Property Act of 1882. With due deference to the opinion of the learned Judge, I am unable to agree that if the provisions of the Calcutta Ordinance were applicable in spite of the Transfer of Property Act, the provisions with regard to notice would also be applicable."

13. It would thus be observed that whereas the personal inclination of Khosla, J. in *Hem Chand's case*, ILR (1955)

Punj 36=57 Pun LR 441 was in favour of the tenant, he appeared to be compelled to hold in favour of the landlord as he did, on the assumption that the observations of Fazl Ali, J., in Brij Raj Krishna's case, AIR 1951 SC 115 (already referred to) had impliedly laid down that the provisions of Section 105 of the Transfer of Property Act had been abrogated by the relevant provisions in the Rent Control Act. J. L. Kapur, J., had already expressed his opinion on the point in question while writing the judgment of Division Bench in the case of Bawa Singh, 1952-54 Pun LR 358=(AIR 1952 Punj 422). While re-affirming the same view, the learned Judge categorically disapproved of the principles laid down in the judgment of the Calcutta High Court in Gurupada Halder Jiban Krishna Das's case AIR 1949 Cal 61. It is noteworthy that the correctness of the view expressed by a Division Bench of this Court in Hem Chand's case, ILR (1955) Punj 36=57 Pun LR 441 came up for consideration before the Supreme Court in AIR 1963 SC 120 (to which judgment detailed reference will hereinafter be made), and their Lordships expressly abstained from deciding whether the judgment of the Division Bench of this Court had laid down the correct law in this respect or not.

14. In Ganga Dutt Murarka v. Kartik Chandra Das, AIR 1961 SC 1057, it was held that where a contractual tenancy to which the rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises by virtue of statutory protection, the occupation of the premises by the tenant is not because of any right arising from the contract which has already been determined and that the statute protects his possession so long as the conditions which justify the lessor in obtaining an order of eviction do not exist. Their Lordships further held that once the prohibition against the exercise of jurisdiction by the Court is removed, the right to obtain possession by the lessor under the ordinary law springs into action and the exercise of the lessor's right to evict the tenant will not, unless the statute provides otherwise, be conditioned.

The case arose under Section 12 of the Calcutta Rent Ordinance (5 of 1946). The said section provided, inter alia, that notwithstanding anything contained in the Transfer of Property Act, the Presidency Small Cause Courts Act or the Indian Contract Act, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by the Ordinance and performs the conditions of the tenancy. Exceptions

against the protection contained in the purview of Section 12 were carved out in the proviso to that section which permitted landlords to obtain possession of the tenancy premises if the conditions specified in the proviso were fulfilled.

The Ordinance was replaced by West Bengal Act 1 of 1947 which was, for all practical purposes in the same terms. The landlord served notice, dated May 15, 1947, on the tenant to vacate and deliver possession of the premises on the expiry of the contractual period of the tenancy which expired on June 15, 1947. Though possession was not delivered in spite of the termination of the contractual tenancy, the landlord continued to accept rent in the meantime. West Bengal Act 1 of 1947, was replaced by West Bengal Act 5 of 1948 and the same was in turn replaced by the West Bengal Act 38 of 1948 which ultimately gave place to West Bengal Premises Rent Control Act, 1950. Section 12 of the 1950 Act gave protection to tenants against eviction including those whose tenancies had expired. At the same time, it was provided that the landlord would be entitled to obtain a decree for ejectment on specified grounds. After the 1950 Act had come into force, the landlord served a notice upon the tenant "to quit, vacate and deliver possession of the premises occupied", which the tenant was described as holding as "monthly tenant" on the expiry of April 14, 1951. The tenant having failed to comply with the notice, the action of the landlord in the Small Cause Court was decreed in his favour.

The first Appellate Court reversed the decree on the ground that acceptance of rent after the determination of the tenancy gave the appellant the status of a "tenant holding over", and since the tenancy was for a manufacturing purpose, it could be determined only by six months' notice expiring with the year of tenancy, which notice had not been served. The landlord's second appeal was accepted by the High Court and the decree of the Small Cause Court directing the eviction of the tenant was restored.

In a further appeal to the Supreme Court under Article 133 (1) (c) of the Constitution it was held, as already stated, that the necessity to give notice under Section 105 of the Transfer of Property Act relates to a contractual tenancy or to a tenant holding over under Section 116 of the Transfer of Property Act and not to a statutory tenancy. Their Lordships further held that where a contractual tenancy to which the rent control legislation applies has expired either by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises, acceptance of rent from the tenant by the landlord after the determination of the contrac-

tual tenancy would not afford ground for holding that the landlord has assented to a new contractual tenancy.

15. In AIR 1963 SC 120 the relevant facts were these. On October 16, 1954, the landlord gave notice to the tenant to quit the premises on the last date of the month of the tenancy as he had not paid arrears of rent for over six months. On December 16, 1954, the landlord filed a suit for the ejectment of the tenant under Section 12 (3) (a) of the Bombay Rent Act. The trial Court decreed the suit for ejectment. Tenant's appeal against the decree of the trial Court and a further petition for revision to the High Court were both dismissed. In further appeal to the Supreme Court by special leave of that Court under Article 136 of the Constitution, one of the points urged on behalf of the tenant was that the notice to quit was not given in accordance with law as it did not comply with the requirements of Section 106 of the Transfer of Property Act. It was in that context that the Supreme Court proceeded to determine whether it is a condition precedent for the institution of a suit by a landlord for the recovery of possession from a tenant who has been in arrears of rent that there had been first determination of the contractual tenancy.

In that context Raghubar Dayal J., who prepared the judgment of the Court observed as below:—

"When a tenancy is created under a contract between the landlord and the tenant, that contract must hold good and continue to be in force till according to law or according to the terms of the contract, it comes to an end. Section 111 of the Transfer of Property Act states the various circumstances in which a lease of immovable property determines. Clause (h) provides for the determination of the lease on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. There is nothing in the Act which would give a right to the landlord to determine the tenancy and thereby to get the right to evict the tenant and recover possession. This Act was enacted for the purpose of controlling the rents and repairs of certain premises and of evictions due to the tendency of landlords to take advantage of the extreme scarcity of premises compared to the demand for them. The Act intended therefore to restrict the rights which the landlords possessed either for charging excessive rents or for evicting tenants. A tenant stood in no need of protection against eviction by the landlord so long as he had the necessary protection under the terms of the contract between him and the landlord. He could not be evicted till his tenancy was de-

termined according to law and therefore there was no necessity for providing any further protection in the Act against his eviction so long as his tenancy continued to exist under the contract.

Sub-section (1) of Section 12 of the Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. It creates a restriction on the landlord's right to the recovery of possession. When the landlord will have such a right is not provided by it. Ordinarily the landlord will have a right to recover possession from the tenant when the tenancy had determined. The provisions of this section therefore will operate against the landlord after the determination of the tenancy by any of the modes referred to in Section 111 of the Transfer of Property Act. What this section of the Act provides is that even after the determination of the tenancy, a landlord will not be entitled to recover possession, though a right to recover possession gets vested in him, so long as the tenant complies with what he is required to do by this section. It is this extra protection given by this section which will be useful to the tenant after his tenancy has determined. The section does not create a new right in the landlord to evict the tenant when the tenant does not pay his rent. It does not say so and therefore it is clear that a landlord's right to evict the tenant for default in payment of rent will arise only after the tenancy is determined and the continued possession of the tenant is not on account of the contractual terms but on account of the statutory right conferred on him to continue in possession so long as he complies with what sub-sec. (1) requires of him. The landlord is restricted from evicting the tenant till the tenant does not do what he is required to do for peaceful possession under sub-section (1) of Section 12. We are, therefore, of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under Section 12 if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-section (2) of Section 12 of the Act."

It is significant that sub-section (2) of Section 12 provided for a special kind of

notice not required under the ordinary law as a condition precedent for getting the premises vacated on the ground of non-payment of rent. That notice had also to be served in the manner provided by Section 106 of the Transfer of Property Act. Despite these facts it was unequivocally held by their Lordships of the Supreme Court that the provisions of Section 12 of the Bombay Rent Act would operate against the landlord only after the determination of the tenancy by any of the modes referred to in Section 111 of the Transfer of Property Act, and that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy in addition to the notice required under subsection (2) of Section 12.

Their Lordships observed that possession of the lessee after the expiry or determination of the lease was by virtue of the provisions of the Act and not by virtue of the extension of the period of lease. As already observed at an earlier stage in this judgment the Supreme Court expressly approved the observations of Chagla, C. J. and Bhagwati, J., in AIR 1953 Bom 76 (supra), and also referred with approval to the judgment of the Saurashtra High Court in AIR 1953 Sau 113 (supra). When a reference was made to their own earlier judgment in AIR 1951 SC 115 (supra), their Lordships of the Supreme Court pointed out that Section 12 of the Bombay Rent Act was worded differently from Section 11 of the Bihar Act. It was held that there is nothing in Section 12 of the Bombay Rent Act which overrides the provisions of the Transfer of Property Act. I have already referred to the Supreme Court having left the question of the correctness of the judgment of a Division Bench of this Court in Hem Chand's case, ILR (1955) Punj 36=57 Pun LR 441 (supra), open. They did mention that there is nothing in the Bombay Rent Act corresponding to the provisions of Section 13 (1) of the Delhi and Ajmer-Merwara Rent Control Act, but left the Punjab case with the following observations—

"It is unnecessary for us to consider whether Hem Chand's case, ILR (1955) Punj 36 was rightly decided or not."

Whereas one side has contended before us that this amounts to the Supreme Court not having approved of the judgment of this Court in Hem Chand's Case, ILR (1955) Punj 36 when an opportunity arose for doing so, the other side has contended that the Supreme Court did not hold the Punjab case to have been wrongly decided. All that the abovesaid observations appear to us to mean is that their Lordships expressly abstained from expressing their opinion on the

point decided by this Court in Hem Chand's case, ILR (1955) Punj 36 one way or the other. In Punjalal Bhagwandin's case, AIR 1963 SC 120 the Supreme Court clearly brought out a distinction between "right to possession" on the one hand and the "right to recover possession" on the other; and held that right to possession arises when the tenancy is determined, and the right to recover possession follows the right to possession and arises when the person in possession does not make over possession as he is bound to do under the law, and there arises the necessity to recover possession through Court for which certain additional hurdles have been placed in the way of the landlord by the Rent Restriction Act. It was in this context that the Supreme Court held:—

"It is clear that the provisions of Section 12 deal with the stage of the recovery of possession and not with the stages prior to it and that they come into play only when the tenancy is determined and a right to possession has come in existence. Of course, if there was no contractual tenancy, and a person is deemed to be a tenant only on account of a statute giving him right to remain in possession, the right to possession arises on the person in possession acting in a manner which according to the statute, gives the landlord right to recover possession, and no question for the determination of the tenancy arises, as really speaking there was no tenancy in the ordinary sense of that expression. It is for the sake of convenience that the right to possession, by virtue of the provisions of a statute, has been referred to as statutory tenancy."

The conclusion of the Supreme Court on the relevant point in Punjalal Bhagwandin's case, AIR 1963 SC 120 was couched in the following language:—

"We are, therefore, of opinion that so long as the contractual tenancy continues a landlord cannot sue for the recovery of possession even if Section 12 of the Act does not bar the institution of such a suit, and that in order to take advantage of this provision of the Act he must first determine the tenancy in accordance with the provisions of the Transfer of Property Act."

16. Mention may also be made of the Supreme Court judgment in Pooran Chand v. Motilal, AIR 1964 SC 461, as reference was made thereto by the learned Counsel for the respondent. The contention of the Counsel for the tenant to the effect that the provisions of Section 13 (1) of the Delhi Rent Control Act afford an additional protection to a tenant (in addition to the notice requisite under Section 106 of the Transfer of Property Act), and that they do not enable

the landlord to dispense with a statutory notice before filing a suit for eviction was left open by the Supreme Court with the following observations:—

"It is not necessary in this appeal to express our opinion on the validity of this contention, for we are satisfied that the term of the tenancy had expired by efflux of time and, therefore, no question of statutory notice would arise."

So far as the law laid down by the Supreme Court in Pooran Chand's case, AIR 1964 SC 461 (supra) on the point in question is concerned, it does not appear to project the matter further than the pronouncement of their Lordships in Ganga Dutt Murarka's case, AIR 1961 SC 1067 (supra)

17. The next important judgment to which reference has been made by both sides was given by the Supreme Court in Abbasbhai v. Gulamnabi, AIR 1964 SC 1341. Once again the case arose under the Bombay Rent Act. Section 12 of that Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as (broadly speaking) the tenant continues to pay rent and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of that Act. Sub-section (2) of that section requires a landlord to serve a special type of notice on the tenant as a condition precedent for instituting a suit for ejectment if the ground on which ejectment is sought is non-payment of rent. Section 106 of the Transfer of Property Act is referred to in sub-section (2) of Section 12 only for defining the manner of service of the notice, and for no other purpose. It is Section 13 of the Bombay Rent Act which contains a list of the grounds on which the landlord may claim to recover possession of any premises notwithstanding the general protection contained in Section 12. Sub-section (1) of Section 13 starts with the words:—

"Notwithstanding anything contained in this Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied."

It is significant to note that the non obstante clause with which sub-sec. (1) of Section 13 starts does not make any reference to Section 106 of the Transfer of Property Act, but only to the other provisions of the Bombay Rent Act itself. An order for eviction had been passed by the High Court of Gujarat against the tenant in that case on the ground that he was not ready and willing to pay the standard rent. The suit for eviction had been filed before the Civil Judge without terminating the contractual tenancy by notice under the Transfer of Property Act. Their Lordships of the Supreme Court held that sub-section (1) of Section 12 of the Bombay Rent Act

"applies to a tenant who continues to remain in occupation after the contractual tenancy is determined; it does not grant a right to evict a contractual tenant without determination of the contractual tenancy. Protection from eviction is claimable by the tenant even after determination of the contractual tenancy so long as he pays or is ready and willing to pay the amount of the standard rent and permitted increases and observes and performs the other conditions of the tenancy consistent with the provisions of the Act." The order of eviction passed by the High Court was set aside with the abovequoted observations.

18. The same question arose before the Supreme Court in a case arising under the Madhya Pradesh Accommodation Control Act (23 of 1955) (hereinafter called the Madhya Pradesh Act). This was disposed of by their Lordships of the Supreme Court in Mangilal v. Sugan Chand, AIR 1965 SC 101, on October 24, 1963. (I am mentioning this date for the purpose which will become apparent while dealing with a recent Full Bench judgment of the Madras High Court). The opening words of Section 4 of that Act provide that "no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds". Then follows a list of the grounds on which eviction can be sought. The ground on which eviction was claimed in Mangilal's case, AIR 1965 SC 101 (supra) was "that the tenant has failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a written notice of demand from the landlord." The Supreme Court pointed out that the abovesaid provision was very different from the provisions contained in the Bombay Rent Act.

It was held (per Mudholkar, J., who prepared the judgment of the Court) that the provisions of Section 4 of the Madhya Pradesh Act are in addition to those of the Transfer of Property Act, and that before a tenant can be evicted by a landlord he must comply both with the provisions of Section 106 of the Transfer of Property Act and those of Section 4 of the Madhya Pradesh Act, as the last mentioned Act does not in any way abrogate Chapter V of the Transfer of Property Act which deals with leases of immovable property. It was then held.—

"The requirement of Section 106 of the Transfer of Property Act is that a lease from month to month can be terminated only after giving fifteen days' notice expiring with the end of a month of the tenancy either by the landlord to the tenant or by the tenant to the landlord. Such a notice is essential for bringing to an end the relationship of landlord and

tenant. Unless the relationship is validly terminated, the landlord does not get the right to obtain possession of the premises by evicting the tenant. Section 106 of the Transfer of Property Act does not provide for the satisfaction of any additional requirements. But then, Section 4 of the Accommodation Act steps in and provides that unless one of the several grounds set out therein is established or exists, the landlord cannot evict the tenant."

19. On September 22, 1966 the Supreme Court delivered judgment in AIR 1967 SC 1419. This case arose under the Calcutta Thika Tenancy Act (2 of 1949) as amended by the Calcutta Thika Tenancy (Amendment) Act (6 of 1953) (hereinafter called the Calcutta Act). The contractual stipulation in the lease-deed between the parties to that litigation provided for the service of a six months notice of termination of the tenancy. The opening part of Section 3 of the Calcutta Act provides —

"Notwithstanding anything contained in any other law for the time being in force, or in any contract, a Thika tenant shall, subject to the provisions of this Act, be liable to ejectment from his holding on one or more of the following grounds, and not otherwise, namely,

Section 4 of the Calcutta Act states that it shall not be competent for a landlord to eject any Thika tenant from his holding unless the landlord has given the Thika tenant "notice in the manner provided in Section 106 of the Transfer of Property Act, 1882". Notices of different periods are prescribed to be given for claiming ejectment on different grounds in the various clauses mentioned under Section 4. Sub-section (1) of Section 5 then provides that—

"Notwithstanding anything contained in any other law for the time being in force but subject to the provisions of Section 28, a landlord wishing to eject a Thika tenant on one or more of the grounds specified in Section 3 shall apply in the prescribed manner to the Controller for an order in that behalf and, on receipt of such application, the Controller shall, ... make an order directing the Thika tenant to vacate the holding and, subject to the provisions of Section 10, to put the landlord in possession thereof."

Section 28 confers on the Court power to rescind or vary decrees and orders in certain cases and we are not concerned with that provision for the purposes of deciding the questions referred to us. The word "notwithstanding" in Section 3 of the Calcutta Act was interpreted by the Supreme Court to mean, on a true construction thereof, "that even where the contractual tenancy is properly terminat-

ed notwithstanding the landlord's right to possession under the Transfer of Property Act or contract of lease he cannot evict the tenant unless he satisfies any one of the grounds set out in Section 3." Their Lordships observed that the Rent Acts are not ordinarily intended to interfere with contractual leases and are Acts for the protection of tenants and are consequently restrictive and not enabling, conferring no new rights of action, but restricting the existing rights either under the contract or under the general law. Their Lordships then referred to a statutory tenancy arising when a tenant under a lease holds over, that is, when a tenant remains in possession after the expiry or determination of the contractual tenancy. In that context it was observed that the right to hold over, which has been called the right of irremovability, thus is a right which comes into existence after the expiration of the lease and until the lease is terminated or expires by the efflux of time, a tenant need not seek protection under that right unless his tenancy has otherwise determined under the general law, as the tenant is till then protected by the lease in breach of which he cannot be evicted.

Reference was then made to the earlier judgments of their Lordships in AIR 1964 SC 1341, and AIR 1965 SC 101. The Madras High Court had held in *Krishnamurthy v. Parthasarathy*, AIR 1949 Mad 780 that Section 7 of the Madras Buildings (Lease and Rent Control) Act (15 of 1946) (hereinafter referred to as the 1946 Madras Act) had its own scheme of procedure, and, therefore, there was no question of an attempt to reconcile that Act with the Transfer of Property Act. On that view the Madras High Court decided that an application for eviction could be made to the Rent Controller even before the contractual tenancy was terminated by a notice to quit. It may be appropriate to mention here that Section 7 of the 1946 Madras Act was for all practical purposes *pari materia* with Section 13 of the Punjab Act of 1949 with which we are concerned. Their Lordships of the Supreme Court held in *Manujendra Dutt's case*, AIR 1967 SC 1419 (supra) that the decision of the Madras High Court in the case of *R. Krishnamurthy*, AIR 1949 Mad 780 (supra) "is clearly contrary to the decisions of this Court in *Abbasbhai's case*, AIR 1964 SC 1341, and *Mangal's case*, AIR 1965 SC 101, and therefore is not correct law." The relevant legal question which their Lordships of the Supreme Court were called upon to decide was answered in paragraph 7 of the AIR (1967 SC 1419) report in the following words:—

"To summarise the position: The Thika Tenancy Act does not confer any addi-

tional rights on a landlord but on the contrary imposes certain restrictions on his right to evict a tenant under the general law or under the contract of lease. The Thika Act like other Rent Acts enacted in various States imposes certain further restrictions on the right of the landlord to evict his tenant and lays down that the status of irremovability of a tenant cannot be got rid of except on specified grounds set out in Section 3. The right of the appellant therefore to have a notice as provided for by the proviso to clause 7 of the lease was not in any manner affected by Section 3 of the Thika Act. The effect of the non obstante clause was that even where a landlord has duly terminated the contractual tenancy or is otherwise entitled to evict his tenant he would still be entitled to a decree for eviction provided that his claim for possession falls under any one or more of the grounds in Section 3. Before therefore the respondents could be said to be entitled to a decree for eviction they had first to give six months' notice as required by the proviso to clause 7 of the lease and such notice not having been admittedly given their suit for eviction could not succeed."

20. It is significant to note that Section 3 of the Calcutta Act starts with the non obstante clause, that no provision in the Calcutta Act requires the service of a notice of termination of the tenancy that there is no provision in the Act requiring that such a notice need not be served and that the Act is almost a complete code laying down even the detailed procedure for initiating an action for eviction and contains an exhaustive list of the grounds on which eviction can be sought.

21. The last judgment of the Supreme Court to which reference may be made in this connection arose under the Delhi Rent Control Act in *Delhi Motor Co. v. U. A. Basrukar*, AIR 1968 SC 794. One of the questions which arose before the Supreme Court was whether the claim for eviction could be decreed without serving a notice under Section 106 of the Transfer of Property Act. On the appraisal of the relevant evidence available on the record of that case, their Lordships held that the lease which had been brought into existence between the parties was certainly for a period exceeding one year and was not a lease from month to month. It was observed that at no stage had it been pleaded and no evidence had been led to show that independent of the documents on the basis of which the Supreme Court came to the abovementioned finding, there was no material from which it could be inferred that a lease from month to month had come into existence between the landlord and the tenant. In those circumstances, observed

their Lordships, "Section 106 of the Transfer of Property Act would clearly be inapplicable, and the lease has to be held to be for a period exceeding one year". It is obvious from a reference to the judgment of the Supreme Court in the case of *Delhi Motor Co.*, AIR 1968 SC 794 (supra), that the only reason for not insisting on the service of a notice under Section 106 of the Transfer of Property Act was that the section itself was not applicable to the facts of the case and it was not held that Sec. 106 of the Transfer of Property Act stood abrogated by anything contained in the rent control law applicable to Delhi.

22. It was in the abovementioned state of law that we held in *Sawaraj Pal's case*, 1968-70 Pun LR 720=(AIR 1969 Punj 26) that in Punjab where the principles of Section 106 of the Transfer of Property Act have all along been applied, it is necessary, in the absence of a contract to the contrary, to terminate a monthly tenancy by notice under Section 106 of the Transfer of Property Act before instituting an action under Section 13 of the East Punjab Urban Rent Restriction Act (3 of 1949), inasmuch as the said Punjab Act does not absolve a landlord from the obligation of serving the requisite notice and does not take away from the tenant a perfect defence of his not being liable to ejection without the service of such a notice. As soon as all the relevant judgments of the Supreme Court on the first question had been read out extensively Mr. Gokal Chand Mittal, the learned counsel for the landlord, lost all his enthusiasm and merely asked us repeatedly to make it clear in our judgment that no notice under Section 106 of the Transfer of Property Act need be served in a case where the contractual tenancy has already come to an end either by efflux of time or under any of the other clauses of Section 111 of the Transfer of Property Act.

There is indeed no quarrel with that proposition of law. Nothing contained in the Rent Control Act authorises or requires the service of a notice under Section 106 of the Transfer of Property Act, where such a notice would not have been required under the general law applicable to a case independent of the 1949 Punjab Act. At the same time, nothing contained in the Rent Control Act, with which we are concerned, abrogates the necessity of terminating a contractual monthly lease by the notice required under Section 106 of the Transfer of Property Act in a case in which the landlord could not succeed in his claim for eviction of a tenant without serving such a notice under the general law. It was not my intention to say anything beyond this in the judgment of the Division Bench in

Sawaraj Pal's case 1968-70 Pun LR 720= (AIR 1969 Punj 26) It is by now well settled that nothing contained in the Transfer of Property Act requires a tenancy to be terminated by a notice if it has already been determined either according to the terms of the particular lease or under the relevant provisions of the Transfer of Property Act. The question of serving a notice under Section 106 of the Transfer of Property Act arises only in those cases —

(1) where the provisions or principles of that section are applicable;

(2) where the contractual tenancy or the tenancy which is deemed to have come into existence under Section 116 of the Transfer of Property Act is a monthly tenancy, and

(3) where such a monthly tenancy is subsisting and has not already come to an end by efflux of time or by forfeiture or by having been determined by an appropriate notice under Section 106 itself.

23. A statutory tenancy which has been called by Meggry as a mere status of irremovability, commences after the contractual tenancy has come to an end in any manner provided by law. We may not be understood to lay down that it is necessary to terminate even a statutory tenancy by a notice under Section 106 of the Transfer of Property Act even after the contractual tenancy has already come to an end. "Statutory tenancy" is a mere misnomer usually adopted because of the statutory definition of the word "tenant" contained in the Rent Acts. The definition in the Punjab Act is in the following terms—

"'tenant' means any person by whom or on whose account rent is payable for a building or rented land and includes a tenant continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building or rented land by its tenant, unless with the consent in writing of the landlord, or a person to whom the collection of rent or fees in a public market, cart-stand or slaughter-house or of rents for shops has been farmed out or leased by a municipal town or notified area committee."

Since the statute calls a person whose tenancy has already been determined a tenant for the purposes of the relevant Act, he is given the title of a statutory tenant. In fact, as already recognised by the Supreme Court, it is a mere right or status of irremovability and does not amount to anything more than a restricted statutory protection against eviction to which a tenant has otherwise become liable under the general law.

24. What the learned Counsel for the landlord tried to contend on the merits of the controversy involved in the first

question was that Section 13 of the Punjab Act has impliedly repealed Section 106 of the Transfer of Property Act. There is no force whatever in that argument. It was held in *Kutner v. Phillips*, (1891) 2 QB 267:—

"Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, 'Leges posteriores contrarias abrogant' applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together."

In the case of AIR 1953 Sau 113 (supra), Shah, C. J., (as Chief Justice of the Saurashtra High Court) held after analysing the entire law on the subject that the general principle governing the construction of Acts of this nature is that unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. The argument which was being dealt with in that case was also about Section 106 of the Transfer of Property Act having been impliedly repealed by Section 12 (b) of the Bombay Rent Act. In *Dr. H. S. Rikhy v. The New Delhi Municipal Committee*, AIR 1962 SC 554, one of the contentions which prevailed with the Court was that no relationship of landlord and tenant had been established between the parties as the written contract of tenancy entered into by the Municipal Committee with *Dr. Rikhy* did not conform to the formalities required by Section 47 of the Punjab Municipal Act, and that mere acceptance of rent from the occupiers of the municipal shop did not create relationship of landlord and tenant. It was sought to be argued on behalf of the landlord that the provisions of Section 47 of the Punjab Municipal Act had been impliedly repealed by the Delhi and Ajmer Rent Control Act (38 of 1952), because the statutory definitions of landlord, premises, and tenant, in the Delhi Rent Control Act were inconsistent with the requirements of Section 47 of the Punjab Municipal Act.

It was in that context that the Supreme Court while dealing with the question of repeal by inconsistency, held in that connection as below:—

"In our opinion, there is no substance in this contention. We have already pointed out that those definitions postulate the relationship of landlord and tenant which can come into existence only

by a transfer of interest in immovable property, in pursuance of a contract. These definitions are entirely silent as to the mode of creating the relationship of landlord and tenant. Therefore, the question is whether the complete silence as to the mode of creating the relationship between landlord and tenant can be construed as making a provision by implication, inconsistent with the terms of Section 47 of the Municipal Act. In our opinion, the mere absence of such provisions does not create any inconsistency as would attract the application of Section 38 of the Act. It is noteworthy that the provisions of Section 38 of the Act were not relied upon either in the High Court or in the Court of first instance."

Applying the abovesaid principles of construction of statutes relating to the question of repeal by repugnancy we are clearly of the opinion that nothing contained in the East Punjab Urban Rent Restriction Act (3 of 1949) can be said to impliedly repeal the requirements of Section 106 of the Transfer of Property Act, as that provision can stand side by side with Section 13 of the Punjab Act.

25. Mr. Gokal Chand Mittal, the learned Counsel for the respondent, tried to distinguish the Bombay cases decided by the Supreme Court on the ground that sub-section (2) of Section 12 of the Bombay Rent Act specifically mentions the requirement of service of notice under Section 106 of the Transfer of Property Act. To say the least, the submission of the learned Counsel is wholly fallacious. Sub-section (2) of Section 12 of the Bombay Rent Act requires the service of a special kind of notice of demand as a pre-requisite for claiming eviction on account of non-payment of rent. A notice referred to in this provision of law is not the notice required under Section 106 of the Transfer of Property Act. In fact sub-section (2) of Section 12 does not at all talk of a notice of eviction or a notice terminating the monthly tenancy. It only requires one month's notice of demand of the standard rent being served by the landlord on the tenant before he can claim possession of the demised premises from a tenant on the ground of non-payment of such rent. Instead of saying in Section 12 (2) that the notice required under that provision "must be in writing signed by or on behalf of the person giving it and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family members or servant at his residence or if such tender or delivery is not practicable, affixed to a conspicuous part of the property," the Bombay legislature merely said that the notice in question should be served upon the tenant "in the manner provided in Section 106 of the

Transfer of Property Act, 1882." This does not by any stretch of imagination equate the notice required under sub-section (2) of Section 12 with any kind of a notice for determining the tenancy.

26. At the conclusion of the arguments of the learned Counsel for the parties, Mr. Roop Chand Chaudhry Advocate made an oral request to us to permit him to add to the submissions of Mr. Gokal Chand Mittal as an intervener on behalf of various landlords whom he represents in some other cases. Without passing any formal order permitting intervention we allowed Mr. Roop Chand to place before us any relevant judgment on the main point which might not have been brought to our notice by the learned Counsel for the contesting parties. Chaudhry Roop Chand first referred to the relevant passage on page 983 of the twenty-sixth edition of "Woodfall on Landlord and Tenant", and submitted that it is settled law according to the English practice that no notice of termination of a statutory tenancy is necessary. He then relied in the same connection on the judgment of the Supreme Court in *Dr. K. A. Dhairyawan v. J. R. Thakur*, AIR 1958 SC 789, wherein it was held that the period of the lease having expired and the tenant having been given notice to quit, he was bound to vacate the demised premises unless he was protected by the relevant Rent Restriction Act, which was the Bombay Act in that case. It is needless to dilate further on this point as I have already held that in view of the authoritative pronouncement of the Supreme Court in the case of *Ganga Dutt Murarka*, AIR 1961 SC 1067 (supra), it is only a contractual tenancy which need be terminated by the notice stipulated in the contract of tenancy or in the absence of such a stipulation by the notice required by Section 106 of the Transfer of Property Act in cases to which that provision applies, but if once the contractual tenancy has come to an end or been determined according to law and the tenancy is continuing in occupation in his capacity as tenant, as defined in the Rent Control Act, and is protected against eviction he is merely enjoying the status of irremovability, usually known as statutory tenancy, which need not again be determined by a notice to quit and that such a right or status is automatically terminated on the tenant incurring any of the disqualifications against protection enumerated in the relevant Rent Control Act.

27. Chaudhry Roop Chand then placed before us the judgment of a Full Bench of the Madras High Court in *M/s Raval and Co. v. K. G. Ramachandran*, AIR 1967 Mad 57. In a very elaborate and exhaustive judgment on the subject, the Full Bench of the Madras High Court

has, after considering a large number of previous cases, held that Section 10 of the Madras Buildings (Lease and Rent Control) Act (18 of 1960) is a complete code for the eviction of tenants on certain grounds with special machinery provided for the relevant decision and that the special features contained in that provision distinguish it from those under the Transfer of Property Act and make it amply clear that the said Madras Act is intended to be a departure from the pre-existing law, viz., the Transfer of Property Act in so far as it relates to tenancies of buildings, and that it is not necessary that the tenancy should first be determined by notice under Section 106 of the Transfer of Property Act before the landlord can avail himself of the grounds mentioned in the section.

For holding that view, the learned Judges have inter alia followed an earlier judgment of a Division Bench of the Madras High Court in AIR 1949 Mad 780 (Reference to the said case is made in paragraph 25 of the AIR report of the Full Bench judgment). In the same paragraph of the Full Bench judgment in which R Krishnamurthy's case, AIR 1949 Mad 780 is referred to, reliance has also been placed by the Full Bench on the Division Bench judgment of the Punjab High Court in ILR (1955) Punj 36=57 Pun LR 441 (supra) in respect of the Delhi and Ajmer Merwara Rent Control Act, the decision about which I have already made observations in an earlier part of this judgment. It is noticeable that the judgment of the Division Bench of the Madras High Court in R Krishnamurthy's case, AIR 1949 Mad 780 has since been categorically and specifically disapproved by the Supreme Court in Manujendra Dutta's case, AIR 1967 SC 1419 (supra) which arose under the Calcutta Thika Tenancy Act (Reference may in this connection be made to AIR 1967 SC 1419 at page 1423, column I).

Moreover, the judgments of the Supreme Court in Ganga Dutt Murarka's case, AIR 1961 SC 1067, and in the case of Abbasbhai Alimahomed, AIR 1964 SC 1341 do not appear to have been placed before the learned Judges constituting the Full Bench of the Madras High Court. It is significant that while overruling the Madras view contained in R Krishnamurthy's case, AIR 1949 Mad 780 their Lordships of the Supreme Court specifically observed in their judgment in Manujendra Dutt's case, AIR 1967 SC 1419 that the said Madras view was no longer correct law in the face of the judgment of the Supreme Court in Abbasbhai Alimahomed's case, AIR 1964 SC 1341. Moreover, the Full Bench judgment of the Madras High Court does not appear to be of much assistance for answering the question which has been referred to

us. It was Section 7 of the Madras Buildings (Lease and Rent Control) Act (15 of 1946) which could be substantially compared with Section 13 of the East Punjab Act. While construing Section 7 of the 1946 Madras Act, the Division Bench of that Court held in R Krishnamurthy's case, AIR 1949 Mad 780 that the provisions of Section 111 (h) and with it those of Section 106 of the Transfer of Property Act had been abrogated. The judgment of the Madras High Court in R Krishnamurthy's case, AIR 1949 Mad 780 having been overruled, it can hardly be said that the earlier Punjab Division Bench judgment adopting the same view has laid down the correct law. The Madras Act (18 of 1960) is a much more detailed enactment. Section 10 of that Act which is a detailed chapter relating to eviction of tenants, contains a vast number of provisions and prescribes a somewhat complicated machinery for evicting a tenant in given eventualities. The provision seems to be in the nature of an enabling piece of legislation which entitles a landlord who seeks to evict his tenant to apply to the Controller for a direction in that behalf, and authorises the Controller to deal with such an application according to the prescribed procedure.

Clause (d) of sub-section (3) of Section 10 states that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord shall not be entitled to apply under that sub-section for the eviction of the tenant before the expiry of such a period. It is clear that after the expiry of the fixed period of tenancy, no question of serving a notice would ordinarily arise as the tenant would then be in occupation merely as a statutory tenant and would be liable to eviction on any of the three grounds mentioned in sub-section (3) of Section 10. Moreover equitable alternative provision giving time to the tenant to vacate even after an order for eviction is passed against him under cl. (e) of sub-section (3) of Section 10 is contained in the said provision which requires the Controller to specify a date by which the tenant has to deliver possession to the landlord in a case where the Controller makes an order directing the tenant to put the landlord in possession.

The second proviso to clause (e) states that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building and may extend such time so as not to exceed three months in the aggregate. The scheme and provisions of the 1960 Madras Act appear to be substantially different from the East Punjab Act. Even otherwise, it appears to us, and we say so with the greatest respect to the learned Judges who constituted the Full Bench

of the Madras High Court, that the law laid down by that Court in the case of *M/s. Raval & Co.*, AIR 1967 Mad 57 (FB) (supra), is not easily reconcilable with the authoritative pronouncements of the Supreme Court in *Abbasbhai Alimohamed's case*, AIR 1964 SC 1341 and in *Manujendra Dutt's case*, AIR 1967 SC 1419. Be that as it may, the correct position regarding the East Punjab Act does not appear to admit of the slightest doubt. The provisions and principles relating to "leases of immovable property" are laid down in Chapter V of the Transfer of Property Act.

Section 105 with which this Chapter begins, defines "a lease of immovable property" as a transfer of a right to enjoy such property. Section 106 states, inter alia, that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for any purpose other than agriculture or manufacturing shall be deemed to be a lease from month to month. The rest of the section which has already been quoted in an earlier part of this judgment provides for the machinery to determine such a lease by fifteen days' notice. Section 107 contains technical rules relating to the manner of making the leases. Section 108 lays down the implied covenants between a lessor and a lessee. Part 'A' of the section enumerates the rights and liabilities of the lessor. Part 'B' deals with the "rights and liabilities of the lessee". Clause (q) of Part 'B' states:—

"On the determination of the lease, the lessee is bound to put the lessor into possession of the property."

Sections 109 and 110 are not relevant for our present purposes. Section 111 prescribes the modes of determination of leases. Clause (h) (already quoted earlier) provides for determination of a lease by due service of a notice. A notice under Section 106 is covered by this clause. Sections 112, 114 and 115 provide respectively for waiver or forfeiture, for relief against forfeiture in certain cases and about the effect of forfeiture on under-leases etc. Section 116 deals with the effect of holding over after the determination of a lease if the lessor accepts rent, after such determination. Chapter V ends with Section 117 which is not relevant for our purposes.

28. The part of Section 106 with which we are concerned, deals with monthly tenancies of all the three types, viz.:—

(i) where a lease expressly states that it is from month to month;

(ii) where the lease is silent on the point and the law, therefore, presumes it to be a lease from month to month; and

(iii) where after the expiry of a lease for a fixed period or otherwise, a tenant

becomes a monthly tenant under Section 116 of the Transfer of Property Act in the circumstances described in that provision.

29. Under the general law, an action for eviction of a tenant during the pendency and continuance of his monthly contractual lease (falling in any of the abovementioned categories) is bound to fail if the lease has not been determined by a proper notice to quit under Section 106 of the Transfer of Property Act in cases to which that provision or its principles apply. Till such determination, a landlord cannot claim the eviction of his tenant as Section 108 (A) (c) provides, inter alia, that "the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption." So long as the right to recover possession under the common law of the land does not accrue to the landlord, the tenant does not need any statutory protection against eviction. As soon, however as the general law entitles the landlord to recover possession, e.g., where a monthly tenancy is determined in the manner provided by Section 106 of the Transfer of Property Act, the liability of the lessee under clause (q) of Part (B) of Section 108 is to put the landlord into possession of the property.

It is at that stage that the Rent Restriction Act steps in and says that "the tenant so continuing in possession after the termination of the tenancy in his favour (who becomes a statutory tenant within the meaning of the definition of the word "tenant" in Section 2 (i) of the Act) shall not be evicted from the building or rented land in his possession as such tenant (i) in execution of a decree passed before or after the commencement of the 1949 Act, (ii) or otherwise; except in the circumstances enumerated in Section 13 of the Act. Though the definition of "tenant" in Section 2 (i) has made the Act applicable to the tenant despite the determination of his tenancy, it is again emphasised in sub-section (1) of Section 13 that the protection referred to above is available to the tenant not only before but even after the termination of his contractual tenancy. The protection against eviction, therefore, operates in two ways. So far as the period "before the termination of tenancy" is concerned, the protection operates in the matter of restricting the grounds on which eviction can be sought notwithstanding an agreement to the contrary in a lease. The said protection results only in restricting the grounds of eviction, but does not either expressly or by implication take away the normal defences of a tenant including

that of his tenancy not having been determined by a notice required in or according to the principles of Section 106 of the Transfer of Property Act

So far however, as the protection is given by Section 13 to statutory tenants, i. e., persons whose tenancy had under the general law been determined in accordance with law and who had become liable to hand over possession under Section 108 (B) (q) of the Transfer of Property Act, the only protection that is available subject to any other statutory provision in force at the relevant time, is to the extent specifically mentioned in Section 13 of the Act. This shows that in either eventuality, i. e., whether during contractual tenancy or during statutory tenancy the grounds on which eviction of a tenant can be sought are only those contained in Section 13 of the Act. To that extent and for that purpose Section 13 is a complete code in itself. All that this means is that eviction cannot be sought on any ground mentioned in the Transfer of Property Act or in the Rent deed which is not contained in Section 13. Nothing contained in Section 13 is inconsistent with Section 106 of the Transfer of Property Act. No provision in the Act either expressly or impliedly requires that a notice determining a statutory tenancy has to be given before an action is brought under Section 13. Whenever any further notice of demand or other notice is required as a condition precedent for evicting a statutory tenant whose contractual tenancy has already come to an end, it is and has to be specifically so provided in the Rent Restriction Act itself. This seems to be the legal position so far as the first question referred to us is concerned, and we appear to be fully supported by the trend of authorities and the authoritative pronouncements of their Lordships of the Supreme Court, to which reference has already been made.

30. I now turn to the second and third questions referred to us i. e., whether objection relating to the non-issue of a notice under Section 106 of the Transfer of Property Act where such a notice is otherwise required to be served, or objection as to the validity of such a notice can in law be waived by a tenant or not. Our answer to these two questions is in the affirmative. The circumstances in which a tenant is deemed to have waived the notice or an objection to its validity would vary from case to case and the question of waiver would have to be decided in each case on its own peculiar facts. Mr. A. N. Mittal, the learned Counsel for the tenant, was fair enough to himself to cite the judgment of the Assam High Court in *Kishanlal Singol v Hari Kisson*, AIR 1956 Assam 113, wherein it has been held that the

question about notice to quit is a mixed question of law and fact and the tenants may be taken to have waived the fifteen days' notice requisite under the terms of the contract of tenancy, and to have been satisfied with the sufficiency and validity of the notice when they fail to raise the point in the lower Courts and especially when they raise the point about the factum of want of service of notice only. By referring to the abovesaid judgment of the Assam High Court, we may not be understood to have approved of the dictum of the learned Chief Justice of that Court about the objection to the validity or sufficiency of the notice having been waived merely by denial of factum of service of notice. We are expressing no opinion on that point. We are, however, in respectful agreement with the judgment of the Assam High Court to the extent to which it holds that objection to the non-service of the requisite notice as well as to its invalidity on account of insufficiency of the period of notice, can in law be waived by a tenant

31. Counsel then referred to the judgment of P. C. Pandit J., in *Raj Kumar v. Major Gurmitinder Singh*, 1968-70 Pun LR 672. The learned Judge has held in that case that where the tenant did not take up the plea in his written statement that an order of ejectment would be without jurisdiction on account of want of notice terminating the tenancy, he is deemed to have waived the objection, and that he cannot be allowed to raise the objection when the decision on merits had gone against him. In the instant case, the objection as to the non-service of the requisite notice had admittedly been taken in the written statement of the tenant, and, therefore, the second part of the dictum of the learned Judge referred to above cannot be directly relevant.

But we have no hesitation at all in approving of the ratio of the judgment of the learned Judge on the point that a tenant can waive an objection as to non-service of a notice required under or on the principles of Section 106 of the Transfer of Property Act. Mr. Mittal half-heartedly argued that the law laid down by the Assam High Court and by Pandit J., in the abovesaid two cases is not quite correct, and that the right of a monthly tenant to resist eviction without being served with the requisite notice cannot be waived as it is a statutory right. He relied for this proposition on a judgment of the Calcutta High Court in *Chandra Nath Mukherjee v. Chulai Pashi* AIR 1960 Cal 40 S K. Sen, J., held in that case that since Section 111 (g) does not contain any clause like "in the absence of a contract to the contrary", the statutory requirement of

Cases Referred:	Chronological	Paras	
(1968) AIR 1968 SC 529 (V 55) =			(1924) 1924-1 KB 171 = 93 LJKB
(1968) 1 SCR 515, Sindhu Resettle-			390, Rex v. Electricity Commr. Ex
ment Corporation v. Industrial			parte London Electricity Joint
Tribunal of Gujarat	46		Committee Co 58
(1968) 1968-1 Lab DJ 79 (Delhi),			(1915) 1915 AC 120 = 84 LJKB 72,
Khadi Gramdyog Bhavan, New			Local Govt Board v. Ablidge 59
Delhi v. Delhi Administration	28, 32,		(1911) 1911 AC 179 = 80 LJKB
	33, 44		796, Board of Education v Rice 56
(1966) AIR 1966 Punj 354 (V 53) =			H. R Gokhale with R K. Rastogi and
ILR (1966) 2 Punj 498, Gondhara			M. C Bhoot, for Petitioner, M. Mridul, for
Transport Co (Pvt.) Ltd. v. State			Respondent No 4
of Punjab	13, 33, 50, 53		
(1965) AIR 1965 SC 1595 (V 52) =			MEHTA, J.: This is a writ petition under
(1965) 2 SCR 366, Associated			Article 226 of the Constitution by the Good
Cement Co Ltd v. P N. Sharma	58		Year India Ltd praying for quashing the
(1965) AIR 1965 SC 1767 (V 52) =			order of reference dated 16th May, 1967 by
(1965) 3 SCR 218, Lala Shri			the Government of Rajasthan to the Indus-
Bhagwan v Ram Chand	60		trial Tribunal, Jaipur and for an injunction
(1964) AIR 1964 All 328 (V 51) =			restraining the respondents from proceed-
(1964) 1 Lab LJ 724, Champion			ing with the purported adjudication.
Cycle Industries v State of			
U. P.	27, 31		2. The petitioner, Good Year India Ltd ,
(1964) 1964-1 Lab LJ 644 =			is a company duly incorporated under the
(1964-65) 26 FJR 385 (Punj),			Indian Companies Act having its Head
Rawalpindi Victory Transport Co			Office at 225-C Acharya Jagdish Bose Road,
(Pvt.) Ltd v. State of Punjab	20, 29		Calcutta with branches at many places in
(1964) 1964 AC 40 = (1963) 2 WLR			India including the one at Swastika House,
935, Ridge v Baldwin	58		Station Road, Jaipur. Shri A. A. Dhingra,
(1963) 1963-2 Lab LJ 717 = (1963)			respondent No 4 was previously sales re-
2 Mys LJ 230, Vasudeva Rao v.			presentative of the Company at Jullunder.
State of Mysore	25, 30		In January, 1954, he was posted at Jaipur
(1962) AIR 1962 All 70 (V 49) =			in the same capacity. On April 1, 1964 he
(1961) 1 Lab LJ 688, L. H. Sugar			was made sales assistant and on 1st January,
Factories and Oil Mills (Pvt.) Ltd.			1966 he was made area supervisor As an
v. State of U. P.	26, 30		area supervisor, Shri Dhingra was in charge
(1962) (1962) 1 Lab LJ 555 = (1962)			of the whole of the State of Rajasthan and
5 Fac LR 4 (Punj), Panipat Woollen			a few towns of Madhya Pradesh. On 16-
and General Mills Co. Ltd. v.			12-66, when his services were terminated
Industrial Tribunal, Punjab	19, 29		by the Company, he was drawing a salary
(1959) AIR 1959 Bom 538 (V 46) =			of Rs. 763 36 (Rs. 706 basic salary plus
ILR (1959) Bom 462, Rambhau			Rs 57.36 pause dearness allowance) be-
Sakharam Nagre v D G. Tatke	38, 56		sides a sizable amount as sales bonus. He
(1959) AIR 1959 Cal 339 (V 46) =			was directly responsible to the District
63 Cal WN 347, B N. Elias and			Manager of the Company stationed at
Co Pvt. Ltd v. G P Mukherjee	43		Delhi For business purposes, Delhi dis-
(1958) AIR 1958 SC 1018 (V 45) =			trict of the Company comprised the States
1959 SCR 1191, State of Bihar v.			of Punjab, Rajasthan, Himachal Pradesh,
.D. N Ganguli	16, 17, 51, 52		Kashmir, Hariyana, part of Uttar Pradesh
(1958) AIR 1958 Andh Pra 276			and Madhya Pradesh Annexure 'A' is a
(V 45) = (1958) 1 Lab LJ 20,			copy of the letter dated 16-12-1966, by
Gurumurthy v K. Ramulu	21, 30		which the employee's services were termi-
(1956) AIR 1956 Mad 113 (V 43) =			nated.
(1956) 1 Lab LJ 221, Radhakrishna			3. According to the petitioner, the duties
Mills (Pollachi) Ltd v State of			of the employee were of a supervisory
Madras	22, 32, 42		nature His duties did not involve any
(1956) AIR 1956 Mad 115 (V 43) =			manual, technical or clerical work Further
(1956) 1 Lab LJ 498, Ram Vilas			the employee's salary was at all material
Service Ltd. v. State of Madras	19,		times more than Rs. 500 per month He
	23, 32		was, therefore, not a workman within the
(1953) AIR 1953 SC 53 (V 40) =			definition of Section 2 (s) of the Industrial
(1953) 1 Lab LJ 174, State of			Disputes Act, 1947 (hereinafter called the
Madras v. C. P Sarathy	14, 50, 55		Act)
(1951) AIR 1951 Trav-Co 203			4. After the termination of the em-
(V 38) = 1951 Ker LT 121, Naga-			ployee's services, the District Manager of
linga Nadar Sons, Firm v. Ambala-			the petitioner received a communication
pusha Taluk Head Load Conve-			from the Regional Assistant Labour Com-
yance Workers Union, Alleppey	41		missioner and Conciliation Officer, Jaipur,
			dated 3rd January, 1967 (Annexure 'C')
			along with a copy of the representation ad-
			dressed by Shri Dhingra to the Conciliation

Officer (Annexure B) asking the District Manager to appear before him on 17-1-67 at 11 A M. In the conciliation proceedings, it was contended on behalf of the petitioner that Shri Dhangra was not a workman within the meaning of Sec 2 (s) of the Act and that, therefore, the conciliation proceedings were without jurisdiction. The petitioner elucidated its stand that Shri Dhangra was not a workman within the meaning of the Act by its representation dated 28th February, 1967 (Ex D) filed before the Conciliation Officer. Shri Dhangra reiterated that he was a workman. The conciliation proceedings did not bear any fruit. The Conciliation Officer made a report to the Government of Rajasthan under Section 12 (4) of the Act on the 3rd of March, 1967 intimating failure of conciliation between the petitioner and Shri Dhangra (Annexure E).

5. The petitioner submitted representation to the Government of Rajasthan, Department of Labour on 10th March, 1967 along with a memorandum pointing out that Shri Dhangra was not a workman, that in spite of the petitioner's insistence, the Conciliation Officer did not decide whether Shri Dhangra was a workman within the meaning of Section 2 (s) of the Act and that, therefore, the conciliation proceedings were without jurisdiction (Annexure F). On 18-4-67, the Government of Rajasthan in the Labour and Employment Department informed the petitioner and Shri Dhangra that it did not consider it a fit matter for reference to adjudication. The Government's letter reads as below—

"I am directed to say that on consideration of the failure of conciliation report it is felt that Shri Dhangra's main job was that of supervisory nature. Clerical work was only incidental. Looking to salary and other aspects of the case, the State Government, in exercise of powers conferred under Section 12 (5) of the Industrial Disputes Act do not consider it a fit matter for reference to adjudication."

6. The petitioner has stated that thereafter it was surprised to find a notification dated 16th May, 1967 issued by the Government of Rajasthan, in which it was alleged that an industrial dispute existed between the petitioner and Shri Dhangra and that in exercise of the powers conferred under Section 10 (1) (d) of the Act, the Government referred the alleged industrial dispute for the adjudication of the Tribunal. The notification reads as under:—

"whereas an industrial dispute specified below exists between M/s Good Year India Limited and their workman Shri A. A. Dhangra

Whereas on consideration, the State Government is satisfied that there is a case for reference to the Industrial Tribunal.

Now, therefore, in exercise of the powers conferred by Clause (d) of sub-s (1) of Sec-

tion 10 of the Industrial Disputes Act, 1947 (Act XIV of 1947), the State Government does hereby refer the abovesaid dispute for adjudication to the Industrial Tribunal, Rajasthan, Jaipur, duly constituted by the State Government under the Industrial Disputes Act, 1947 (Act No XIV of 1947)

DISPUTE

"Whether termination of the services of Shri A. A. Dhangra, an employee of M/s Goodyear India Limited, Rajasthan Depot, Murza Ismail Road, Jaipur, by the District Manager, Goodyear India Limited, Delhi, is valid, and justified? And to what relief, Shri A. A. Dhangra is entitled?"

7. The petitioner's case is that after receiving the order dated 18th April, 1967 from the Government of Rajasthan stating that it did not consider Shri Dhangra's case fit for reference for adjudication, the petitioner believed that the said case had been dropped. After passing the said order dated 18th April, 1967, no intimation was sent to the petitioner that the case was being reopened nor was there any change of circumstance after 18th April, 1967. The petitioner has alleged that the order of reference dated 16th May, 1957 was made in violation of the principles of natural justice. The order dated 16th May, 1967 does not give any reasons and is inconsistent with the reasoned order dated 18-4-67. The petitioner has prayed that the order dated 16th May 1967 may be quashed as it is illegal, without or in excess of the jurisdiction of the Government, arbitrary and capricious. The petitioner has also prayed that the respondents be restrained from taking any steps pursuant to the said order of reference.

8. No appearance has been given on behalf of the Tribunal, Conciliation Officer and the State of Rajasthan, respondents Nos 1 to 3. The writ petition has been contested by Shri A. A. Dhangra, respondent No 4. Shri Dhangra has stated that his duties were essentially of a clerical nature and that he was, a workman within the meaning of Section 2 (s) of the Act. He has admitted that after the termination of his services by the petitioner, he moved the Conciliation Officer for starting conciliation proceedings. The Conciliation Officer took necessary proceedings and submitted failure report to the Government on 3rd March, 1967. The State Government had not called upon him to make his submissions before issuing the order dated 18th April, 1967. When he got the order dated 18-4-67 from the Government, he made a representation maintaining that he was a workman and that the Government had erroneously refused to make a reference on the assumption that he was not a workman. He has maintained that the Government was well within its powers to make a reference of the dispute to the Tribunal under S 10 (1) of the Act, irrespective of the fact that it

had on an earlier occasion refused to make a reference while considering the failure report under Section 12 (5). According to the respondent No. 4, the Government has properly carried out the statutory duty cast upon it. He has prayed that the writ petition be dismissed.

9. The bone of contention between the parties was that while the petitioner contended that Shri Dhingra was not a workman within the meaning of Section 2 (s) of the Act, and, therefore, no proceedings could be taken under it, Shri Dhingra contended that he was a workman within the meaning of the Act and that his case should be decided under the provisions of the Act. In all fairness, learned counsel for the petitioner has not raised the question before us whether Shri Dhingra is a workman within the definition of Section 2 (s) of the Act. He has submitted that if the reference by the Government to the Tribunal is otherwise held to be valid, the question whether Shri Dhingra is a workman or not, being a question of fact, would have to be decided by the Tribunal. That being so, what we are called upon to decide is the validity of reference dated 16-5-67 by the Government to the Tribunal.

Learned counsel for the petitioner has assailed the reference on the following four grounds:

(1) The Government having made the order dated 18-4-67 under Section 12 (5), its powers under section 10 of the Act were exhausted and it had no power to make the order dated 16-5-67 superseding the order dated 18-4-67.

(2) By the order dated 16-5-67, the Government by implication, reviewed its order dated 18-4-67. The order dated 18-4-67 gave reasons in support of it. No reasons are mentioned in the order dated 16-5-67. The Government could not change the order dated 18-4-67 without giving reasons for doing so.

(3) The order dated 16-5-67 was passed in violation of the principles of natural justice as no intimation was given to the petitioner that the order dated 18-4-67 was being reviewed.

(4) No industrial dispute was raised by Shri Dhingra with the petitioner.

10. Learned counsel for respondent No. 4 has in reply stated that the order of reference made by the Government under Section 10 (1) (d) of the Act was only an administrative act and that refusal by it to refer it to the Tribunal earlier did not affect a subsequent reference of the same dispute for adjudication. As regards point No. 2, it has been submitted that no reasons were necessary to be given by the Government in making a reference under Sec 10 of the Act. If the Government is of opinion that any industrial dispute exists or is apprehended, it may, at any time, by order in writing, make a reference. In the order

dated 16-5-67, the Government has clearly stated that it is of the opinion that an Industrial dispute exists requiring it to be referred to the Tribunal for adjudication, which, according to the contesting respondent, met the requirements of Section 10 of the Act. On the third and fourth grounds, Shri Dhingra's stand is that there was no violation of the principles of natural justice and that an industrial dispute had unmistakably been raised by him with the petitioner.

11. We proceed to decide the points raised by learned counsel for the petitioner in *seriatim*:

12. Point No. 1. Section 10 (1) (d) and Section 12 (1), (4) and (5), which are material for our purposes read as below—

Section 10 (1). "Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at any time, by order in writing,

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication

Section 12 (1). Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under Section 22 has been given, shall hold conciliation proceedings in the prescribed manner.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

(5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, (Labour Court, Tribunal or National Tribunal), it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor."

12-A. Section 12 (5) of the Act provides that if, on a consideration of the report referred to in sub-section (4) of Section 12, the appropriate Government is satisfied that there is a case for reference to the Board, Labour Court, Tribunal or National Tribunal, it may make such a reference. It further provides that where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor. Section 12 (5) occurs in Chapter IV of the Act dealing with the Procedure, Powers

and Duties of the authorities under the Act. Section 12 (5) undoubtedly confers power on the appropriate Government to act in the manner specified by it. If the appropriate Government comes to the conclusion that the case for reference has been made out, such a reference can be made under Section 10 (1).

13. The submission on behalf of the petitioner is that once an order under Section 12 (5) has been made by the Government refusing to refer the matter to the Tribunal for adjudication, it could not make an order of reference under Section 10 (1) of the Act. For this proposition, reliance has been placed on a single Bench decision of the Punjab High Court in *Gondhara Transport Co (Pvt) Ltd v. State of Punjab*, AIR 1966 Punj 354. In that case, the Punjab Government issued the notification dated March 1, 1962 under Section 10 (1) of the Act purporting to make a reference of the two industrial disputes to the Labour Court, Rohtak in direct reversal of the earlier order dated July 20, 1961 stating that the Government did not consider them as fit cases for adjudication. The High Court held that the impugned reference of the dispute to the Labour Court in reversal of the earlier order of the Government dated July 20, 1961 is not authorised by any provision of law and is not valid as the power of the State Government under Section 10 (1) of the Act in relation to the said dispute had been exhausted after the issue of letter dated 20th July, 1961. The relevant observations are contained in paragraph No 21 and read as below:

"Considering the scheme, objects and purposes of the relevant provisions of the Act as a whole it appears to be clear that words "at any time" in S. 10 (1) of the Act refer to a period which commences with the issue of demand notice or with any other legal steps by which the proceedings are initiated for making a reference to a Labour Court or Tribunal and which period terminates with an order of the appropriate Government either making a reference or declining to make it for any valid reason. Once the Government has arrived at and given out its decision one way or the other, S. 10 (1) of the Act ceases to exist for that particular dispute or demand and with such a decision of the Government the words "at any time" contained in S. 10 (1) of the Act also cease to operate."

14. It is well settled that in making a reference under Section 10 (1) of the Act, the Government is doing an administrative act; it is neither a judicial nor a quasi-judicial act. This position is accepted by learned counsel for the petitioner. In this connection, it would be sufficient to refer to the following observations of the Supreme Court in *the State of Madras v. C. P. Sarathy*, AIR 1953 SC 53 = (1953) 1 Lab LJ 174

"But, it must be remembered that in making a reference under S 10 (1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters."

15. A reference under Section 10 (1) of the Act is an administrative act. Such an order, being an administrative order, can it be said that there is a bar to the appropriate Government to give a different decision? Cases may arise where it may be open to the Government to give a different decision on grounds of expediency or if it is found that its earlier order lacked proper consideration of all material facts or is vitiated by some error requiring further consideration of the matter.

In the single bench decision of the Punjab High Court referred to above, it has been held that the order of the State Government refusing to make a reference, could not be reversed by holding that the dispute may be referred to the Labour Court. This view does not, with respect, seem to us to be well founded. Also, the view taken in that case is opposed to the view taken by the other High Courts as would be shown presently.

16. Learned counsel for the petitioner has also placed reliance on the State of Bihar v. D. N. Ganguly, AIR 1958 SC 1018. He has submitted that though that case has no direct bearing on the point involved in the present case, it lends support to it. In that case, it has been held that the Act does not expressly confer any power on the appropriate Government to cancel or supersede a reference made under Section 10 (1) of the Act. Nor can such power be claimed by implication on the strength of S 21 of the General Clauses Act. The rule of construction enunciated by S 21 of the General Clauses Act in so far as it refers to

the power of rescinding or cancelling the original order cannot be invoked in respect of the provisions of Section 10 (1) of the Act. Once an order in writing is made by the appropriate Government, referring an industrial dispute to the Tribunal for adjudication under Section 10 (1) of the Act, proceedings before the Tribunal are deemed to have commenced and they are deemed to have concluded on the day on which the award made by the Tribunal becomes enforceable under Section 17-A. After the dispute is referred to the Tribunal, during the continuance of the reference proceedings, it is the Tribunal which is seized of the dispute and which can exercise jurisdiction in respect of it. Except for cases falling under Section 10 (5) of the Act, the appropriate Government stands outside the reference proceedings, which are under the control and jurisdiction of the Tribunal itself.

17. In the present case, the question of cancelling or superseding the reference made by the Government on 16-5-67 under Section 10 (1) of the Act is not involved and, therefore, that case has no direct application to the facts of the present case. Let us see whether it lends support to the case of the petitioner in any way. The case lays down that once an order in writing is made by the appropriate Government referring an industrial dispute to the Tribunal for adjudication under Section 10 (1), the Tribunal is seized of the dispute and the Government stands outside the reference proceedings, which are under the control and jurisdiction of the tribunal. To say that when the Government cannot cancel or supersede the order of reference made under Section 10 (1), it cannot also cancel or supersede the order made under Section 12 (5) refusing to make a reference is not correct. After making a reference under Section 10 (1) of the Act, the jurisdiction and control over the dispute vests in the Tribunal and the appropriate Government stands outside the reference proceedings whereas after making an order under Section 12 (5) of the Act refusing to refer the matter to the Tribunal, the Government does not get divested of its power to reconsider the matter. It does not get functus officio and there is no bar to its reconsidering the matter and in coming to a finding that reference be made to the Tribunal. The decision AIR 1958 SC 1018 is thus of no help to the petitioner.

18. I may now refer to the decisions cited by learned counsel for respondent No. 1 which have taken a contrary view.

19. In *Panipat Woollen and General Mills Co. Ltd. v. Industrial Tribunal, Punjab*, (1962) 1 Lab LJ 555 (Pun) it has been observed.

"The first point that has been raised by the learned counsel for the petitioners relates to a legal issue, namely, whether a

dispute which the Government had earlier refused to refer, could be referred for adjudication. The tribunal has stated that the management led no evidence to support this contention nor did its representative even advert to the issue during the course of arguments before the tribunal. As this contention was not pressed before the tribunal, no question of examining it in these proceedings arises. Even otherwise there can be no doubt that the order of reference under S. 10 (1) is an administrative act of the Government. If there is an industrial dispute, the factual existence of which could not really be in dispute, a fresh determination by the Government of the question of the expediency of making a reference does not amount to a review of a question judicially determined previously and, therefore, a prior order of the Government does not affect the jurisdiction of the Government to exercise the statutory power under S. 10 (1) (c) of the Industrial Disputes Act (vide *Ram Vilas Service, Ltd. (Kumbakonam Branch) v. State of Madras*, (1956) 1 Lab LJ 498 = (AIR 1956 Mad 115)).

20. In *Rawalpindi Victory Transport Co. (Pvt.) Ltd. v. State of Punjab*, (1964) 1 Lab LJ 644 it has been held that annexure H would show that the Government had not specifically mentioned that they were not prepared to make a reference to the labour Court, as provided in S. 10 (1) of the Act and that even if this annexure is construed to be such a refusal, the Government could review its previous decision and make a reference to the Labour Court.

21. In *Gurumurthy v. K. Ramulu* AIR 1958 Andh Pra 276 the Government of Madras had declined to make a reference of a labour dispute. The Government of Andhra, its successor, after consideration of the subsequent events, came to a conclusion that there was a dispute, which must be referred to the decision of the tribunal and accordingly made the reference under Section 10 (1). The relevant observations read.

"The fact that the Government of Madras declined to make a reference does not invalidate the order of reference made by the Government of Andhra. The order passed by the Government of Madras is an administrative order and is neither a judicial nor a quasi-judicial order. It was open to the Government of Andhra to take into account the subsequent happenings and circumstances and in the event of their being satisfied that there was a dispute, to make a reference under S. 10 (1), and that is what the Government of Andhra have done.

The further contention that no reference can be made under S. 10 (1) without following the procedure laid down in S. 12 (5) of the Act is unsustainable. Under S. 10 (1) the Government can make a reference if they are of opinion that an industrial dispute exists or is apprehended. The jurisdiction of the Government to make a refer-

ence under S. 10 (1) is independent of the procedure laid down in S 12 (5)"

22. In *Radhakrishna Mills (Pollachi) Ltd v. State of Madras*, AIR 1956 Mad 113 it has been held that a decision under S. 12 (5) of the Act is an administrative act and not a judicial or a quasi-judicial adjudication. Such a decision has not been invested with any statutory finality by any provision of the Act. The right of the Government, very often it is a duty, is not exhausted by the exercise of the power vested in it by S 12 (5) of the Act. It could re-examine the question of expediency afresh.

23. In AIR 1956 Mad 115 = (1956) 1 Lab LJ 498 it has been held that if there was an industrial dispute, the factual existence of which could not really be in dispute a determination afresh by the Government of the question of the expediency of referring such a dispute for adjudication under S. 10 (1) (c) of the Act did not amount to a review of any question judicially determined previously, and that a prior order of the Government under Section 12 (5), which refused to refer for adjudication a given dispute, did not affect the jurisdiction of the Government to exercise the statutory power conferred upon it by S 10 (1) (c) of the Act on any subsequent occasion.

24. The contention of the learned counsel for the petitioner, that the order of the Government dated 27-8-1953 under S. 12 (5) barred the exercise of the jurisdiction conferred on the Government by S 10 (1) (c) of the Act, which it exercised on 13-7-1954 was negatived.

25. In *Vasudeva Rao v. State of Mysore*, (1963) 2 Lab LJ 717 (Mys) it has been observed that it is well settled that an order of the Government making a reference is an administrative act and not a quasi-judicial one, and that Government is the sole judge in regard to the factual existence of an industrial dispute and of the expediency of making a reference. It has further been observed that it is hardly open to doubt that, as the power under Section 10 (1) has been conferred upon Government in the interests of industrial peace, the amplitude of the power cannot be curtailed by the importation of other principles unless there is any warrant for them in the statute itself and that even if at one stage Government had come to the conclusion that no reference is called for in the interests of industrial peace, it may re-examine the matter, whether in the light of fresh material or otherwise, and make a reference if it comes to the conclusion that a reference is justified, in the interest of industrial peace.

26. In *L H Sugar Factories and Oil Mills (Pvt.), Ltd Pilibhit v State of Uttar Pradesh*, (1961) 1 Lab LJ 688 = (AIR 1962 All 70) the observations are —

"One can visualize a situation where Government first decides not to refer a dispute

for adjudication by the industrial tribunal but subsequently on receiving more reliable reports on the gravity of the situation in the locality, it decides to make a reference in my opinion, Government can always review its previous decision and make a reference provided it acts bona fide and within a reasonable time and there is no statutory bar against such review."

27. In *Champion Cycle Industries v. State of Uttar Pradesh*, (1964) 1 Lab LJ 724 = (AIR 1964 All 328) it has been observed —

"If it can refer an industrial dispute to-day even though it did not refer it yesterday it can refer it today even though it deliberately refused to refer it yesterday; its saying yesterday that it would not refer it does not bar its referring it today. Its refusal yesterday to refer it does not amount to its deciding anything which may operate as *res judicata* or as estoppel. The State Government, therefore, could refer the industrial dispute to the Labour Court in spite of its having refused to do so on a previous day."

28. In *Khadi Gramodyog Bhavan, New Delhi, v. Delhi Administration*, (1968) 1 Lab DJ 79 (Delhi) it has been held that even if at one stage the Government had come to the conclusion that no reference was called for, it may re-examine the matter whether in the light of fresh material or otherwise, and make a reference if it came to the conclusion that a reference is justified, in the interest of industrial peace.

29. Learned counsel for the petitioner has submitted that it was not necessary in (1962) 1 Lab LJ 555 (Pun) to decide whether a dispute which the Government had earlier refused to refer could be referred for adjudication as it was not pressed before the tribunal. In (1964) 1 Lab LJ 644 (Pun) the Government had not specifically mentioned in its earlier order that it was not prepared to make a reference. It has, therefore, been urged on behalf of the petitioner that the observations in these cases were in the nature of obiter dicta. Even so, they are entitled to great respect as they appear to be considered expression of opinion on the question of law involved.

30. As regards the cases, namely, AIR 1958 Andh Pra 276, (1963) 2 Lab LJ 717 (Mys) and (1961) 1 Lab LJ 688 (All) it has been urged that there was fresh material before the Government to revise its earlier decision, which was not there in the present case. It is true that in cases, AIR 1958 Andh Pra 276 and (1961) 1 Lab LJ 688 = (AIR 1962 All 70) subsequent events were taken into consideration by the Government in revising its earlier decision, but it has been held that the order declining to make a reference is an administrative order and is neither a judicial nor a quasi judicial order and that being so, the Government

could re-examine the question of expediency and make a reference under Section 10 (1) of the Act. In (1963) 2 Lab LJ 717 (Mys) it has been held that the earlier decision refusing to refer the matter for adjudication could be re-examined in the light of fresh material or otherwise. According to this authority, re-examination of the matter was not solely dependent on fresh material. It was permissible otherwise also.

31. As regards the case, (1964) 1 Lab LJ 724 = (AIR 1964 All 328) it has been submitted that it was a case under Section 4-K of the Uttar Pradesh Industrial Disputes Act, which provision was analogous to Section 10 (1) of the Act, but there was no provision similar to Section 12 (5) of the Act in the said Uttar Pradesh Act, and, as such, the observations in this case carry no force. Even if the provision similar to Section 12 (5) had been there, it would have made no difference to the decision of the case.

32. With regard to (1968) 1 Lab DJ 79 (Delhi) it has been stated that the previous order was revised on the recommendation of the Labour Commissioner, which was a distinguishing feature. It is true that the earlier decision not to refer the dispute for adjudication was revised on the recommendation of the Labour Commissioner, but the principle that has been laid down is that a refusal by the Government earlier to refer a dispute can be revised by it. No distinguishing features have been pointed out in respect of cases AIR 1956 Mad 113 and AIR 1956 Mad 115.

33. Gondhara Transport Company's case, AIR 1966 Punj 354 on which reliance has been placed on behalf of the petitioner has been noticed and dissented by the Delhi High Court in (1968) 1 Lab DJ 79 (Delhi) and, if we may say so, with respect, correctly.

34. Having carefully considered the matter, my view is that a decision under Section 12 (5) not to make a reference is an administrative act and not a judicial or quasi judicial adjudication and such a decision not having been invested with statutory finality by any provision of the Act, the Government can re-examine the question and make a reference under Section 10 (1) if it is of the opinion that an industrial dispute exists or is apprehended. The earlier decision by the Government not to make a reference does not operate as res judicata. The fact that the appropriate Government had refused to refer an industrial dispute for adjudication could not bar the Government from subsequently referring the same dispute for adjudication, provided the conditions mentioned in section 10 (1) are satisfied.

35. Point No 2.— It has been argued on behalf of the petitioner that the order dated 16-5-67 of the Government referring the dispute to the tribunal does not contain

reasons, and, as such, it was not a proper order in the eye of law. Section 10 (1) of the Act states that when the State Government is of the opinion that any industrial dispute exists or is apprehended, it may, at any time, by order in writing refer the dispute to the appropriate labour court or tribunal. It is clear from the language of S. 10 that the power to refer the dispute to the tribunal rests with the appropriate Government and for making reference it may give reasons and may not do so. The satisfaction of the Government is the only condition precedent to the making of the order of reference. In the order dated 16-5-67, it has been clearly stated by the Government that it is satisfied that there is a case for reference to the tribunal. The order of reference meets the requirements of law.

36. It has been urged that reasons have been given in the order dated 18-4-67 refusing to make a reference, and, therefore, reasons should also have been given in the order dated 16-5-67 making a reference to the tribunal. This argument does not seem to have force in it. When a report from the Conciliation Officer is received on failure of conciliation under Section 12 (4), the State Government is required to consider it, and if, under sub-section (5) of that Section, it is satisfied that there is a case for reference, it may make it, but if, on the other hand, it makes no reference, it should record and communicate to the parties concerned its reasons therefor. In case the Government refuses to make a reference, it is imperative for it to record reasons and communicate them to the parties concerned. That is why reasons were recorded in the order dated 18-4-67 and communicated to the parties. No such reasons are required to be given in the order of reference to the tribunal. What is required in such an order is satisfaction of the Government that there is a case for reference to the tribunal. This being the position, no reasons were necessary to be recorded in the order of reference dated 16-5-67 and it was not bad on that account.

36-A. Point No. 3 — It has been contended that the order dated 16-5-67 of the Government making the reference to the tribunal revising its earlier order dated 18-4-67 refusing to make a reference was made in violation of the principles of natural justice and, therefore, its validity could be challenged. After the order dated 18-4-67, Shri Dhingra made representation Ex. D. 1 dated 25-4-67 requesting the Government to reconsider the matter and refer the dispute for adjudication to meet the ends of justice. It has been argued on behalf of the petitioner that the representation dated 25-4-67 of Shri Dhingra amounted to a hearing to him by the Government. No opportunity was given to the petitioner to put its point of view before the Government. Therefore, the order dated 16-5-67

was illegal and invalid, being against the principles of natural justice. On facts as well as in law, this argument does not seem to be sustainable.

37. It may be recalled that after his services were terminated, Shri Dhangra made a representation to the Conciliation Officer (Annexure B) for starting conciliation proceedings. On his representation, the Conciliation Officer started proceedings and made a failure report. The petitioner gave detailed representations to the conciliation officer during conciliation proceedings and after the submission of the failure report, to the Government challenging the report made by the conciliation officer. The Government on 18-4-67, did not consider it to be a fit case for reference to adjudication. Thereafter, Shri Dhangra requested the Government by his representation dated 25-4-67 to reconsider its decision. This representation contains no new material. In it, Shri Dhangra has reiterated that he is a workman within the meaning of the Act, which is the position he has taken from the very inception.

38. In this connection, reliance has been placed on behalf of the petitioner on *Rambhau Sakham Nagre v. D. G. Tatke*, AIR 1959 Bom 538. In this case, the Government of the State of Bombay by a notification issued by them on the 19th April, 1955 fixed wages for workers in Bidi manufacturing concerns in certain areas at the rate of Rs 2/2 per thousand bidis. By the various notifications, the manufacturers in certain areas were exempted, which (exemption) was extended from time to time till 31-12-1956. The exemption, however, was withdrawn or cancelled by the Government by notification dated 22nd August, 1956 effective from 1st September, 1956. On behalf of the bidi workers it was contended that consequent upon the withdrawal of the exemption, they became entitled to the wages at the rate of Rs. 2/2 per thousand bidis from 1st September 1956 to 31st December, 1956. The owners of the bidi manufacturing concerns, who were respondents contested this claim on the ground that, before withdrawing the exemption already granted, the State Government gave a hearing to the representative of the workers, but gave no opportunity to the employers to put their views before them, and, as such, the notification withdrawing the exemption was invalid. It has been observed—

“Where there are two parties in a controversy, as in the present case where the parties are employers and the employees, a fair opportunity must always be given to both of them in correcting or contradicting any relevant statement prejudicial to their view. In the present case, it would appear that after the exemption from the application of the Act was granted by the State Government by its notifications, Mr Nagre, a representative of the employees, met the authorities of the Government and discussed

the matter with them. The Government thereafter gave no opportunity to the employers to put their views before them. It was impossible for the employers to know what might have been stated by Mr. Nagre to the State Government. It is not improbable that the statements made by Mr. Nagre to the State Government might have been prejudicial to the interests of the employers in which case it was but fair to give an opportunity to the employers to correct or contradict those statements. As the notification withdrawing the exemption was issued arbitrarily by the State Government in this case, we must uphold the contention of Mr. Kotwal pressed before us on behalf of the employers, the owners of the bidi manufacturing concerns, that it was an illegal and invalid notification.”

39. This case has no application to the facts of the present case inasmuch as it is not the case of the petitioner that Shri Dhangra met any authorities of the Government and discussed the matter with them. The representation dated 25-4-67 filed by Shri Dhangra did not amount to a hearing as it merely contained a request for reconsideration with no new material incorporated in it. In fact, new material there could be none in this case as the entire dispute centred round the petitioner's stand that Shri Dhangra was not a workman and Shri Dhangra's stand that he was a workman within the meaning of the Act. The respective point of view of the parties was fully before the Government when it made the order dated 18-4-67 and, thereafter, when it thought it expedient to reverse it by the notification dated 16-5-67 making a reference to the tribunal. The aforesaid Bombay case is clearly distinguishable from the facts of the present case.

40. I may now refer to some authorities holding that no hearing in such a case is necessary.

41. In *Nagalinga Nadar Sons, Firm v. Ambalapuzha Taluk Head Load Conveyance Workers Union, Alleppey*, AIR 1951 Trav-Co 203 a similar question was raised, which was repelled in these words—

“Now I shall proceed to consider the fifth point raised before me viz, that the order of reference is invalid as in making it Government did not conform to the rules of natural justice. What was urged was that Government did not issue notice to the petitioners or hear them before referring the dispute to the Tribunal. I am not aware of any law or rule that even where any judicial function is not invoked an authority should give notice or hear both sides to a controversy before it takes action sanctioned by law. As far as I understand the position it is a pure executive or administrative act of Government to refer an industrial dispute to a Tribunal appointed by them. In my view there is no substance in this contention.”

42. Similarly, in AIR 1956 Mad 113 it has been held that failure to give notice of reference to the management does not vitiate the exercise of the statutory power vested in Section 10 (1).

43. In *B. N. Elias and Co. Private Ltd. v. G. P. Mukherjee*, AIR 1959 Cal 339 while holding that the Government is not bound to give notice to the parties or to hear them, it has been observed—

“It is now well settled that the order of reference under Section 10 (1) of the Industrial Disputes Act is an administrative act and that the expediency of making a reference is a matter entirely for the Government to decide. see *State of Madras v. C. P. Sarathy*, 1953 SCR 334 at pp 346-347 = (AIR 1953 SC 53 at p. 57). The Government is not bound to give notice to the parties or to hear them before making the order of reference.”

44. In (1968) 1 Lab DJ 79 (Delhi) it has been held that where the Government refuses to refer the dispute, it is open to it to revise and such a revision can be made without notice to the parties.

45. The Government was not bound to give notice to the parties or to hear them before making the order of reference. There was no violation of the principles of natural justice in this case.

46. Point No. 4:— It has been urged that no industrial dispute had been raised by the employee with the petitioner and, as such, the reference was not competent. This is not so. The employee's services were terminated by the petitioner on 16-12-66. Immediately thereafter, he moved an application before the Conciliation Officer challenging the termination of his services and requesting for reinstatement. The petitioner opposed his reinstatement. It cannot, in the circumstances, be said that no industrial dispute had been raised by Shri Dhingra with the petitioner. Reliance has been placed on behalf of the petitioner on the decision of the Supreme Court in *Sindhu Resettlement Corporation v. Industrial Tribunal of Gujarat*, AIR 1968 SC 529. In this case, the retrenched employee and the Union had confined their demand to the management to retrenchment compensation only and did not make any demand for reinstatement. That being so, the reference made by the Government under Section 10 in respect of reinstatement was held by the Supreme Court to be not competent. It was held that the only reference, which the Government could have made had to be related to payment of retrenchment compensation. In the present case, the dispute is about wrongful termination of the employee's services and the demand is about reinstatement. The reference relates to it. The said Supreme Court decision is thus clearly inapplicable.

47. The decision of this point also goes against the petitioner

48. For the aforesaid reasons, the writ petition fails and should be dismissed with costs.

49. **BHANDARI, J.:** I agree with my learned brother. I however take this opportunity of making some observations on the various points raised by learned counsel for the petitioner.

50. The first point raised is that the State Government having refused to make a reference to the Industrial Tribunal on 18th April, 1967, had no power to make a reference on 16th May, 1967. The power to make a reference to the Industrial Tribunal is vested in the State Government under Section 10 (1) (d) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). This power is of purely administrative nature. The exercise of this power depends entirely on the opinion of the Government and such opinion is subjective which cannot be challenged in a court of law. Reference may be made in this connection to the *State of Madras v. C. P. Sarathy*, AIR 1953 SC 53. The argument, however, is that once this power has been exercised by refusing to make a reference, it cannot be exercised again by making a reference. It is urged that the expression “at any time” occurring in Section 10 (1) (d) means at one time or only once. This is not the literal meaning of the expression “at any time” nor this meaning can be discerned in the context of Section 10 (1) of the Act. The words “at any time” only emphasise that there are no restrictions on the power of the appropriate government to refer the industrial dispute provided that it is of opinion that such dispute exists or is apprehended. There is no restriction or impediment for the appropriate government to form one opinion and then to form another opinion which may be altogether contrary to its first opinion nor can a court of law review the decision of the appropriate government to refer a dispute even though it has material on record that earlier that very Government had refused to make a reference. The decision of AIR 1966 Punj 354 that the words “at any time” refer to a period which commences with the issue of demand notice or with any other legal steps by which the proceedings are initiated for making a reference and terminates with an order of the appropriate government either making a reference or declining to make it does not appear, if I may say so with respect, to be correct. It is not necessary that there must be any regular proceedings before the appropriate government for making a reference nor does it seem proper to infer that there is any termination of the power to make a reference when the appropriate government declined to make it at one stage.

51. Learned counsel for the petitioner has urged that the Supreme Court in AIR 1958 SC 1018 has taken the view that the

appropriate government has no power to cancel or supersede a reference made under Section 10 (1) of the Act and has further held that such power cannot be claimed by the appropriate government by implication under Section 21 of the General Clauses Act. It has been urged that the same principle should apply when the appropriate government has declined to make a reference at one stage and it should be held that the appropriate government had no power to cancel or supersede that order. In my humble opinion, there is an obvious fallacy in this argument. By making a reference the appropriate Government altogether divests itself with the subject-matter of the reference and sends the matter to a Tribunal constituted under the Act to be decided in accordance with law. After making the order of reference, the subject-matter of reference does not remain in the hands of the State Government. The reference proceedings go exclusively within the jurisdiction of the Tribunal. This has been pointed out by their Lordships of the Supreme Court in the State of Bihar's case, AIR 1958 SC 1018 (supra) in the following observations

"The scheme of the provisions in Chapters III and IV of the Act would thus appear to be to leave the reference proceedings exclusively within the jurisdiction of the tribunals constituted under the Act and to make the awards of such tribunals binding between the parties, subject to the special powers conferred on the appropriate government under Sections 17A and 19. The appropriate government undoubtedly has the initiative in the matter. It is only where it makes an order in writing referring an industrial dispute to the adjudication of the tribunal that the reference proceedings can commence, but the scheme of the relevant provisions would prima facie seem to be inconsistent with any power in the appropriate government to cancel the reference made under Section 10 (1)."

The same cannot be said when the appropriate Government has refused to make a reference. The power to make a reference at any subsequent time remains in the appropriate government and unless there is an express prohibition in the exercise of that power, it cannot be said that that power is exhausted. This also follows if the provisions of section 21 of the General Clauses Act, 1897, are applied. Their Lordships of the Supreme Court in the State of Bihar, AIR 1958 SC 1018 (supra) did not lay down that section 21 will not apply even when the power to make a reference is still in the hands of the Government. To take a familiar example, a State Government may decline to sanction prosecution of a government servant at one time and may revise its opinion and sanction his prosecution later on. But once prosecution has been launched in a criminal court, it does not lie in

the hands of the State Government to withdraw the case except under the provisions laid down in the Code of Criminal Procedure. The reason is that having sanctioned the prosecution, the matter, so far as the prosecution is concerned, has gone out of the hands of the State Government. But as long as it remains in the hands of the State Government, it can change its mind at any time.

52. Learned counsel has argued that whatever may be the position, when the order refusing to make a reference is made in a case in which section 12 of the Act has not been resorted to, but when a reference has been refused under sub-section (5) of Section 12, it is not possible for the appropriate government to revise its order of refusal to make a reference. It is urged that under Section 12 (5) of the Act, the appropriate government has to record its reason for not making a reference after receiving a report from the conciliation officer and to communicate the said reasons to the parties concerned and it cannot be envisaged that the appropriate government should be granted the power of reversing its order for which reasons have been assigned and those reasons are communicated to the parties concerned. In this connection it may be pointed out that power to make a reference is contained in Section 10 (1) of the Act and not in anything contained in Section 12 (5). That power cannot be said to be exhausted even when an order has been made refusing to make a reference under Section 12 (5) and reasons for not making a reference have been recorded and communicated to the parties concerned. Learned counsel has mainly relied for his contention on the following observations in AIR 1958 SC 1018 (supra)

"There is another consideration which is relevant in dealing with this question. Section 12 which deals with the duties of the conciliation officer provides in substance that the conciliation officer should try his best to bring about settlement between the parties. If no settlement is arrived at, the conciliation officer has to make a report to the appropriate government, as provided in sub-section (4) of Section 12. This report must contain a full statement of the relevant facts and circumstances and the reasons on account of which in the opinion of the officer the settlement could not be arrived at. Sub-section (5) then lays down that if, on a consideration of the report, the appropriate government is satisfied that there is a case for reference to a board, labour Court, tribunal or national tribunal, it may make such a reference. Where the appropriate government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor. This provision imposes on the appropriate govt. an obligation to record its reasons for not making a reference after receiving a report from the conciliation officer and to

communicate the said reasons to the parties concerned. It would show that when the efforts of the conciliation officer fail to settle a dispute, on receipt of conciliation officer's report by the appropriate government, the government would normally refer the dispute for adjudication; but if the government is not satisfied that a reference should be made, it is required to communicate its reasons for its decision to the parties concerned. If the appellant's argument is accepted, it would mean that even after the order is made by the appropriate government under Section 10 (1), the said government can cancel the said order without giving any reasons. This position is clearly inconsistent with the policy underlying the provisions of Section 12 (5) of the Act. In our opinion, if the legislature has intended to confer on the appropriate government the power to cancel, an order made under Section 10 (1), the legislature would have made a specific provision in that behalf and would have prescribed appropriate limitations on the exercise of the said power."

The aforesaid observations have been made only to point out that while reasons are to be recorded and to be communicated to the parties concerned, when the appropriate government is following the procedure under Section 12 (5) and refusing to make a reference, it would be against the spirit of section 12 (5) to hold that the appropriate government would have the liberty to cancel the order of reference without giving any reasons under Section 10 (1). Cancelling of an order of reference is virtually refusing to make a reference for which reasons are to be assigned. Cancellation of an order of reference without assigning any reasons would be clearly inconsistent with the policy underlying S. 12 (5) and Section 12 (5) contemplates assigning reasons for making a reference. These observations cannot be construed as affording any help to the argument that even when a reference has been previously refused and reasons for such refusal were recorded and communicated to the parties concerned, the appropriate government cannot review this order and make a reference. The policy underlying the provisions of Section 12 (5) is that order of refusal to make a reference must be made after recording reasons therefor and such reasons must be communicated to the parties concerned. The policy may be that reference may not be refused on flimsy grounds or it may be that the parties concerned may on refusal by an appropriate government to make a reference take such steps that they think proper for settling their disputes. But making a reference does not in any way conflict with the policy that may be underlying the provisions of Section 12 (5) of the Act. The aforesaid observations rather impliedly convey that under Section 10 (1), recording of reasons is not necessary.

53. In my humble opinion, the view taken by the Punjab High Court in AIR 1966 Punj 354 (Supra) is not correct. The other cases in which that view has not been accepted have been referred to in the judgment of my learned brother and I need not refer to them over again. In my humble opinion, the view taken in these cases is correct even though in some of the cases this view has been expressed only by way of obiter dicta.

54. It will be proper in my view to dispose of the third point raised by learned counsel for the petitioner at this stage. It has been urged that the order making the reference was passed in violation of the principle of natural justice as the order was passed after receiving the representation from the respondent No 4, and no notice of this representation was given to the petitioner nor was any opportunity afforded to him to have his say on this representation. Apart from the facts of the instant case, the broader question is whether the principles of natural justice are to be followed in a case like this.

55. I have already pointed out that making of a reference under Section 10 (1) is purely an administrative act. The Supreme Court has clearly said in AIR 1953 SC 53 (supra) that the court cannot canvass the order of reference closely to see if there is any material before the Government to support its conclusion as if it was a judicial or quasi-judicial determination. This being the position, the court is equally incompetent to see whether any principles of natural justice have been followed or not in making the order of reference. It has been stressed that by making a reference the rights of the petitioner are seriously jeopardised as a new liability may be imposed on him to keep the respondent No 4 in employment in case the industrial tribunal directs him to do so under the provisions of the Act. It is contended that under the general law, by illegally terminating the services of an employee, the employer incurs the liability to compensate the employee but he is under no obligation to keep him under employment but the Act casts on the employer the liability to keep even an undesirable employee in employment if such is the decision of the industrial tribunal. It is urged that order of such a nature when it is passed against the employer in supersession of the earlier order refusing to make a reference must be passed after notice to the employer and after giving an opportunity to have his say on the representation made by the employee.

56. Learned counsel for the petitioner has relied on the decision of the House of Lords in the Board of Education v. Rice, 1911 AC 179 and on the decision of the Bombay High Court in AIR 1959 Bom 538.

57. Before I take these cases into consideration, I may make some general observations.

58. The circumstances under which a writ of Certiorari may be issued are laid down in the following passage of Lord Atkin, L J in *Rev v Electricity Commissioner, Ex parte London Electricity Joint Committee Co.*, (1924) 1 KB 171

"... the operation of the writs of prohibition and certiorari has extended to control the proceedings of bodies which do not claim to be and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs"

Lord Reid in a recent judgment of the House of Lords in *Ridge v Baldwin*, 1964 AC 40 has explained that the judicial element may be inferred from the nature of the power conferred on an authority. This view must be taken to be approved by the Supreme Court in *Associated Cement Companies Ltd v. P N Sharma*, AIR 1965 SC 1595 where it has been observed that

"In dealing with questions as to whether any impugned orders could be revised under Article 226 of our Constitution, the test prescribed by Lord Reid in this judgment may afford considerable assistance"

Now in a case in which administrative authority is to decide a dispute in a quasi-judicial manner, the principles of natural justice may be applied. The right of hearing is a rule of natural justice. About this rule Wade has observed in *Administrative Law*, 1961 Edition at page 142 that

"... the courts took their stand several centuries ago on the broad principles that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. It extended into almost every sphere of administration until, not many years ago, an unexpected reaction set in. The hypothesis, on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. If the court cannot control administrative discretion within its proper sphere, it can at least see that the discretion is not exercised without consideration of both sides of the case. Nothing is more likely to conduce to just and right decisions than the habit of first giving a hearing to any affected party. All power needs to be so exercised, regardless of whether it is judicial or administrative. In enforcing this principle, therefore, the courts have found an important piece of common ground on which to base both legal and administrative justice."

It can be very well visualised that in a country not covered by Constitution the courts in order to safeguard the rights of parties rightly inferred that even an administrative tribunal should decide their rights following the principles of natural justice. But nevertheless the case must be such in which either from the constitution of the authority or the nature of the dispute or from the statutory provision under which that authority is exercising the jurisdiction, it may be inferred that the case is to be decided in a quasi-judicial manner. Before saying that an administrative authority has violated the principles of natural justice, it must be held that the authority was duty-bound to adopt judicial approach.

59. Now I take into consideration the decision of the House of Lords relied on by learned counsel for the petitioner. The following observations in that case were relied on

"Comparatively recent statutes have extended if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind, but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine then there is a remedy by mandamus and certiorari."

It may be noted that in that case, Lord Loreburn had expressed the view that the Board was in the nature of arbitral tribunal and was to act judicially. Lord Haldane approved these observations of Lord Loreburn in *Local Government Board v. Abldge* 1915 AC 120. It was observed that in deciding the appeal the local government or the Board must act judicially. They must deal with the questions referred to them without bias and they must give to each of the parties the opportunity of adequately representing the case. Those ob-

servations of Lord Loreburn cannot be of any assistance to the petitioner unless it is held that the State Government was bound to act in quasi-judicial manner in referring the dispute to the industrial tribunal; but it is conceded that this is not so.

60. The Bombay High Court in Ram-bhau Sakham Nagre's case (supra) has relied on that aforesaid observations of Lord Loreburn for taking the view that even when an authority is exercising purely administrative power, its action can be quashed on the ground that it was arbitrary as it heard one of the parties affected while denied the right of hearing to the other. In my humble opinion, administrative act which is based on a policy may appear to be arbitrary to some minds but this does not mean that it is illegal. The very foundation for applying the rules of natural justice is that the authority must be bound to adopt judicial approach to the question before it. If this latter element is lacking, the act of such authority could not be illegal simply because one or the other party whose interests are affected have approached and had put its case before it behind the back of the other. It may not be proper to grant hearing to one party behind the back of the other. but, strictly speaking, the order passed by the authority is not illegal. I may draw support for this view on the following observations of their Lordships of the Supreme Court in Lala Shri Bhagwan v. Ram Chand, AIR 1965 SC 1767:

"When a legislative enactment confers jurisdiction and power on any authority or body to deal with the rights of citizens, it often becomes necessary to enquire whether the said authority or body is required to act judicially or quasi-judicially in deciding question entrusted to it by the statute. It sometimes also becomes necessary to consider whether such an authority or body is a tribunal or not. It is well known that even administrative bodies or authorities which are authorised to deal with matters within their jurisdiction in an administrative manner, are required to reach their decisions fairly and objectively; but in reaching their decisions, they would be justified in taking into account considerations of policy. Even so, administrative bodies may, in acting fairly and objectively, follow the principles of natural justice, but that does not make the administrative bodies, tribunals and does not impose on them an obligation to follow the principles of natural justice."

In my humble opinion, the decision of the Bombay High Court is not correct.

61. This being the position, the order of the State Government refusing to make a reference cannot be quashed even if any hearing was not granted to the petitioner after receiving the representation of respondent No. 4. Apart from this, as pointed out by my learned brother, there was nothing more in the representation made by res-

pondent No. 4 except that a number of authorities were cited to show that the question whether respondent No. 4 was working or not should be better left to be decided by the Industrial Tribunal.

62. Now I take up point No. 2. The contention of learned counsel for the petitioner is that the Government could not make an order of reference without giving reasons for the same. In my humble opinion, this contention must be rejected for the reasons already given by me. I may further add that even a body which is required to act in a quasi-judicial manner need not give reasons for arriving at a decision. In this connection I may refer to the following passage contained in Judicial Review of Administrative Action by S. A. de Smith at page 109:

"The rules of natural justice are not rigid norms of unchanging content. Each of the two main rules embraces a number of sub-rules which may vary in their application according to the context. But it is clear that natural justice does not require that administrative adjudication be conducted in public or that reasons be given for decisions."

63. Now I take up point No. 4. The contention of learned counsel for the petitioner is that before the respondent No. 4 went to the Regional Assistant Labour Commissioner and Conciliation Officer, he had not raised any dispute with the petitioner inasmuch as he had not made any demand from the petitioner for re-instatement. This argument is not raised in the writ petition and we cannot permit it to be raised at the stage of arguments as it involves a question of fact. Moreover, this argument has no force so far as the making of reference is concerned because by the time the reference was made by the State Government on 16th May, 1967, the respondent had clearly raised a dispute with the petitioner before the Conciliation Officer for his re-instatement, and the State Government was referring this dispute to the Industrial Tribunal.

64. The result of the aforesaid discussion is that the reference made by the State Government to the Industrial Tribunal by its order dated 16th May, 1967, is not bad and cannot be quashed.

65. **BY THE COURT:** The writ petition is dismissed with costs.

RGD

Petition dismissed.

AIR 1969 RAJASTHAN 109 (V 56 C 22)

C. M. LODHA, J.

Gulab Singh, Petitioner v. Bhan Mal and others, Non-petitioners.

Civil Revn. No 261 of 1964, D/- 17-7-1968, against order of Addl. Munsif, Kota, D/- 25-2-1964.

JL/LL/E649/68

Civil P. C. (1908), S. 115, O. 40, R. 4 and O. 43, R. 1 (S) — Application under O. 40, R. 4 (c) — No prayer for attachment and sale of receiver's property — Application dismissed — Order of refusal not appealable as it is not one under O. 40, R. 4 — Revision lies.

The operative part of O. 40, R. 4 clearly goes to show that a direction for attachment and sale of receiver's property is contemplated by the Rule (Para 2)

Where in an application against the receiver that he has committed default under O. 40, R. 4 (c), there is no prayer that, for making good the loss, the receiver's property may be attached and sold, and the application is dismissed, the order dismissing the application cannot be said to be one contemplated by O. 40, R. 4 and, therefore, the order is not appealable under O. 43, R. 1 (S). As no appeal would lie against such order, revision is maintainable. AIR 1963 Mys 173, Discussed, AIR 1922 Mad 234 and AIR 1954 Mad 535, Relied on, (1908) ILR 35 Cal 568 and (1911) 14 Cal LJ 445 and AIR 1920 Pat 220 and AIR 1920 Pat 703 and AIR 1925 Rang 266, Ref (Para 2)

Cases Referred:	Chronological	Paras
(1963) AIR 1963 Mys 173 (V 50) =		
Virappa Mallappa v. K. S. Deshpande		2
(1954) AIR 1954 Mad 535 (V 41) =		
1954-1 Mad LJ 8, P. Krishnamurthy v. P. Ramalingayya		2
(1925) AIR 1925 Rang 266 (V 12) =		
ILR 3 Rang 318, Arunachellam Chettiar v. U Po Lu		2
(1922) AIR 1922 Mad 234 (V 9) =		
65 Ind Cas 403, R. M. P. Palaniappa Chetti v. M. S. A. P. L. Palaniappa Chetty		2
(1920) AIR 1920 Pat 220 (V 7) =		
4 Pat LJ 636 = 54 Ind Cas 207 = 1920 Pat HCC 35, Ganesh Lal v. Satya Narayan Singh		2
(1920) AIR 1920 Pat 703 (V 7) =		
5 Pat LJ 97 = 55 Ind Cas 15 = 1920 Pat HCC 121, Samhantha Singh v. Bhagwati Singh		2
(1911) 14 Cal LJ 445 = 12 Ind Cas 780, Mohini Mohan Patra v. Barada Kanta Sirkar		2
(1908) ILR 35 Cal 568 = 12 Cal WN 648, Keshobati Kumari v. Macgregor		2
D. K. Soral, for Petitioner; J. S. Rastogi, for Non-petitioners		

ORDER: The plaintiff filed a suit against Manohar Lal, Bhan Mal and Jamna Lal in the Court of Munsiff, Kota, on 5-11-60 for dissolution of partnership and for rendition of accounts. A preliminary decree was passed on 9-2-61, and Shri Kanhaiya Lal, Advocate, who had already been appointed a receiver during the pendency of the suit, was also appointed commissioner to go into the accounts and to carry out the

directions contained in the preliminary decree. While the matter was pending for passing of final decree, an application was made by the plaintiff on 12-5-63 to the effect that the receiver, viz. Shri Kanhaiya Lal, had not carried out his duties inasmuch as he did not file the report in time and also did not file suits against several debtors of the partnership firm with the result that claims amounting to about Rs. 20,000/- due to the firm, became time barred. It was, therefore, prayed that the receiver Shri Kanhaiyalal may be directed to make good the loss occasioned to the plaintiff on account of his gross negligence in carrying out his duties as a receiver. Shri Kanhaiyalal gave a written reply and refuted the allegations made against him. He pleaded that he had filed a number of suits, some of which had been decreed. He also submitted that the parties had not co-operated with him in disclosing the correct state of affairs of the firm. He further stated that the firm used to keep duplicate and triplicate sets of accounts with the result that the correct position of the firm could not be known without the assistance of the parties. The learned Munsif recorded the statement of the plaintiff Gulab Singh on 5-2-64 and by his order dated 25-2-64 dismissed the plaintiff's application holding that there was no material on the record on the basis of which the receiver could be made liable for payment of any amount to the plaintiff. Aggrieved by the order of the learned Munsif the plaintiff has filed this revision.

2. Mr. Rastogi, learned counsel for the non-petitioner Mr. Kanhaiyalal, raised a preliminary objection regarding the maintainability of the revision. He urged that the order under revision clearly falls within the ambit of Order 40 Rule 4 C. P. C., even though no provision has been mentioned in the application. It is argued that an order passed under Order 40, Rule 4 C. P. C. is appealable under Order 43 Rule 1 (S). C. P. C. and since no appeal has been filed, this revision is not maintainable. For a correct decision of the point raised by Mr. Rastogi, it is necessary to see whether the order passed by the learned Munsif comes within the ambit of Order 40 R. 4, C. P. C. which reads as follows—

"Order XL, R. 4. Enforcement of receiver's duties, — Where a receiver —

(a) fails to submit his account at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver."

The Court has been empowered under this provision to direct attachment and sale of the receiver's property if it comes to the conclusion that the receiver has committed any of the defaults mentioned in clauses (a), (b) and (c) of the said rule. It is true that in the application filed by the petitioner an allegation has been made against the receiver that the latter was guilty of wilful default and gross negligence in not having filed the suits against the debtors of the firm and for having allowed the debts to become time barred and thus having occasioned loss to the parties. But there is no prayer in the application that for making good the loss the receiver's property may be attached and sold. All that has been prayed in the application is that the receiver may be called upon to pay the amount to the plaintiff on account of the loss occasioned to the latter. The court came to the conclusion that the receiver was not guilty of any wilful default or negligence and, therefore, he was held not liable for payment of any amount to the plaintiff. The operative part of the Rule set out above clearly goes to show that a direction for attachment and sale of the receiver's property is contemplated by this rule. The learned counsel for the non-petitioners contends that an appeal would lie even though the prayer for attachment and sale of the property is refused and in support of his submission the learned counsel has relied on *Virappa Mallappa v. K. S. Deshpande*, AIR 1963 Mys 173. That authority, no doubt, supports the contention urged on behalf of the non-petitioner in this respect, though it is not clear from the facts stated in the judgment whether there was any prayer in the application for attachment and sale of the receiver's property. The learned Judge was however of the opinion that if the application properly falls under Order 40, Rule 4 C. P. C. and has been refused, an appeal would nevertheless lie as provided under Order 43, Rule 1 (S), C. P. C.

The question—whether an appeal would lie even though no prayer for attachment and sale of the receiver's property is asked for?—has not been dealt with in this judgment. In this connection I may refer to *R. M. P. Palaniappa Chetti v. M. S. A. P. L. Palanippa Chetty*, AIR 1922 Mad 234 wherein it has been observed that the plain language of the rule (Order 40, Rule 4) shows that the Receiver's right of appeal arises only on an order of attachment being passed by the lower Court. In that case the subordinate judge had given directions to the Receiver to pay a certain sum of money into the court and an appeal was filed against the order of the subordinate judge. On a preliminary objection having been raised as to maintainability of the appeal, the learned Judges held that the order was not appealable for the simple reason that no order for the attachment of the Receiver's property and realisation of money

by means of such attachment had been passed by the lower Court as contemplated by Order 40, Rule 4 C. P. C. The same view was taken in a later decision of the Madras High Court in *P. Krishnamurthy v. P. Ramalingayya*, AIR 1954 Mad 535. The view taken by the learned Judges of the Madras High Court, with utmost respect, appears to be correct. This view is supported not only by the plain language of the rule in question, but also by a few earlier decisions of Calcutta and Patna High Courts. It was held by the Calcutta High Court under the old Civil Procedure Code that directions given by a Court in passing the Receiver's accounts are not appealable (*Vide Keshobati Kumari v. Macgregor*, (1908) ILR 35 Cal 568 = 12 Cal WN 648 see also *Mohini Mohan Patra v. Barada Kanta Sirkar*, (1911) 14 Cal LJ 445 = 12 Ind Cas 780). The same view was taken by the Patna High Court also in *Ganeshlal v. Satya Narayan Singh*, 4 Pat LJ 636 = (AIR 1920 Pat 220) and *Samhantha Singh v. Bhagwati Singh*, 5 Pat LJ 97 = (AIR 1920 Pat 703). I may also refer to a Bench decision of the Rangoon High Court in *L. A. R. Arunachellam Chettiar v. U. Po. Lu*, AIR 1925 Rang 266. It was held by the learned Judges of the Rangoon High Court that an order directing a Receiver to pay a sum of money by way of damages is not appealable as it does not come within the operative part of R. 4.

Shri Rastogi, learned counsel for the non-petitioners, has submitted that when a default is alleged under any of the sub-rules (a), (b) or (c) of R. 4 of O. 40, and an order is passed by the Court in respect of it, irrespective of the question, whether an order for attachment of the Receiver's property is passed or not, appeal would lie from such an order. I find myself, however, unable to accept this submission. The operative part of R. 4 is the part which enables the Court to attach the Receiver's property and sell it and clauses (a), (b) and (c) give only the grounds on which such an order can be made. All that can be said, therefore, in the present case is that the petitioner had alleged in his application one of the grounds contained in the Order 40, R. 4, viz. ground (c) and thus asserted that loss had been occasioned to the firm's property by negligence of the receiver. There is, however, no prayer for attachment of the Receiver's property. It is, therefore, idle to argue that an appeal would lie even though no prayer much less an order for attachment of the Receiver's property was made as contemplated by the operative part of the Rule. Thus, so far as this case is concerned, apart from the fact, that no order has been passed under the operative part of the rule for attachment and sale of the Receiver's property even a prayer for attachment and sale of the receiver's property has not been made. Thus, no order, as contemplated by O. 40, R. 4 C. P. C. can be said to have been pass-

ed by the lower court in this case and, therefore, it cannot be said that the order under revision is appealable under O. 43, R 1 (S) C P C. In these circumstances, I do not see any force in the preliminary objection and hereby overrule it.

3. Coming to the merits of the case, the question is has the lower court committed any error in exercise of its jurisdiction? The learned Munsif has held and doubtless correctly, that the allegations made by the plaintiff in his application dated 17-5-63, are vague. The only material allegation contained in the application is that the Receiver did not look into the papers in time and did not file suits against some debtors with the result that the claims to the tune of Rs 20,000/- became time barred. No details of the debtors have been given nor it has been mentioned, which debts had become time barred and when. No particulars of wilful default or negligence on the part of the Receiver have been mentioned. Even in his statement, the plaintiff has not been able to supply any material in this connection and the learned Munsif is right in his observation that on the material as it stood it was not possible for any court to come to the conclusion that the Receiver had committed any wilful default or negligence. There does not appear any ground to take a different view of the matter from the one taken by the learned Munsif. I am informed that the suit has been disposed of and the matter is not pending before the trial court in any form. In these circumstances no useful purpose would be served by giving directions to the learned Munsif for making a further probe into the matter.

4. This revision thus has no force and is hereby dismissed. In the circumstances of the case I leave the parties to bear their own costs.

NR/DVC Revision petition dismissed

AIR 1969 RAJASTHAN 112 (V 56 C 23)
C B BHARGAVA, J.

Ladulal, Petitioner v. Keshavdas, Non-petitioner

Civil Revn No 315 of 1965, D/- 19-7-1968, against judgment of Dist J, Jhunjhunu, D/- 6-3-1965

(A) Limitation Act (1908), S. 4 — Order by District Judge to deposit costs of opposite party within 30 days of order — Last day being public holiday deposit made on next working day — Should be deemed to have been made within time.

In an appeal to set aside an ex parte decree, District Judge while accepting appeal, ordered to pay costs of decree-holder within 30 days from date of order. The last day being a public holiday deposit was made on next working day.

Held that though S. 4, Limitation Act and S 11, Rajasthan General Clauses Act (8 of 1955) may not apply in terms to a situation like this, the petitioner could rely on the two general principles: (1) the law does not compel a man to do that which he cannot possibly perform and (2) an act of the Court shall prejudice no man. Hence as the last day for making the deposit was a public holiday, the same made on the next working day should be within time. Case law Ref. to (Paras 5 and 6)

(B) Civil P. C. (1908), O. 41, R. 10 — Appeal to set aside ex parte decree — District Judge making conditional order on payment of costs of opposite party within 30 days in the Court of Civil Judge — Payment made to Court of District Judge — Held such payment was not proper compliance though the error was condonable for reasons of bona fides.

(Paras 7 and 9)

Cases Referred: Chronological Paras

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|--|---|
| (1961) AIR 1961 SC 882 (V 48) = | |
| 1961-3 SCR 763, Ram Das v. | |
| Ganga Das | 9 |
| (1961) AIR 1961 Bom 254 (V 48) = | |
| ILR (1961) Bom 45, L. P. Jain v. | |
| Nandakumar R Talwalla | 3 |
| (1957) AIR 1957 Andh Pra 780 (V 44) = | |
| ILR (1956) Andh Pra 109, P. Nasar | |
| Saheb v P Nabi Saheb | 3 |
| (1955) AIR 1955 Nag 300 (V 42) = | |
| ILR (1956) Nag 247, Rambir | |
| Narhargir v Prabakar Bhaskar | 5 |
| (1949) AIR 1949 Nag 141 (V 36) = | |
| ILR (1948) Nag 612, Premchand | |
| Bhikabhai v. Ramdeo Sukhdeo | |
| Marwari | 5 |
| (1927) AIR 1927 Mad 1196 (V 14) = | |
| 106 Ind Cas 502, Chinna Nadar v | |
| A R V. Arumugham Chetty | 5 |
| (1926) AIR 1926 Oudh 481 (V 13) = | |
| 94 Ind Cas 973, Surajpal Singh v. | |
| Deokali | 3 |
| (1924) AIR 1924 All 218 (V 11) = | |
| ILR 46 All 328 (FB), M. Muham- | |
| mad Jan v. Shiam Lal | 5 |
| N M. Kashwal, for Petitioner, Pyarelal | |
| Ojha, for Non-petitioner. | |

ORDER. : This revision application is directed against the order dated 6th March, 1965, of the learned District Judge, Jhunjhunu by which the petitioner's appeal was rejected and the order passed by the Civil Judge, Sikar dated 18th November, 1963, was upheld.

2. The facts giving rise to the present application may briefly be stated as under, Keshavdas opposite party in this case filed a suit for recovery of Rs 3176/- against Ladulal petitioner in the court of the Civil Judge, Sikar. The petitioner filed his written statement in the suit, issues were also framed and on 17th September, 1962, when evidence of two witnesses of the plaintiff was to be recorded he did not put in appearance in the court and his counsel

also pleaded no instructions. The court then proceeded to record the evidence of the plaintiff and decreed the suit with costs on the same date.

3. The petitioner then made an application before the Civil Judge for setting aside the *ex parte* decree which was rejected. He then preferred an appeal against the said order to the court of the District Judge, Jhunjhunu and the learned District Judge after hearing the parties passed the following order:

"I, therefore, accept this appeal and order that the case be remanded to the lower court for further enquiry into the application of Ladulal dated 12-10-62 on payment of Rs. 50/- as costs to the respondent Kesavdass. If the costs are not paid or deposited in the court of Civil Judge, Sikar within a period of 30 days to be paid to the respondent, this appeal of the appellant Ladulal would stand dismissed." It is not in dispute that in compliance of this order the petitioner sent a money order of Rs. 50/- on 16th September, 1963 to the court of the District Judge, Jhunjhunu which was received in that court on 19th September, 1963.

However, this fact that such deposit had been made in the court of the District Judge was not communicated to the Civil Judge, Sikar either by the petitioner or by the District Judge, Jhunjhunu. When the record of the case was received in the court of the Civil Judge, he recorded an order on 29th August, 1963, that it might be submitted before him on 21st September, 1963 after the period for depositing the costs expired. On 21st September, 1963, the learned Civil Judge was not at the headquarters. The file was, therefore, submitted before him on 12th October, 1963 and on this date only the counsel for the non-petitioner was present while the petitioner and his counsel were absent. The learned Judge on that date passed an order that as the order passed by the learned District Judge on 20th August, 1963, had not been complied with, the suit cannot be restored to its original number. Subsequently, on 24th October, 1963, the petitioner made an application before the court stating that he had complied with the order of the District Judge inasmuch as he had sent the amount of Rs. 50/- by money order to that court and was also received there on 19th September, 1963 and, therefore, the suit might be restored and enquiry be made as directed by the District Judge. He also submitted the postal acknowledgment receipt along with the application.

The learned Civil Judge rejected this application on 18th November, 1963 holding that according to the direction of the District Judge the amount of Rs 50/- ought to have been deposited in his court and not in the court of the District Judge and as such the order had not been complied with.

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Against this order the petitioner again preferred an appeal in the court of the District Judge. The learned District Judge rejected the appeal holding that the order passed by him on 20th August, 1963, had not been strictly complied with, as the amount of Rs. 50/- instead of being deposited in the court of the Civil Judge was deposited in his own court. He also referred to *Surajpal Singh v. Deokali*, AIR 1926 Oudh 481, *L. P. Jain v. Nandakumar R. Talwalla*, AIR 1961 Bom 254 and *P. Nasar Saheb v. P. Nabi Saheb*, AIR 1957 Andh Pra 780 for the view that he had no power to extend the time for the deposit of costs as he had become *functus officio* and the order of dismissal of appeal has automatically come into force on the expiry of 30 days.

Against this order this revision petition has been preferred by the petitioner and it has been contended that substantial compliance of the order passed by the District Judge had been made by the petitioner inasmuch as he had deposited Rs 50/- within the time fixed by the court, in the court of the District Judge and that being so both the courts were in error in holding that the order was not complied with merely on the ground that the amount instead of being deposited in the court of the Civil Judge was deposited in the court of the District Judge. Learned counsel for the non-petitioner has raised two principal objections viz,

(1) that no appeal lay to the District Judge against the order passed by the Civil Judge on 18th November, 1963 and at any rate the Civil Judge had decided the matter finally on 12th October, 1963, against which no appeal was preferred.

(2) that the amount of costs was not deposited in the court of the Civil Judge as ordered by the District Judge and it was also not deposited within 30 days from 20th August, 1963. In this connection he says that the last date for depositing the amount was 18th September, 1963.

4. I have heard learned counsel for the parties and in view of the objections raised by the learned counsel for the opposite party, the first question to be determined is whether the amount of costs was deposited within the time fixed by the order dated 20th August, 1963. In this connection learned counsel for the petitioner has pointed out that even if the time be computed from the date of the order dated 20th August, 1963, the last date for the deposit would be 18th September, 1963. But that day was a public holiday and as such the amount deposited on 19th September, 1963, should be deemed to have been deposited within time.

5. In my view this contention of the learned counsel for the petitioner must prevail. Though Section 4 of the Limitation Act and Section 11 of the Rajasthan General Clauses Act, 1955 may not apply

in terms to a situation like this, but they embody the general principles enshrined in two maxims:

(i) *lex non cogit ad impossibilia* — i. e. the law does not compel a man to do that which he cannot possibly perform.

(ii) *Actus curiae neminem gravabit* — i. e. an act of the Court shall prejudice no man.

and the petitioner can rely on the said general principles embodied in the two provisions. See *M. Muhammad Jan v. Shiam Lal*, AIR 1924 All 218 (FB), *Chinna Nadar v. A. R. V. Arumugham Chetti*, AIR 1927 Mad 1196, *Premchand Bhikabhai v. Ramdeo Sukhdeo Marvari*, AIR 1949 Nag 141, and *Rambir Narhargr v. Prabhakar Bhaskar*, AIR 1955 Nag 300. Since 18th September, 1963, was a holiday and the court was closed the amount of costs deposited on the opening of the court on 19th September, 1963, shall be within 30 days from 20th August, 1963.

6. The next question is whether the order passed by the Civil Judge on 18th November, 1963, was appealable and whether, if at all, any appeal lay against the order of the Civil Judge, it should have been directed against the order passed by him on 12th October, 1963. In my view the period of limitation for filing an appeal would not run against the petitioner from 12th October, 1963 because the order was passed in his absence. The petitioner having complied with the order passed by the District Judge must have been under the impression that he will receive a notice from the court of the civil Judge of the date fixed by him for further enquiry. It, therefore, cannot be said that appeal should have been preferred against the order of that date.

7. Whether the order passed on 18th November, 1963, was appealable is the next question. The petitioner by his application had requested the court to set aside the *ex parte* decree because in his view he had complied with the order passed by the District Judge. But the learned Civil Judge holding that the order of the District Judge had not been complied with refused to restore the suit to its original number and to take any further action as directed by the learned District Judge. In my view the only reasonable interpretation of this order would be that the learned Civil Judge again refused to set aside the *ex parte* decree which was sought for in appeal by the petitioner before the District Judge and on which a conditional order was passed on 20th August, 1963. That being so, I am of the view that the order dated 18th November, 1963, was appealable.

8. Now the question is whether the petitioner had complied with the order passed by the District Judge or not. Both the courts below have taken the view that he had not, because the amount of Rs. 50/-

should have been deposited in the court of the Civil Judge and not in the court of the District Judge. This was the only question which the learned District Judge ought to have considered as there was no application before him for extending the period fixed by him for the deposit of the amount of costs. Therefore, the cases referred to by the learned District Judge in his order do not have any bearing upon the question which in fact required consideration. The learned District Judge by his order directed

(1) that the petitioner should pay Rs. 50/- as costs.

(2) that it should be paid or deposited within 30 days.

(3) that in case they are not paid, they should be deposited in the court of the Civil Judge, Sikar.

9. Now the petitioner did deposit Rs. 50/- and also within time prescribed by the court, but he did not comply with the third condition i. e., of depositing it in the court of the Civil Judge. Though strictly speaking he has not complied with the order because he was directed to deposit the amount in the court of the Civil Judge, but to my mind the main object underlying the order was that Rs. 50/- be paid as costs to the non-petitioner and that too within 30 days. Now take for instance if the direction would have been to pay the amount to the party directly and the other party without tendering that amount to the party concerned deposited it in the court for being paid to him whether under such circumstances would it be argued with any plausible justification that the order had not been complied with?

In the present case also I do not see why the deposit made in the court of the District Judge be not taken as sufficient compliance of the order. The petitioner could not have been motivated by any mala fide intention. Instead of sending the money order to the court of the District Judge he could very well have sent it to the court of the Civil Judge. But it seems to me that due to some misunderstanding he sent the amount to the court of the District Judge as it was that court which had ordered the payment of costs. The Supreme Court in *Ram Das v. Ganga Das*, AIR 1961 SC 882, observed:

"How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decree apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed."

10. These observations were made in a case where the High Court of Patna had directed the party to pay deficit court-fee within a fixed period, and that party had applied for extension of time on the last day when the period was to expire. The application for extension of time could not be heard because the Division Bench which was competent to pass orders on it was not sitting in those days. When the matter came up before the Division Bench it refused to extend time.

11. So it will appear that the order passed by the District Judge is also "in essence in terrorem". But here the party has made no default. It complied with the order substantially within time fixed by the court and in my view too narrow a construction should not be put on the order of the District Judge because that would instead of advancing the cause of justice hamper it.

12. The result therefore, is that the revision application is allowed, orders of the courts below are set aside and the learned Civil Judge, Sikar is directed to take further proceedings in accordance with law as directed by the learned District Judge in his order dated 20th August, 1963. No order as to costs.

DGB/D.V.C.

Revision allowed.

AIR 1969 RAJASTHAN 115 (V 56 C 24)
L. S. MEHTA, J.

Lt. Col. U. G. Menon and another, Petitioners v. State of Rajasthan, Respondent.

Criminal Rev. No. 134 of 1968, D/- 9-9-1968, against order of Addl. Spl. J. (for Rajasthan) Jaipur, D/- 5-4-1968.

(A) Army Act (1950), Ss. 125 and 126 — Criminal P. C. (1898), Section 549 — Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules (1952), Rules 5, 6, 8 and 9 — Trial of military personnel — Determination of venue for — Final choice rests with Central Government — Discretion of military authority under Rule 6, not final — No legal hindrance for authority to differ from previous order.

According to Section 549 Cr. P. C. and the Rules framed thereunder the determination of the forum of the trial of a military personnel ultimately depends upon the decision of the Central Government in case there is difference of opinion between the Criminal Court and the military authorities. (AIR 1965 SC 247 Foll.)

(Para 5)

From a perusal of Sections 125 and 126 of the Army Act it is manifest that the discretion exercised by the military authority about the forum of the trial of a military

personnel cannot be said to be final and the criminal Court is within its right to question it. The mere intimation of the Commanding Officer to the criminal Court that the accused would be tried by Court-Martial does not divest the jurisdiction of the ordinary criminal Court if in spite of such an order, the criminal Court holds the view that the case should be tried by it, and if, the military authority agrees to those views, there is no legal hindrance for the Commanding Officer in differing from the earlier discretion in this regard. With the cancellation of the previous order for the trial of the accused by the military authority, there remains no difference of opinion between the view of the court and the army authority on the venue of the trial and there is no necessity to make any reference to Central Government.

(Para 8)

(B) Criminal P. C. (1898), Section 549 — Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules (1952), Rules 8, 9 — Trial of military personnel by Criminal Court — Central Government according sanction for — Interference by military authority — Illegal.

Where the Central Government has already accorded sanction for the prosecution of the military personnel by a criminal Court, that sanction cannot be subsequently interfered with by the military authority. Such sanction cannot be deemed to have been superseded by a subsequent notice of the military authority asking the Criminal Court to deliver the accused to them for their trial by Court-martial (AIR 1965 SC 247 Foll.)

(Para 7)

(C) Army Act (1950), S. 122 — Period of limitation under — Court-martial has no jurisdiction to try case after expiry of.

The limitation period prescribed in Section 122, having expired, the court-martial will ordinarily have no jurisdiction to try the case. The accused persons might have made an application that they should be delivered to the military authority prior to the expiry of the period of limitation. But that is not likely to confer jurisdiction on the court-martial to try the case even after the expiry of the period of limitation. Ostensibly after the expiration of 3 years' period of limitation, the persons charged with offences cease to be liable to arrest or trial by court-martial.

(Para 9)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 247 (V 52) =
1965 (1) Cri LJ 236, Ram Sarup
v. Union of India. 5, 7

L. K. Sood, for Petitioners, B. C. Chatterji, Deputy Gov. Advocate, for Respondent.

ORDER.: This is a revision-application filed by Lt. Col., U. G. Menon, and Lt. Col., S. K. Kashyan, against the order of learned Additional Special Judge for Rajasthan, Jaipur, dated April 5, 1968.

2. A charge-sheet, it appears, was put up by Special Police Establishment, Jaipur Branch, on January 27, 1966, in the Court of Additional Special Judge, Jaipur, against 8 persons, accusing them of offences under Sections 120-B, 161, 165 and 409, I. P. C., as also under Section 5 (2), read with S. 5 (1) (a) and 5 (1) (d), Prevention of Corruption Act, 1947. One of the accused persons, namely, U. S. Oberoi has turned an approver. Of the remaining seven accused, 3 are civilians and 4 are officers of the Indian army. The 4 army officers moved a joint application on 13th September, 1966, in the court of Additional Special Judge, Rajasthan, to the effect that in view of Criminal Law Amendment (Amending) Act, 1966, they, being commissioned officers of the Indian army, were entitled to be dealt with in accordance with the provisions of S. 549, Cr. P. C. The said Judge rejected their application on October 10, 1966. A revision-application was moved in the High Court against that order. Beri J. allowed the revision-application and set aside the above order of learned Special Judge and directed the trial Court to proceed in accordance with the provisions of Rules 3 and 4 of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952. In compliance with the said order the trial court issued a notice to the Commanding Officer of the 4 accused-applicants, on January 12, 1967. On receipt of the notice the Officer Commanding, 123, Infantry Battalion (T. A.), Jaipur, requested the Additional Special Judge to stay the proceedings against the 4 army officers and to deliver them to the military authorities.

As the 4 army officers were temporarily attached to 123, Infantry Battalion (T. A.), Jaipur, during the period of their suspension to enable them to stand their trial in the court situate at Jaipur, and as these officers were working in the A. S. C., Centre at Alwar, under the Officer Commanding of that Unit during December, 1962, and the year 1963, when the criminal conspiracy was alleged to have been hatched and the offences were alleged to have been committed by them, it was objected by the Public Prosecutor that the Officer Commanding, 123, Infantry Battalion, Jaipur, had no jurisdiction to take a decision in the matter for the trial of the accused by Court-martial. Learned Public Prosecutor further submitted in his application that the Officer Commanding, who could take such a decision, was the officer commanding of the A. S. C., Centre, Alwar. It was also pointed out by the Public Prosecutor that under Section 122 of the Army Act, 1950, the limitation of three years prescribed for the trial by court-martial had expired with the close of the year 1966. It was also asserted by the Public Prosecutor that as the Central Government had already accorded sanction for the trial of the accused by the Special Judge, the Officer Commanding,

123, Infantry Battalion, Jaipur, could not have passed the order for the trial of the 4 military personnel by court-martial. Learned Public Prosecutor then urged that the criminal case involved not only the military officers but also civilians and that the latter could not be tried by court-martial and that the case of criminal conspiracy could not have been splitted up. In the end, it was prayed that the matter should be referred to the Central Government with a view to obtain final decision on the point in issue.

Learned Additional Special Judge, by his communication, dated January 7, 1967, directed the Commanding Officer that he should make a reference to the Central Government or the Chief of the Army Staff in terms of the difficulties pointed out by the learned Public Prosecutor. He in the meantime stayed the proceedings. On receipt of the above message, the Officer Commanding, 123, Infantry Battalion (T. A.) Jaipur, desired the court that the notice under Rule 5 of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, previously served, should be treated as cancelled. Thereupon the application of the accused for handing them over to the court-martial was rejected. Learned Judge further held that the case would be tried by his court and that the military personnel, who are accused in the case, should not be delivered to the military authorities for trial by the court-martial.

3. Aggrieved against the above order, the present revision-petition has been preferred on behalf of Lt. Col., U. S. Menon, and Lt. Col., S. K. Kashyap. Learned counsel for the petitioners has argued that the Commanding Officer, 123, Infantry Battalion, Jaipur, could not have cancelled his previous order, dated January 16, 1967, (annexure 1), by his subsequent order dated January 28, 1967. Once an order was passed by the Commanding Officer for the delivery of the military personnel to the army authorities for trial by court-martial, no option was left to the Special Judge, but to hand over the accused to the military authorities for the purpose. The order once passed by the Commanding Officer, Infantry Battalion, Jaipur, could not have been reviewed subsequently. Learned counsel further pressed that the Special Judge is acting as Magistrate as has been held by Beri J., in his order dated December 20, 1966. All proceedings, according to learned counsel, after the order of the High Court, are null and void as there was no other alternative for the Additional Special Judge but to surrender the accused to the military authorities. Learned counsel also argued that Rule 8 of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, and Section 126 of the Army Act are not applicable to the present case. Learned Deputy Government Advo-

cate supported the order of Additional Special Judge, dated April 5, 1968.

4. The only point to be considered for the disposal of this revision-application is: whether Additional Special Judge has got jurisdiction to try this case.

5. The Central Government framed rules vide S. R. O. 709, dated April 17, 1952, as amended by the Home Ministry's S. R. O. No. 1740, dated March 22, 1953. These Rules are called Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952. They have been framed under S. 549, Cr. P. C. Rule 2 of the said Rules provides that the Commanding Officer, in relation to a person subject to military law, means the Officer Commanding the Unit or detachment to which such person belongs or is attached. Under the same rule competent military authority means the Officer Commanding the army, army corps, division, area, corps or independent brigade or sub-area in which the accused person is serving. Rule 3 lays down that where a person subject to military, naval or air force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial, such Magistrate shall not proceed to try such person or to enquire with a view to his commitment for trial by the court of Session or the High Court for any offences triable by such court unless (a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, navy or air-force authority; or (b) he is moved thereto by such authority.

Rule 4 provides that before proceeding under clause (a) of Rule 3 the Magistrate shall give written notice to the Commanding Officer of the accused and until the expiry of a period of seven days from the date of the service of such notice, he shall not convict or acquit the accused or frame in writing a charge against the accused or make an order committing the accused for trial by the High Court or the Court of Session. Rule 4 is followed by Rule 5, which reads that where within the period of seven days mentioned in Rule 4 above, or at any time thereafter before the Magistrate has done any act or made any order referred in that rule, the Commanding Officer of the accused or competent military, naval or air force authority, as the case may be, give notice to the Magistrate that in the opinion of such authority, the accused should be tried by a Court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him to such authority. Rule 6 enables military authority to give notice to the Magistrate that, in the opinion of such authority, the accused should be tried by the Court-martial. The Magistrate then has to stay the proceedings and deliver the accused to the military autho-

riety. Where an accused person has been delivered by the Magistrate under Rules 5 and 6, the Commanding Officer shall, as soon as may be inform the Magistrate that the accused has been tried by Court-martial or effectual proceedings have been taken or ordered to be taken against him. When the Magistrate is informed under sub-rule (1) of Rule 7 that the accused has not been tried or effectual proceedings have not been taken or ordered to be taken against him, the Magistrate shall report the circumstances to the State Government, which may, in consultation with the Central Government, take proper steps to ensure that the accused person is dealt with in accordance with law.

Then we come to Rule 8. This rule enables a Magistrate to require the Commanding Officer of the military personnel either to deliver such person to him for being proceeded against according to law or to stay the proceedings against such person before the court-martial, if since instituted, and to make a reference to the Central Government for the determination as to the court before which the proceedings should be instituted. Rule 9 lays down that where the competent military authority or the Central Government has, on a reference made under Rule 8, decided that proceedings against such person should be instituted before a Magistrate, the Commanding Officer of such person shall, after giving a written notice to the Magistrate concerned, deliver such person to that Magistrate.

Rule 8 practically corresponds to S. 126 of the Army Act, and Rule 9 provides for the military authority to deliver the accused to the ordinary court, when in its opinion or under the orders of the Government, the proceedings against the accused are to be conducted in the court of a Magistrate. According to S. 549, Cr. P. C., and the rules framed thereunder the final choice about the forum of the trial of a military personnel rests with the Central Government. Whenever there is difference of opinion between the criminal court and the military authorities in regard to the forum of the court, the decision of the Central Government shall prevail. In this connection, a reference is made to *Ram Sarup v. Union of India*, AIR 1965 SC 247 in which it was observed by their Lordships of the Supreme Court that the determination of the forum ultimately depends upon the decision of the Central Government, in case there is difference of opinion between the criminal court and the military authorities.

6. Here, the Central Government had already accorded sanction under S. 197, Cr. P. C., and S. 6 (1) (a), Prevention of Corruption Act, 1947, for the prosecution of Lt. Col. Khazan Singh, Lt. Col., U. G. Menon, Lt. Col., S. K. Kashyap, and Major Jaspal Singh for the various offences committed by them, and for taking cognizance

of the said offences by the court of competent jurisdiction. In the face of such an order the military authority could not have insisted that the Additional Special Judge was to deliver the accused to such authority for their trial by Court-martial.

7. S. 125 of the Army Act, 1950, is in the terms following:—

"When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody."

S. 126, reads:—

"(1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."

From a perusal of the above sections, it is manifest that the decision of the military officer does not decide the matter finally. S. 126 empowers a criminal court concerned to require the military officer to deliver the offender to it or to postpone proceeding pending reference to the Central Government, if the criminal court is of the view that the accused should be tried by it. When such a request is made, the military officer has either to comply with it or has to submit a reference to the Central Government whose decision in the matter shall be final for the purpose of determining the venue of the trial. The discretion exercised by the military authorities is always subject to the final orders of the Central Government. Here the Central Government had already accorded sanction for the prosecution of the accused by a criminal court. That sanction cannot be subsequently interfered with by the military authority. Such sanction cannot be deemed to have been superseded by a notice of the military authority, dated January 16, 1967, asking the Additional Special Judge to deliver the accused to them for their trial by court-martial; vide para 23 of AIR 1965 SC 247 (supra).

8. There is another aspect of the matter, which cannot be lost sight of. The Additional Special Judge, Rajasthan, Jaipur, disagreed with the discretion of the Commanding Officer communicated by letter, dated January 16, 1967, whereby it expressed the opinion that the proceedings should continue before itself in respect of the offences, and he did not consider it proper to hand over the accused to the military authority for being tried by court-martial and requested the Commanding Officer to get the matter decided by the Central Government. On receipt of this letter, the Commanding Officer reviewed its previous discretion and communicated to the court that his prior notice, under Rule 5 of the Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, stood cancelled. It is obvious that the Commanding Officer did so when certain circumstances were brought to his notice. The result, therefore, is that the Commanding Officer ultimately decided that the accused should be tried by ordinary criminal court and not by the court-martial. Learned counsel for the petitioners, while citing various authorities, which need not be referred to here, as they do not deal with the matter in controversy, has argued that when once an order was made for the trial of the accused by the court-martial, that could not have been reviewed subsequently. This argument has no force. There appears to be no legal hindrance for the Commanding Officer in differing from the earlier discretion in this regard. When the Commanding Officer withdrew his prior order the conflict stood resolved and there was hardly any necessity to make any reference to the Central Government. The mere intimation of the Commanding Officer to the Additional Special Judge, Rajasthan, Jaipur, that the accused would be tried by court-martial does not divest the jurisdiction of the ordinary criminal court if in spite of such an order, the criminal court holds the view that the case should be tried by it, and if, the military authority agrees to these views, there remains no dispute as to whether the criminal court or the court-martial is to try the accused. In this case the Commanding Officer while simply intimating to the criminal court that the accused would be tried by court-martial, has not divested such court of its jurisdiction to try the case, and the criminal court continues to have control over the matter. The discretion exercised by the military authority on January 16, 1967, cannot be said to be final and the criminal court is within its right to question it. With the cancellation of the previous order for the trial of the accused by the military authority, there remains no difference of opinion between the view of the court and the army authority on the venue of the trial.

9. It may also be pointed out that according to S. 122 of the Army Act, 1950, no trial by court-martial of any military

personnel subject to the Act, for any offence shall be commenced after the expiration of a period of three years from the date of such offence, except under the circumstances mentioned therein. In this case it is given in the challan that the offences were committed during December, 1962 — January, 1964, at A. S. C. Centre, Alwar. The 3 years' period expired by the end of January, 1967. The limitation period prescribed in S. 122, having expired, the court-martial will ordinarily have no jurisdiction to try the case now. The accused persons might have made an application that they should be delivered to the military authority prior to the expiry of the period of limitation. But that is not likely to confer jurisdiction on the court-martial to try the case even after the expiry of the period of limitation. Ostensibly after the expiration of 3 years' period of limitation, the persons charged with offences cease to be liable to arrest or trial by court-martial.

10. It may also be mentioned here, *inter alia*, that in this case, as has been pointed out above, 7 persons are to be tried jointly. Of these 4 are military personnel and 3 are civilians. The nature of the case is such that it cannot be splitted up. If the military personnel are handed over to the military authority for trial by court-martial, the natural consequence would be that the civilians would have to be tried separately on the basis of the same facts and evidence. That position would create insuperable difficulties and the possibility of pronouncement of divergent judgments by two different courts on the same facts, cannot be ruled out. With a view to avoid this contingency, or uncertain situation, the proper thing would be that all the accused persons are tried by the court of Additional Special Judge, Rajasthan, Jaipur.

11. In the result, this revision petition fails and is dismissed. The Additional Special Judge, Rajasthan, Jaipur, is directed to conduct the trial of this case expeditiously as sufficient time has already elapsed since the submission of the charge-sheet by the Special Police Establishment Branch, Jaipur.

GDR/D.V.C.

Revision dismissed.

AIR 1969 RAJASTHAN 119 (V 56 C 25)
V. P. TYAGI, J.

Balia, Appellant v. Heerji, Respondent.

Criminal Appeal No 534 of 1966, D/- 13-3-1968, against order of Spl. Judl. (Railway) Magistrate, Jodhpur, D/- 14-5-1966.

Penal Code (1860), Ss. 499, Exception 9, and 500—Disclosure to Panchayat that son-in-law was impotent — Disclosure in

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the interests of daughter — Panchayat, a recognised forum by custom — Disclosure, held, not punishable.

In accordance with an age-old custom of the community, the case of a wife who had not joined her husband was placed for decision by the Village Panchayat. When her father was asked why he had not sent his daughter to her husband's house, he told them that the husband was impotent and unable to perform the sexual act even though he tried on several occasions. He told them that the information was given to him by his daughter. The son-in-law preferred a complaint against his father-in-law under S. 500 Penal Code.

Held, that the accused was not guilty of the offence under S. 500 since he made the statement bona fide and with due care and caution to a body which, though not statutorily empowered to hear the dispute in question, was by custom approached by parties for settlement and that the same was made in the interests of his daughter. AIR 1963 SC 1317 Ref.

(Para 9)

Cases Referred: Chronological Paras
(1968) Civil First Appeal No. 61 of 1965, D/- 28-2-1968 (Raj) 10
(1963) AIR 1963 SC 1317 (V 50) =
1963 (2) Cri LJ 345, Kanwar Lal v. State of Punjab 6

B L Panwar, for Appellant; J. R. Tadia, for Respondent.

JUDGMENT: This appeal of Balia is directed against the judgment of the Special Judicial (Railway) Magistrate, Jodhpur, whereby respondent Heerji has been acquitted by the learned Magistrate of the charge under section 500 Indian Penal Code.

2. The circumstances leading to this appeal are as follows: Mst. Pushpa, daughter of Heerji, was married to the appellant about eight years back and the 'muklawā' ceremony was performed after five years of the marriage. According to Mst. Pushpa, Balia was not potent and, therefore, in spite of the fact that on many occasions Balia tried to have sexual intercourse with her but he failed to do so, and hence Pushpa out of frustration left her husband's house and ultimately came to live with her parents.

On 24th May, 1964, it so appears that a caste panchayat was summoned to consider a charge against Heerji that he was not willing to send his daughter Pushpa to her husband's house. Heerji was also called to meet that charge and it is said that Heerji told the panchayat that Balia was impotent. Balia then filed a complaint against Heerji in the court of the Municipality-Magistrate, Jodhpur City, under section 500 Indian Penal Code alleging that accused maliciously propagated among

the members of the caste panchayat that the complainant was impotent and therefore he deserves to be punished under section 500, Indian Penal Code.

3. Complainant Balia when he entered the witness box stated that this allegation of the accused that he was impotent is false and that it was made with a view to defame him. In his cross-examination, however, he admitted that the accused had told this to the caste panchayat because he was informed about it by his daughter Mst. Pushpa. Another prosecution witness Shankerlal (P. W. 13) has, however, deposed that he was present in the panchayat when Heerji had made his statement before the panchayat, but he clarified that Heerji made that statement when he was asked by the panchayat to explain as to why he was not sending his daughter to her husband's house.

4. Accused in his statement under section 342 Criminal Procedure Code admitted to have made such a statement before the panchayat, but his explanation is that he did so because he was informed by his daughter Pushpa that Balia was impotent and was not fit for woman. In his defence he examined his daughter Mst. Pushpa who has very categorically stated that Balia many a times tried to have sexual intercourse with her after her marriage but every time he failed and could not succeed in his attempt and, therefore, she took him to be impotent.

5. The learned Magistrate, after a close scrutiny of the evidence produced by both the sides, came to the conclusion that the accused could not be found guilty under section 500 Indian Penal Code as the statement was made by the accused before the panchayat in good faith and with a view to defend the interests of his daughter and, therefore, exception 9 to section 499 Indian Penal Code is attracted to this case. This finding of the learned Magistrate is challenged in the present appeal.

6. Learned counsel appearing on behalf of the appellant, relying on a Supreme Court case in *Kanwar Lal v. State of Punjab*, AIR 1963 SC 1317, urged that the caste panchayat had no jurisdiction to sit over in judgment about the conduct of the accused as well as the complainant and, therefore, the accused had no business to convey any information to the panchayat which was of a defamatory character, and as such he cannot take shelter under exception 9 to section 499 of the Indian Penal Code.

He also argued that the panchayat was not in a position to protect the interests of the accused or his daughter and, therefore, the accused cannot be said to

have communicated such a defamatory information to the panchayat in good faith and with a view to protect the interests of his daughter Pushpa. In these circumstances, according to learned counsel for the appellant, the trial court has erred in coming to the conclusion that the accused had made the imputation before the panchayat with a view to safeguard the interests of his daughter and thus he is saved by exception 9 to section 499 Indian Penal Code.

7. There is no doubt that the caste panchayats do not function under any statutory powers or under any constitution of their own but in our country this institution of caste panchayat has been recognised by the society for times immemorial. In spite of our recent political advancement, I can safely say that in many respects our social customs have not changed and people still take recourse to get their grievances redressed through the age-old institutions like caste panchayats which have no legal sanction behind them, but which are still in existence on account of moral sanctions based on the age-old customs prevalent in the community.

It is in the evidence of the prosecution itself that such disputes between husband and wife are referred to the caste panchayats and probably it was in pursuance of this recognised custom in the community to which the parties belonged that the panchayat was called and the dispute between Pushpa and Balia was referred to it.

It is also in the evidence of P. W. 3 Shankerlal that the panchayat had asked the accused as to why he was not willing to send his daughter with her husband and it was in reply to that query made by the panchayat that the accused disclosed this fact that complainant Balia was impotent. Balia himself has admitted in his cross-examination that Heerji had told the panchayat that it was on the information received from his daughter Pushpa that he was communicating the information about the impotency of Balia.

8. Mst. Pushpa has also been examined as a defence witness and she has categorically stated that Balia in spite of repeated attempts had failed to have sexual intercourse with her. It is also in the evidence that for some time she did not disclose this weakness of her husband to anybody but ultimately she communicated this fact to her mother who conveyed it to her father. From these circumstances it is evident that the accused derived his knowledge about the impotency of the complainant from his daughter and there is nothing on the record to show that there was any good reason for the accused to have disbeliev-

ed such an information which came to him through his own daughter.

9. All that is required to bring a case under exception 9 to section 499 Indian Penal Code is that there should be a good faith, i.e. the imputation must have been made by the accused after due care and attention and the motive behind it was to safeguard the interests of the daughter and not to defame the complainant. I find that both these elements were present when Heerji made his statement before the panchayat and levelled a charge of impotency against the complainant Balia.

10. Learned counsel for the appellant urged that in a civil litigation it has been declared by this Court in D.B. Civil First Appeal No. 61 of 1965 D/- 28-2-1968 (Raj) that Balia was not impotent and, therefore, it must be taken that Heerji knew it that the statement that he was making before the panchayat was wrong. I regret, I cannot accept this contention of learned counsel for the appellant because at the time when Heerji communicated to the panchayat about the impotency of Balia there was no such declaration in his favour by any competent authority that he was not impotent. As is admitted by the complainant himself, Heerji was acting on the information that he had received from his own daughter Pushpa and there was no earthly reason for him to disbelieve his daughter. In these circumstances, it is difficult for this Court to infer that Heerji had disclosed the fact of Balia being impotent in a reply to the query put by the caste panchayat itself with any mala fide intention. The order of acquittal passed by the trial court, in these circumstances cannot be said to be erroneous and it cannot be set aside as the case of the accused, in my opinion, definitely falls under exception 9 to section 499, Indian Penal Code.

11. The appeal is dismissed.

TVN/D.V.C. Appeal dismissed.

AIR 1969 RAJASTHAN 121 (V 56 C 26)
C. B. BHARGAVA, J.

Mithukhan, Petitioner v. State of Rajasthan, Respondent.

Criminal Revn No 278 of 1967, D/- 20-2-1968, against judgment of S J: Kota, D/- 17-7-1967

Penal Code (1860), Ss. 99, 97, 52 — Acts of public servants wholly without jurisdiction — Attempt at search for and seizure of narcotics from petitioner's house—Officers not complying with S. 165 Criminal P. C. — Held, search illegal and petitioner had right of private defence—

HL/LL/D372/68

(Criminal P. C. (1898), S. 165 — Provision mandatory — Non-compliance fatal) — (Opium Act (1878), Ss. 14, 15 & 16 — Searches subject to Criminal P. C. provisions — Violation of — Search illegal — Person searched has right of private defence).

Inspector Narcotics together with the informer and a number of policemen surrounded the petitioner's house with a view to hold a raid and search the premises for narcotics believed to be kept concealed thereat. The Inspector had not recorded in writing the grounds of his belief specifying therein the thing for which search was to be made thus violating the provisions of section 165 (1) of Criminal P. C. The petitioner struck the Inspector as also the informer when they were attempting to enter the house and prevented their entry. Petitioner was thereupon prosecuted for his acts.

Held (1) that all searches under Ss. 14 and 15 of the Opium Act are to be made in accordance with section 165 of Criminal P. C., which is mandatory and non-compliance of which render the search illegal. (Paras 4 to 6)

(2) that the person sought to be searched had the right of private defence of property against such illegal search and therefore he would not be guilty for obstructing the officers effecting the search. (Para 6)

(3) that the acts of the officers did not attract the exception contained in S. 99 of Penal Code since under S 52 of the Penal Code they could not be considered to be bona fide. The officers empowered to effect searches under Section 14 of the Opium Act should be presumed to know the law and the act having been done in contravention of the mandatory provisions of law, it must be held to have been done without due care and attention. The facts were therefore not 'bona fide' within the meaning of section 52 of Penal Code. (Para 6)

and (4) that S. 99 of Penal Code could not cure the defect in the search due to non-compliance of the provisions under S 165, Criminal P. C. AIR 1960 SC 210 and AIR 1946 Lah 456 and AIR 1935 Nag 237 and AIR 1944 Pat 228, Rel. on; AIR 1939 Lah 280, Ref. (Para 6)

Cases Referred: Chronological Paras
(1960) AIR 1960 SC 210 (V 47) =
1960 Cri LJ 286, State of Rajasthan v. Rehman 3
(1946) AIR 1946 Lah 456 (V 33) =
48 Cri LJ 161, Emperor v. Mohammad Shah 6
(1944) AIR 1944 Pat 228 (V 31) =
45 Cri LJ 802, Ram Parves Ahir v. Emperor 6
(1939) AIR 1939 Lah 280 (V 26) =
184 Ind Cas 6, Maingal Singh v. Ghulam Mohammad 6

(1935) AIR 1935 Nag 237 (V 22)=

31 NLR Sup 66, Hiralal v. Ram

Dulare

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R. N. Surolia, for Petitioner; M. L. Shrimal, for State

ORDER: This is an application in revision by Mithukhan against his conviction under sections 332 and 353 of the Indian Penal Code.

2. The case of the prosecution is that on 31st October 1963, at about 7 p.m. Shri Govind Gurnani, Inspector Narcotics on the information of an informer that the petitioner had contraband opium in his house, reached there along with members of his party. The petitioner was then present at his house. Panchas were called and his house was surrounded and while the search party was attempting to enter the house, the petitioner resisted the attempt and struck lathi blows on Amir Mohd. Constable and Shafiq Ahmed, the informer, and thus the attempt of the raiding party to enter the petitioner's house was frustrated. Shri Gurnani called help from the police. But by the time the police arrived the petitioner had escaped.

Thereafter search of the house was taken by Shri Gurnani with the help of the police, but nothing incriminating was found inside the house. It is said that Yasinkhan son of the petitioner removed the lathi with which the constable and the informer were assaulted with the intention of screening the offender from legal punishment. On these facts the petitioner and his son were prosecuted the latter under section 201 of the Indian Penal Code.

A number of witnesses were examined on behalf of the prosecution and the trial Magistrate found the petitioner as well as his son guilty of the offences with which they were charged. On appeal the learned Sessions Judge, Kota acquitted the petitioner's son of the offence under section 201 of the Indian Penal Code, but maintained the conviction and sentences passed on the petitioner by the trial court.

3. In this court learned counsel for the petitioner has urged that according to section 16 of the Opium Act, 1878 (hereinafter called the Act), all searches under section 14 or 15 are to be made in accordance with the provisions of the Code of Criminal Procedure, Section 14 of the Act empowers officers of the Central Excise, Narcotics, Drugs Control, Customs, Revenue, Police or Excise, superior in rank to a person or constable, authorised in this behalf by the Central Government, to enter, arrest and seize on information opium unlawfully kept in any enclosed place. But in view of the provisions of S. 16 of the Act, the procedure laid down under the

Code of Criminal Procedure is required to be followed by the officers mentioned in S. 14.

It is urged by the learned counsel that in the present case the Inspector of Narcotics did not comply with the provisions of sub-sections (1) and (5) of Section 165 of the Code of Criminal Procedure which are mandatory in nature and whose non-compliance rendered the search illegal. Therefore, the petitioner was entitled to defend his property when attempt was made by the raiding party to enter his house where his females also resided. Reliance is placed in this connection on State of Rajasthan v. Rehman, AIR 1960 SC 210 and it is pointed out that Rule 201 of the Central Excise Act, contains provisions similar to sections 14 and 16 of the Act respectively and while considering the provisions under the Central Excise Act the Supreme Court held that "provisions of section 165 of the Code of Criminal Procedure must be followed in the matter of searches under rule 201 of the Rules and a search where provisions of S. 165 are ignored, would be a search made in contravention of the provisions of the Code and would be illegal."

On the authority of this case it is urged by the learned counsel that under the Opium Act too if the officer authorised under section 14 of the Act taking the search does not comply with the provisions of section 165 of the Code of Criminal Procedure, the search would be illegal and if any resistance has been offered during the course of that search and members of the raiding party have even been assaulted, they would be protected under section 97 of the Indian Penal Code as exercising the right of private defence of property.

4. It is undoubtedly true that Shri Gurnani did not comply with the provisions of section 165 (1) of the Code inasmuch as he failed to record in writing the grounds of his belief and specifying therein the thing for which search was to be made. On behalf of the prosecution nothing has been brought on the record to show that the above requirement of law was complied with. As already stated, under the Act all searches are to be made according to the procedure laid down in the Code of Criminal Procedure which included section 165 also and in view of the pronouncement of the Supreme Court mentioned above, it becomes clear beyond any shadow of doubt that the search was being made by Shri Gurnani in contravention of section 165 (1) of the Code.

5. There is also no doubt that the acts of the raiding party clearly amounted to an attempt to commit criminal trespass inasmuch as they had clearly expressed their intention to take the

search of the petitioner's house, had surrounded it and were about to enter it when this assault is said to have been made by the petitioner. In view of these facts there is no doubt that section 97 of the Indian Penal Code comes to the rescue of the petitioner and he can claim right of private defence of property.

6. On behalf of the State learned Deputy Government Advocate has claimed the benefit of Section 99 of the Indian Penal Code for the members of the raiding party. He urges that in the Supreme Court case cited above this question was left open whether absence to record reasons under Section 165 (1) of the Code was merely an irregularity and would give right to the petitioner to prevent the officer from making search. He says that the right of private defence under Section 97 of the Indian Penal Code is subject to Section 99 of the Indian Penal Code and because Shri Gurnani who was a public servant was acting in good faith under colour of his office and the act committed by him did not reasonably cause the apprehension of death or of grievous hurt, the petitioner had no right of private defence of property even though the act of such public servant was not strictly justifiable by law.

In my opinion the contention has no force because as laid down in Section 52 of the Indian Penal Code nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. The public servants who are empowered to take search under Section 14 of the Act, are presumed to know the law and if the act is done in contravention of the mandatory provisions of law it must be held to have been done without due care and attention and cannot be said to be done in good faith. That being so Section 99 of the Indian Penal Code does not come to the aid of the Inspector or the members of his party who were attempting to enter the petitioner's house for taking search.

In support of his contention learned Deputy Government Advocate also invited my attention to Maingal Singh v. Ghulam Mohammad, AIR 1939 Lah 280. But that case was noticed in a subsequent decision of that Court in Emperor v. Mohammad Shah, AIR 1946 Lah 456, and it was held that "it is difficult to say that a police officer who carries out a search under Section 165, Criminal Procedure Code without complying with the safeguards incorporated in that section which were undoubtedly intended by the legislature to be mandatory, is acting with due care and attention." AIR 1935 Nag 237 and 45 Cr LJ 802 = (AIR 1944 Pat 228) were also relied on in that judgment. It was further held in that case that "the simple safeguards incorporated by the Legislature in Section 165, Cri-

minal PC, are mandatory, not directory, and must be carried out immediately and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Unless this is done the search is without jurisdiction and bad in law. Section 99, Penal Code, will in no way cure this, for the Police officer who carries out a search under Section 165, Criminal PC, without complying with its requirements, which are intended to be mandatory is acting without due care and attention."

There are also decisions of other High Courts to the same effect which need not be cited. I am therefore of the view that no offence was committed by the petitioner in assaulting the constable and the informer when they were attempting to enter the house of the petitioner for search without following the procedure laid down under Section 165 (1) of the Code

7. The revision is therefore, allowed, conviction and sentences passed on the petitioner are set aside and he is acquitted. He is on bail. He need not surrender to it His bail bonds are cancelled. Fine if paid by him shall be refunded.

TVN/D. V. C.

Petition allowed.

AIR 1969 RAJASTHAN 123 (V 56 C 27) FULL BENCH

D. S. DAVE, C. J., D. M. BHANDARI
AND V. P. TYAGI, JJ.

Gullaram, Petitioner v. Govindram and others, Respondents.

Civil Writ Petn. No. 397 of 1962, D/- 19-7-1968, against order of Dist. J. Jhunjhunu, D/- 8-5-1962.

(A) Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 10 — Jurisdiction conferred on Debt Relief Court — Nature of — It can to certain extent disturb decree or order of Civil Court.

The scheme of section 10 is to provide relief to the agriculturists both in the principal loan and the interest by scaling down the principal amount of the loan and the interest. Even in those cases where a decree or order has been passed by a Civil Court, the principal and the interest have got to be reduced by the Debt Relief Court while determining the debts under this section. The view that the Debt Relief Court has jurisdiction to go behind the decree is not open to challenge, though, at the same time, the jurisdiction conferred upon the Debt Relief Court under this section is of a limited nature and it can disturb the decree or order of a

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civil court only to the extent permitted therein: 1963 R L W 406, Approved; AIR 1939 All 31 and AIR 1942 Nag 88 and AIR 1944 Nag 289, Ref. (Para 21)

(B) Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 7 — Term 'creditors'—It would include decree-holders also.

(Para 10)

(C) Debt Laws — Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 6 (1), — Term 'debt' — It would as much include decretal debts as those debts in respect of which no decree has already been passed. (Para 8)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 577 (V 52)= | |
| (1964) 8 SCR 306, K. Hutchi | |
| Gowder v. Richobdas Fathaimall & Co | 14 |
| (1963) 1963 Raj LW 406 = ILR | |
| (1963) 13 Raj 716, Karansee v Sonsingh | 3, 5, 7, 22 |
| (1944) AIR 1944 Nag 289 (V 31) = | |
| ILR 1944 Nag 568 (FB), Rukhmabai Ganpatrao Parkhi v. Shamlal Surajmal Marwadi | 23 |
| (1942) AIR 1942 Nag 88 (V 29)= | |
| ILR 1942 Nag 357, Dau Balwant Singh v. Mt. Bindabai | 23 |
| (1939) AIR 1939 All 31 (V 26) = | |
| 1938 All LJ 976, Sunderlal v. v. Kaushiram | 22 |

R K. Rastogi, for Petitioner; M. M. Tewari, for Respondent No. 1.

D. S. DAVE, C. J.: This is a debtor's application under Article 226 of the Constitution of India and it seeks to challenge the correctness of the decision of the learned District Judge, Jhunjhunu, dated 8th May, 1962, given in a revision application filed against the order of the Civil Judge, Neem-ka-thana, dated 25th November, 1961.

2. The facts giving rise to it are as follows

The non-petitioner No 1 before this Court, that is, Govindram, had obtained against the petitioner two decrees from the Civil Courts, one dated 29th March, 1957 for Rs. 593/- and the other dated 18th April, 1957 for Rs. 887/- The Rajasthan Relief of Agricultural Indebtedness Act, 1957 (No 28 of 1957), which will hereinafter be referred to as the 'Act', came into force from 15th May, 1958 On 24th February, 1960 the present petitioner Gullaram presented an application under section 6 of the Act in the Court of Civil Judge, Neem-ka-thana which was also a Debt Relief Court according to section 3 of the Act. The said court found that there were two types of transactions between the parties, one relating to the loan of grain and the other concerning the loan in cash. After examining the previous

transactions, it came to the conclusion that the petitioner was not liable to pay anything so far as the transaction relating to the grain was concerned, but in the account relating to the loan in cash, it was held that Rs. 102/- only remained payable by him. It, therefore, upheld the claim of respondent No 1 only to the extent of Rs. 102/- and discharged the the remaining debts. Aggrieved by that order dated 25-11-61, the non-petitioner No. 1 presented a revision application in the Court of District Judge, Jhunjhunu, under Section 17 of the Act. The learned Judge was of the view that the Debt Relief Court had no jurisdiction to go behind the decrees of the Civil Court and that it could take into consideration only those payments which were made by the debtor subsequent to the passing of the decrees, if they were not accounted for by the decree-holder. He, therefore, allowed the revision application, set aside the order of the Civil Judge, Neem-ka-thana and remanded the case with direction to proceed under section 11 of the Act in the light of the observations made by him. It is the correctness of this order which is sought to be challenged in the present writ application.

3. When this case came for hearing before a Division Bench of this Court, it was urged by learned counsel for the petitioner that the decision of the learned District Judge to the effect that the Debt Relief Court had no jurisdiction to go behind the decrees and reopen the accounts was manifestly wrong and in support of his contention he referred to Karansee v. Sonsingh, 1963 Raj LW 406. Learned counsel for respondent No. 1 challenged the correctness of the view taken in the said case and, therefore, the Court referred the present case to a larger Bench.

4. The short question for determination before this Court is, whether the Debt Relief Court functioning under the Rajasthan Relief of Agricultural Indebtedness Act has jurisdiction to go behind the decree of the Civil Court passed before that Act came into force.

5. In 1963 Raj LW 406, it was observed by the learned Judges that S 6 (1) of the Act provides that any debtor, who is an agriculturist, may file an application before the Debt Relief Court having jurisdiction praying for determination of his debts. It was further pointed out that the word 'debt', as defined in section 2 (c), "includes all liabilities owing to a creditor, in cash or kind, secured or unsecured, payable under a decree or order of a civil court or otherwise, whether due or not due, but shall not include land revenue or anything recoverable as land revenue other than liabili-

ties payable under a decree of a village panchayat or any money for the recovery of which a suit is barred by limitation." The learned Judges then proceeded to observe that "the scope of an application under section 6 (1) for determination of debts having regard to the definition of the term 'debt' must be considered wide enough to include decretal debts as well and the contention of the learned counsel does not appear to be sound for treating the decretal debts immune from such proceedings." It was held that the term 'debt' referred to in section 6 (1) was comprehensive enough to include the decretal debt also. It was further observed that "the Debt Relief Court has jurisdiction to take proceedings as mentioned in section 10, but it should not question the findings of a civil court where section 10 does not necessarily authorise such court to go behind them. For instance, in the proceedings of the suit filed by Karansee, the question of payment was agitated by him and the civil court found against him that his plea of making payment was not established. The same plea cannot now be allowed to be revived by him in proceedings under the Act and the Debt Relief Court, even when going behind the decree, will have to determine the amount of the principal and shall have to determine also the amount of the interest recoverable under the principles laid down by section 10 of the Act, and should not entertain the plea that had been rejected by the civil court of making payment and wiping out the suit debts."

6. Learned counsel for respondent No. 1 has urged before us that although the term 'debt' as defined in section 2 (c) of the Act includes all liabilities owing to a creditor, in cash or kind, secured or unsecured, payable under a decree or order of a civil court or otherwise, whether due or not due, there is nothing in the Act to show that the Debt Relief Court should disregard the sanctity of the decree and go behind it. According to learned counsel, the Debt Relief Court has jurisdiction to take into account only those payments, if any, which are made by the debtor subsequent to the passing of the decree if they have not been accounted for.

7. Learned counsel for the petitioner, on the other hand, supports the view taken in 1963 Raj LW 406, referred to above.

8. We have given due consideration to the arguments advanced by learned counsel for both the parties. It is common ground between them that the term 'debt' as defined in section 2 (c) of the Act, includes the decretal debts also. In order to decide the question whether the Debt Relief Court can go behind the

decree of a civil court passed before the Act came into force, it would be proper to go into the scheme of the Act. It may be pointed out that section 6 (1) provides that any debtor, who is liable for debts individually, or jointly with another person, may file an application before the Debt Relief Court having jurisdiction in the area in which he ordinarily resides or earns his livelihood praying for determination of his debts. It cannot be gainsaid that the term 'debt' appearing in this section would as much include decretal debts as those debts in respect of which no decree has already been passed, because that term appearing in the section must be understood in the sense in which it has been defined.

9. Section 6A then provides for application for recording settlement. We are not concerned with it in the present case.

10. Section 7 lays down that upon the admission of an application under section 6 or 6A, all creditors shall be joined as parties to the proceedings and the Debt Relief Court shall pass an order fixing the date of hearing. The term 'creditors' in this section would obviously include decree-holders also.

11. Section 8 then provides for submission of claims by creditors.

12. Section 9 lays down that on the date fixed for hearing of the case, the Debt Relief Court shall require proof of the validity and subsisting character of the debts. The word 'debts' appearing in this section would also mean the debts as defined in section 2 (c).

13. Then we come to section 10 which deals with the determination of debts and gives a guidance to the Debt Relief Court as to how it should proceed in the matter of determination of debts which remain payable by the debtor-agriculturist to the creditors. It would be proper to reproduce that section in extenso because it is mainly this section which offers the answer to the point raised before us. The subsequent section 11 only lays down how the Debt Relief Court should prepare the scheme of repayment of debts and transfer of the judgment-debtor's property after the amount due has been determined under section 10. Section 10 runs as follows:

"Section 10 — Determination of Debts.

(1) Notwithstanding anything contained in any enactment for the time being in force or in any agreement between the parties or the persons through whom they claim, as to allowing compound interest or treating without an account the profits of mortgaged property to be interest on the mortgage money or specifying the mode of otherwise settling accounts and notwithstanding any written statement or settlement of accounts or

any agreement purporting to close previous dealings and create a new obligation, the Debt Relief Court shall—

(i) reopen all transactions carried on during (fifteen years) immediately preceding the last transaction or the first day of January 1952, whichever is earlier;

(ii) ascertain the amount and date of each loan originally advanced; and

(iii) draw up an account, which in case there are more creditors than one, shall be prepared separately for each of them in the manner laid down thereunder, namely—

(a) separate accounts of interest and principal shall be taken up to the date of the application filed under section 6 (or under sub-section (1) of section 6A, as the case may be),

(b) in the account of principal moneys advanced, there shall be debited to the debtor such moneys as may from time to time have been actually received by him or on his account from each creditor and the price of goods, if any, sold to the debtor by such creditor as part of the transaction,

Provided that there shall not be so debited to the debtor—

(i) any sum in excess of the amount due or accrued due under a decree which the debtor may have agreed directly or indirectly to pay in pursuance of an agreement relating to the satisfaction of such decree, or

(ii) any accumulated interest which has been converted into principal in any statement or settlement of accounts or by any contract made in the course of the transaction.

(c) in the account of interest there shall be debited to the debtor simple interest on the balance of the principal moneys for the time being outstanding at the rate stipulated by the parties or if the debt is payable under the decree or order of the civil courts, at the rate provided for in such decree or order or at the rate of six per cent per annum in the case of secured loans and nine per cent per annum in the case of unsecured loans, whichever is the lowest;

(d) all moneys paid by or on account of the debtor to the creditor or on his account and of profits, services or other advantages of every description received by the creditor in the course of the transactions estimated, if necessary, at such money value as the Debt Relief Court in its discretion or with the aid of valuers appointed by it may determine, shall be credited first in the account of interest and, if any such payment or the money equivalent of any such profits, services or other advantages exceed the balance of interest due at the time it is made, the residue thereof shall be credit-

ed to the debtor in the account of principal moneys.

(e) if the aggregate of the amounts so credited in the account of interest is equal to the total amount of the principal, no further interest thereon shall be deemed to be due,

(f) if such aggregate is less than the total amount of the principal, further interest, if due in accordance with the provisions of Clause (c), may be allowed to the maximum limit of the difference between such aggregate and the total amount of the principal,

(g) the Debt Relief Court shall, in the manner laid down in this sub-section and subject to the provisions of the succeeding sub-section, determine and declare separately the amount outstanding against the debtor as principal and interest,

(2) A Debt Relief Court shall reduce by forty per cent the principal amount of the loans advanced prior to the 1st of January (1945) as found in accordance with the provisions of sub-section (1) to be due on the date of the application filed under section 6 (or under sub-section (1) of section 6A, as the case may be),

(3) Notwithstanding anything contained in this Act or in any other law for the time being in force, no Debt Relief Court shall award on account of arrears of interest a sum exceeding the total amount of principal found due in accordance with the foregoing provisions of this section,

(4) If a Debt Relief Court finds that nothing is due to the creditor it shall pass an order discharging the debt,

(5) If the aggregate of the amount credited in the account of interest in the manner laid down in sub-section (1) is less than the total amount of the principal, the difference between the total amount so credited and the total amount of the principal or the balance outstanding in the account of interest, whichever is the less, shall be allowed as interest,

(6) Nothing contained in this Act shall be deemed to require the creditor to refund any sum which has been paid to him or to increase the liability of the debtor to pay any amount in excess of that which would have been payable by him if this Act had not been passed,

(7) In the case of any transaction carried on between a debtor and a creditor in kind in the form of grain or goods for the purpose of manure or seed or any other purpose, the account of such transaction shall be prepared in terms of the money-equivalent of such grain or goods calculated at the market price thereof prevailing at the time of the transaction."

14. Before proceeding to examine the provisions of the said section, it may be observed that although the decrees of Civil Courts are sacrosanct and must be respected in the normal course, it is open to the Legislature to enact a law whereby the sanctity of the decree may be disturbed and the decretal amount may be scaled down in order to provide relief to agriculturists over-burdened with debts. In *K. Hutchi Gowder v. Ricobdas Fathaimall & Co.*, AIR 1965 SC 577, their Lordships of the Supreme Court had occasion to examine the provisions of the Madras Agriculturists Relief Act No. 4 of 1938. Section 19 of this Act was as follows:

"(1) Where before the commencement of this Act a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist . . . apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction as the case may be:

xx xx xx
(2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement." While interpreting this section, it was observed by their Lordships that in the case of debts that had ripened into decrees, section 19 (1) and (2) prescribe a special procedure for reopening the decree though it was only in respect of debts incurred before the parent Act came into force. A decree obtained in a suit to enforce a debt incurred after the Act came into force could not, however, be amended either under section 19 or 13 of that Act by scaling down the debt. The observations of their Lordships were as follows:

"The legal position may be briefly stated thus. Sections 7, 8, 9 and 13 form a group of sections providing the principles of scaling down of debts incurred by agriculturists under different situations. A debt can be scaled down in an appropriate proceeding taken in respect of the same. But in the case of debts that have ripened into decrees, S 19(1) and (2) prescribe a special procedure for reopening the decree only in respect of debts incurred before the parent Act. The parent Act does not provide for the reopening of decrees made in respect of debts incurred after it came into force, and for understandable reasons the relief in respect of such decrees is specifically confined only to a concession in the rate of interest."

15. By referring to these observations, we only mean to point out that it is within the competence of the Legislature

to disturb the sanctity of the decrees passed by the Civil Courts if it chooses to give relief to the judgment-debtors in certain special circumstances. We may make it clear that we are not referring to this case to import the scheme of the Madras Agriculturists Relief Act, 1938, if it is not to be found in the Rajasthan Act. If the scheme of S. 10 of the Rajasthan Act does not give jurisdiction to the Debt Relief Court to go behind the decree, such interpretation would not be placed upon its provisions. However, after examining the provisions of S 10 of the Act closely, we think that although its language is not so clear as that of section 19 of the Madras Agriculturists Relief Act or section 22 of the Bombay Agricultural Debtors' Relief Act No 38 of 1947, it does confer jurisdiction upon the Debt Relief Court to go behind the decrees passed by the civil courts and scale down the debts of the agriculturists according to its provisions. The plain reading of sub-section (1) of section 10 would show that it casts a duty on the Debt Relief Court that it should reopen all transactions carried on between the agriculturist-debtor and his creditor during 15 years, immediately preceding the last transaction or the first day of January 1952, whichever is earlier. This power is to be exercised by the Court even if there is any provision to the contrary in any enactment for the time being in force or there is any agreement between the parties, or the persons through whom they claim, as to allowing compound interest. If there has been any earlier agreement between the parties that the profits of the mortgaged property would be treated to be interest on the mortgage-money and no account of such profits would be taken, or if there is any agreement specifying the mode of settling accounts in some other manner or even if there is any written statement or settlement of accounts or any agreement purporting to close previous dealings and create a new obligation, it is enjoined upon the Debt Relief Court that it will reopen all transactions between the parties made during the last fifteen years dating back from 1st January 1952 or the last transaction whichever is earlier. It is also enjoined upon it that it should ascertain the amount and date of each loan originally advanced and draw up an account of each creditor both with regard to the principal amount and the interest. Clause (a) of sub-section (1) requires that separate accounts of interest and principal should be taken up to the date of the application filed under section 6.

16. Clause (b) provides that in the account of principal moneys advanced, the court should debit to the debtor such moneys as may from time to time have

been actually received by him or on his account from each creditor and the price of goods if any sold to the debtor by such creditor as part of the transaction. There are two provisos to this clause and the first proviso lays down that the court should not debit to the debtor any sum in excess of the amount due or accrued due under a decree which the debtor may have agreed directly or indirectly to pay in pursuance of an agreement relating to the satisfaction of such decree. The second proviso provides that the court should not further debit to the debtor's principal account any accumulated interest which has been converted into principal in any statement or settlement of accounts or by any contract made in the course of the transaction.

17. Just as clause (b) lays down what items should be debited to the debtor, in the account of the principal, so also clause (c) lays down as to what should be debited to him in the account of interest. It provides that in the account of interest the court should debit to the debtor only simple interest and not compound interest on the balance of the principal moneys for the time being outstanding, at the rate stipulated by the parties or if the debt is payable under the decree or order of the civil courts, at the rate provided for in such decree or order or at the rate of six per cent per annum in the case of secured loans and nine per cent per annum in the case of unsecured loans, whichever is lowest. It is obvious that clause (c) enjoins upon the Debt Relief Court to scale down the rate of interest at the rate of six per cent per annum in the case of secured loans and nine per cent per annum in the case of unsecured loans if the interest is allowed at a higher rate under the decree or order of a civil court. In other words, if the interest allowed by any decree or order of the civil court is not higher than six per cent in the case of secured loans and nine per cent in the case of unsecured loans, the Debt Relief Court would not interfere. Similarly, it would not interfere if the decree or order of the civil court has allowed interest to the creditors at a still lower rate but if it exceeds six per cent per annum in the case of secured loans and nine per cent per annum in the case of unsecured loans, the Debt Relief Court will have to scale down the decretal amount of interest according to this clause. This leaves no doubt about the jurisdiction of the Debt Relief Court to go behind the decree, examine the rate of interest and prepare the account of interest according to this clause.

18. Clause (d) then provides in what manner moneys paid by or on account of the debtor to the creditor would be credited to the account of the debtor.

If the creditor has received services or other advantages from the debtor, the court would credit to the debtor's account its equivalent, first in the account of interest and if there is any balance still left, to the account of the principal. According to clause (e) if the total of the amount credited in the account of interest becomes equal to the total amount of the principal, no further interest would be allowed. If, however, the aggregate of the amounts credited in the account of interest is less than the total amount of principal, further interest may be allowed according to clause (f), but not to exceed the maximum limit noted therein. Then clause (g) requires that the Debt Relief Court should, subject to the provisions of the succeeding section, determine and declare separately the amount outstanding against the debtor as principal and interest.

19. Sub-section (2) to which reference has been made in clause (g), is again significant. It enjoins upon the Debt Relief Court that it should reduce by forty per cent the principal amount of the loans advanced prior to the 1st of January 1945 as found in accordance with the provisions of sub-section (1). The provisions of this sub-section again show that if the principal amount of the loans advanced relates to a period prior to 1st January 1945, the Debt Relief Court has to reduce by forty per cent the principal amount. It could not have been the intention of the Legislature that the principal would be scaled down only in those cases where the civil court has not passed a decree and that no relief would be provided to the agriculturist if a decree has already been passed against him with regard to a loan advanced prior to 1st January 1945. Such discrimination would be invidious.

20. Sub-section (3) lays down that the Debt Relief Court should not award on account of arrears of interest a sum exceeding the total amount of principal found due in accordance with the foregoing provisions of section 10 even if there is anything contained to the contrary in this Act or in any other law for the time being in force.

21. Thus, in our opinion, the scheme of section 10 is to provide relief to the agriculturists both in the principal loan and the interest by scaling down the principal amount of the loan and the interest. Even in those cases where a decree or order has been passed by a civil court, the principal and the interest have got to be reduced by the Debt Relief Court while determining the debts under this section. The view therefore taken in 1963 Raj LW 406, referred to above, that the Debt Relief Court has jurisdiction to go behind the decree is

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